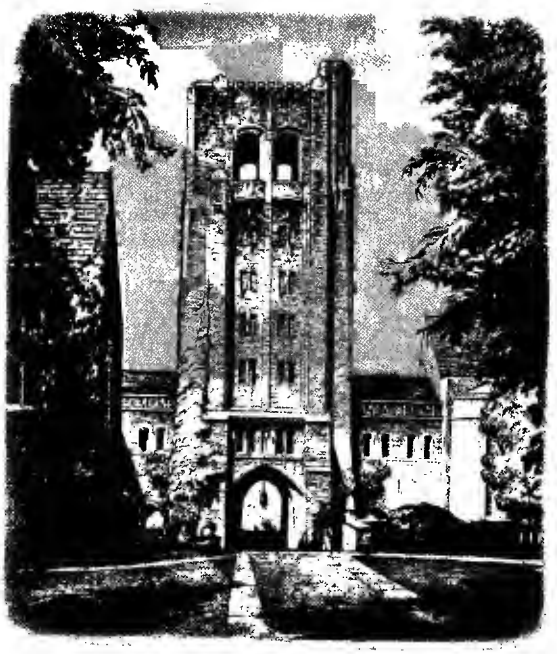

A TREATISE

ON THE

CRIMINAL LAW

OF THE

UNITED STATES:

COMPRISING A

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

AND A

Digest of the Penal Statutes

OF THE

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

WITH THE DECISIONS ON CASES ARISING UPON THOSE STATUTES,

BY

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United States.

§ 1296. *Making, altering, forging, &c., any certificate, indent, or other public security of United States.*—If any person shall falsely make, alter, forge, or counfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting any certificate, indent, or other public security of the United States, or utter, put off, or offer, or cause to be uttered, put off, or offered in payment or for sale any such false, forged, altered, or counterfeited certificate, indent, or other public security, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited, and shall thereof be convicted, such person shall suffer death.—(Act 30th April, 1790, sect. 14.)

§ 1297. *Stealing, taking away, &c., any writ, or other proceedings, in any of the courts of United States.*—If any person shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ, process, or other proceedings, in any of the courts of the United States, by means whereof any judgment shall be reversed, made void, or not take effect, or if any person acknowledge or procure to be acknowledged in any of the courts aforesaid, any recognizance, bail, or judgment, in the name or names of any other person or persons not privy or consenting to the same, every such person or persons, on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty-nine stripes. This act does not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted for any person or persons against whom any such judgment or judgments shall be had or given.—(Ibid. sect. 15.)

§ 1298. *Counterfeiting, &c., any note in imitation of, or purporting to be, a treasury note.*—If any person shall falsely make, forge, counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in

falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be, a treasury note, or shall falsely alter, or cause or procure to be falsely altered, or willingly aid or assist in falsely altering any treasury note, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any false, forged, or counterfeited note, purporting to be a treasury note, knowing the same to be falsely forged or counterfeited, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any falsely altered treasury note, knowing the same to be falsely altered, such person shall be deemed guilty of felony, and being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labour for a period not less than three years, nor more than ten years, and be fined in a sum not exceeding five thousand dollars.—(Act 30th June, 1812, sect. 10.)

Forgery of treasury notes. Uttering and publishing.—If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting, any note in imitation of, or purporting to be, a treasury note aforesaid, or shall falsely alter, or cause or procure to be falsely altered, or willingly aid or assist in falsely altering, any treasury note issued as aforesaid, or shall pass, utter or publish, or attempt to pass, utter or publish as true, any false, forged or counterfeited note, purporting to be a treasury note as aforesaid, knowing the same to falsely forged or counterfeited, or shall pass, utter or publish as true, any falsely altered treasury note issued as aforesaid, knowing the same to be falsely altered, every such person shall be deemed and adjudged guilty of felony, and being thereof convicted, by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a period not less than three years nor more than ten years, and to be fined in a sum not exceeding five thousand dollars.—(Act 28 Jan., 1847, sect. 9, 9 Stat. 120.

Engraving or having possession of plates, &c., with intent to forge treasury notes.—If any person shall make or engrave, or cause or procure to be made or engraved, or shall have in his custody or possession any metallic plate engraved after the similitude of any plate from which any notes issued as aforesaid shall have been printed, with intent to use such plate, or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid, or shall have in his custody or possession any blank note or notes engraved and printed after the similitude of any notes issued as aforesaid, with intent to use such blanks, or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid, or shall have in his custody or possession any paper adapted to the making of notes and similar to the paper upon which any such notes shall have been issued, with intent to use such paper or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid, every such person being thereof convicted by due course of law, shall be sentenced to be imprisoned, and kept to hard labor, for a term not less than three nor more than ten years, and fined in a sum not exceeding five thousand dollars.—(Ibid. sect. 10.)

Forgery of treasury notes. Uttering and publishing.—If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting any note in imitation of or purporting to be a treasury note, issued as aforesaid; or shall pass, utter or publish, or attempt to pass, utter or publish as true any false, forged or counterfeit note, purporting to be a treasury note as aforesaid, knowing the same to be falsely made, forged or counterfeited; or shall falsely alter, or cause or procure to be falsely altered, or willingly aid or assist in falsely altering any treasury note issued as aforesaid; or shall pass, utter or publish, or attempt to pass, utter or

publish as true, any falsely altered treasury note, issued as aforesaid knowing the same to be falsely altered; every such person shall be deemed and adjudged guilty of felony, and being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept at hard labour for a period not less than three years, nor more than ten years, and to be fined in a sum not exceeding five thousand dollars.—(Act 23d Dec., 1857, sect. 12, 11 Stat. 259.)

Engraving or having possession of plates, &c., with intent to forge treasury notes.—If any person shall make or engrave, or cause to procure to be made or engraved, or shall have in his custody and possession any metallic plate engraved after the similitude of any plate from which any notes issued as aforesaid shall have been printed, with intent to use such plate, or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid; or shall have in his custody or possession any blank note or notes engraved and printed after the similitude of any notes issued as aforesaid, with intent to use such blanks, or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid; or shall have in his custody or possession any paper adapted to making of such notes, and similar to the paper upon which any such note shall have been issued, with intent to use such paper, or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid; every such person, being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labour for a term not less than three nor more than ten years, and fined in a sum not exceeding five thousand dollars.—(Ibid. sect. 13.)

§ 1299. *For counterfeiting with intent to injure or defraud the United States.*—If any person shall, with intent to injure or defraud the United States, or any person or corporation, falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any note, in imitation of or purporting to be a treasury note, or shall falsely alter, or cause or procure to be falsely altered, or wilfully aid or assist in falsely altering any treasury note, issued by virtue of this act, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any false, forged, or counterfeit note, purporting to be a treasury note as aforesaid, knowing the same to be falsely made, forged, or counterfeited, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any falsely altered treasury note, issued as aforesaid, knowing the same to be falsely altered, every such person shall be deemed and adjudged guilty of felony, and being thereof convicted by due course of law, shall be sentenced to be imprisoned for a period not less than three years, nor more than ten years, or imprisoned and kept to hard labour for a period not less than three years, nor more than ten years, and, in either case, be fined in a sum not exceeding five thousand dollars.—(Act 26th December, 1814, sect. 6.)

§ 1299 (*a*). *Forgery of bounty-land warrants, uttering, &c.*—If any person or persons shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or willingly aid or assist in falsely making, altering, forging or counterfeiting any military bounty-land warrant, or military bounty-land warrant certificate, issued or purporting to have been issued by the commissioner of pensions under any act of congress, or any certificate of location of any military bounty-land warrant, or any duplicate certificate of the location of any military bounty-land warrant, or military bounty-land warrant certificate, upon any of the lands of the United States, or any certificate of the purchase of any of the lands of the United States, or any duplicate certificate of the purchase of any of the lands of the United States, or any receipt for the purchase-money of any of the lands of the United States, or any duplicate receipt for the

purchase-money of any lands of the United States, issued or purporting to have been issued by the register and receiver at any land office of the United States, or by either of them; or if any person or persons shall pass, utter or publish as true any false, forged or counterfeited military bounty-land warrant, military bounty-land warrant certificate, certificate of location, or duplicate certificate of location, certificate of purchase, duplicate certificate of purchase, receipt or duplicate receipt for the purcase-money of any of the lands of the United States, knowing the same to be false or forged; such person or persons so offending shall be deemed and adjudged guilty of felony, and, being thereof duly convicted, shall be sentenced to be imprisoned and kept at hard labour for a period not less than three years nor more than ten years: Provided, nevertheless, That nothing herein contained shall be construed to deprive the courts of the several states of jurisdiction under the laws thereof over offences declared punishable by this law.—(Act 5th Feb., 1859, sect. 1, 11 Stat. 381.)

§ 1299 (*b*). *Counterfeiting stamps.*—If any person or persons shall forge or counterfeit, or shall utter or use knowingly, any counterfeit stamp of the post office department of the United States issued by authority of this act, or by any other act of congress, within the United States, or the post office stamp of any foreign government, he shall be adjudged guilty of felony, and, on conviction thereof in any court having jurisdiction of the same, shall undergo a confinement at hard labor for any length of time not less than two years, nor more than ten, at the discretion of the court.—(Act 3 March, 1845, sect. 5, 5 Stat. 749.)

§ 1299 (c). *Forging letter stamps.*—Any person who shall falsely and fraudulently make, utter or forge any postage stamp, with the intent to defraud the post office department, shall be deemed guilty of felony, and on conviction shall be subject to the same punishment as is provided in the 21st section of the act approved the 3d day of March, 1825, entitled "an act to reduce into one the several acts establishing and regulating the post office department."—(Act 3d March, 1847, sect. 11, 9 Stat. 201.)

§ 1299 (*d*). *Forging stamps on envelopes. Dies or plates. Paper. Printing. Fraudulent delivery.*—Any person who shall forge or counterfeit any postage stamp, printed or impressed upon any letter envelope, authorized by the eighth section of an act entitled "An act to establish certain post roads, and for other purposes," approved August 31st, 1852, or by any other act, or who shall counterfeit any die, plate or engraving therefor; or who shall make or print, or knowingly use or sell, or have in his possession with intent to use or sell, any such false, forged or counterfeited die, plate, engraving or stamped envelope; or who shall make or knowingly use or sell, or have in his possession with intent to use or sell, any paper bearing the water mark of such letter envelopes, or any fraudulent imitation thereof; or who shall make or print, or authorize or procure to be made or printed, any stamped or printed letter envelope of the kind provided by the postmaster-general under the authority aforesaid, without the especial direction of the post office department; or who, after such letter envelopes have been prepared or printed, shall, with intent to defraud the revenues of the post office department, deliver any such letter envelopes to any person or persons other than such as shall be authorized to receive the same by instrument of writing duly executed under the hand of the postmaster-general, and the seal of the post office department, shall, on conviction thereof, be deemed guilty of felony, and be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment.—(Act 3 March, 1853, sect. 7, 10 Stat. 256.)

§ 1300. *Falsely making, &c., any power of attorney, &c., for purpose of falsely receiving from United States any sum of money.*—If any person or persons shall

falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or enabling any other person or persons, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum or sums of money, or shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing as aforesaid, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or offices of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered. forged, or counterfeited, every such person shall be deemed and adjudged guilty of felony, and being thereof duly convicted, shall be sentenced to be imprisoned and kept at hard labour for a period not less than one year, nor more than ten years, or shall be imprisoned not exceeding five years, and fined not exceeding one thousand dollars.—(Act 3d March, 1823, sect. 1.)

§ 1301. *Possession of any forged deed, power of attorney, &c., for the purpose of defrauding the United States.*—If any person or persons shall knowingly have in his, her, or their possession, any false, altered, forged, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of enabling any person or persons, either directly or indirectly, to obtain or receive from the United States, or any of its officers or agents, any sum or sums of money, knowing the same to be false, altered, forged, or counterfeited as aforesaid, with intent to defraud the United States, every such person, upon being thereof duly convicted, shall be fined and imprisoned at the discretion of the court, according to the nature and aggravation of the offence: *Provided, nevertheless*, That nothing herein contained shall be construed to deprive the courts of the several states of jurisdiction, under the laws thereof, over offences declared punishable by this law.—(Ibid. sect. 2.)

§ 1302. *Counterfeiting, or assisting to counterfeit.*—If any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any paper, writing, or instrument, in imitation of, or purporting to be an indent, certificate of the public stock, or debt, treasury note, or other public security of the United States, or any letters patent issued or granted by the President of the United States, or any bill, check, or draft for money drawn by or on the treasury of the United States, or by or on any other public officer or agent of the United States, duly authorized to make, draw, accept, or pay the same on behalf and for account of the United States, or if any person or persons shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any such false, forged, or counterfeited paper, writing, or instrument, knowing the same to be false, forged, or counterfeited with intent to defraud the United States, or any body politic or corporate, or any other person or persons whatsoever, or if any person or persons shall falsely alter any indent, certificate of the public stock, or debt, treasury note, or other public security of the United States, or any letters patent issued or granted by the President of the United States, or any bill, check, or draft for money drawn by or on the Treasurer of the United States, or any other public officer or agent of the United States, duly authorized to make, draw, accept, or pay such bill, check,

or draft, or if any person or persons shall pass, utter, or publish, or attempt to pass, utter, or publish as true and unaltered, any such falsely altered indent, certificate, treasury note or other public security, letters patent, or bill, check, or draft, knowing the same to be falsely altered, with intent to defraud the United States, or any body politic or corporate, or any person whatever, every such person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labour not exceeding ten years, according to the aggravation of the offence.—(Act 3d March, 1825, sect. 17.)[a]

§ 1303. *Counterfeiting any paper, &c., for the purpose of selling or conveying any share in public stock, debt, pension, or annuity, &c.*—If any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting any paper, writing, or instrument, in imitation of, or purporting to be any letter of attorney, or other authority or instrument, to assign, transfer, sell, or convey any share or sum in the public stock, or debt of the United States, or in the capital stock of the president, directors, and company of the Bank of the United States, or to receive any annuity or annuities, dividend or dividends, due or to become due to any such stock or debt; or to receive any pension, prize money, wages, or other debt or sum of money due, or to become due from the United States; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or willingly aid or assist in forging or counterfeiting the name or names of any of the holders or proprietors of any such public stock or debt, or of any person entitled to any such annuity, dividend, pension,[aa] prize money, wages, or other debt or sum of money aforesaid, in

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[a] The 14th section of the act of Congress, of the 30th of April, 1790, providing that the forgery of, or the uttering and publishing of, any forged "certificate, indent, or other public security," shall be punished by death, is repealed by the 17th section of the Crimes Act, of the 3d of March, 1825, which enumerates as the subjects of forgery, an "indent, certificate of public stock, or debt, or treasury note, or other public security of the United States, or any letters patent," &c., and declares that the punishment, on conviction, shall be fine and imprisonment. (U. S. *v.* Irwin, 5 M'L. C. C. R., 178.)

A military land warrant is neither an indent nor a public security of the United States, within the meaning of the act of Congress of 1825. (U. S. *v.* Irwin, 5 M'L. C. C. R. 178.)

[aa] In Vondersmith's case, in the United States District Court for Philadelphia in April, 1859, Judge Cadwalader charged the jury as follows:—

"An act of the Congress of the United States, passed on 3d March, 1825, made it felony to forge, or cause or procure to be forged, any paper, writing or instrument in imitation of, purporting to be, any letter of attorney, or other authority or instrument, to receive any pension due or to become due from the United States, or the name or names of any person entitled to any such pension. An act of the 3d March, 1823, had already made it felony to forge, or cause or procured to be forged, not only a power of attorney, but also a certificate or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive any sum or sums of money from the United States, or any of their officers or agents. This act likewise makes it felony to utter or publish any such forged writing as true, with intent to defraud the United States, knowing it to be forged; and also makes it felony, with such intent and knowledge, to transmit it to, or present it at, or cause or procure it to be transmitted to, or presented at, any office or officer of the Government of the United States.

"The defendant is charged under these acts, with having forged, or procured to be forged, uttered as true, and transmitted to the office of the Commissioner of Pensions, pretended applications in the names of non-existing persons, for money alleged in them to be due for pensions to widows and children of officers and soldiers of the revolutionary war, supported by pretended affidavits which the pretended deponents and subscribers never deposed or subscribed, and by certificates which the pretended

or to any such pretended letter of attorney, authority, or instrument; or shall knowingly and fraudulently demand, or endeavour to have or obtain such share or sum in such public stock or debt, or capital stock of the said bank, or to have any part thereof transferred, assigned, or sold, or conveyed, or such annuity, dividend, pension, prize money, wages, or other debt or sum of money, or any part thereof, to be received or paid, by virtue of any such false, forged, or counterfeited letter of attorney, authority, or instrument; or shall falsely and deceitfully personate any true or real proprietor or holder of such share or sum in such public stock or debt, or capital stock of the said bank, or any person entitled to such annuity, dividend, pension, prize money, wages, or other debt or sum of money, as aforesaid, and thereby transferring or endeavouring to transfer such public stock or debt, or capital stock of the said bank, or receiving or endeavouring to receive the money of such true or lawful holder or proprietor thereof, or the money of such person or persons, really and truly entitled to receive such annuity, dividend, pension, prize money, wages, or other debt or sum of money, as if such offender were the true and lawful owner thereof, and entitled thereto; every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labour, not exceeding ten years, according to the aggravation of the offence.—(Ibid. sect. 18.)

§ 1304. *Making, &c., any false sea letter, Mediterranean passport, &c.*—If any person shall knowingly make, utter, or publish any false sea letter, Mediterranean

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attestants never subscribed or saw. In legal proceedings, the presumption is always in favor of innocence rather than of guilt; and in proceedings for criminal offences, the party accused is entitled under this presumption, to the benefit of any reasonable doubt of his guilt that can be honestly entertained. If the proof to sustain the present prosecution had rested upon the testimony concerning the making by the defendant of applications in the names of non-existing persons, in the particular cases in which it is charged in the indictments, a doubt whether he had not been himself imposed upon by some deceitful party personating the supposed applicant might perhaps have been suggested. For this reason, proof has been given in support of the prosecution of transactions of the same character, composing a series in which the cases in question are included. This proof has been adduced, in order to show that from their multiplicity, they cannot have occurred innocently. In the language of the Supreme Court, when the question to be tried is one of fraudulent intent, 'It has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.' (16 Pet. 360.) It has been decided previously by the House of Lords in England, in a case in which the opinion of the Judges was taken, that when the question in issue was whether a defendent knew that the name of a non-existing party to a paper was fictitious, his knowledge could be shown by proof of numerous other cases in which he had acted upon similar papers in the names of non-existing persons, under circumstances precluding a reasonable belief that he could, in so many cases, have been ignorant of the truth. (2 H. Bl. 288.) In cases of prosecutions for forgery, the question in different forms has often been presented for decision. There never has been a case, perhaps, in which such testimony was more proper than the case which you are to determine. Some of the transactions proved are, it is true, remoter in date from the transaction in question than those of which proof has been given in other cases. But their uniformity, identity of purpose, and connection as a series, has been established so as to render this, in the opinion of the Court, an immaterial distinction as far as the mere admissibility of the evidence is concerned. But this evidence, except on the question of guilty intention alone, is entitled to no consideration, where it is not applicable directly to the particular cases of alleged forgery, charged in the indictment.

passport, or certificate of registry, or shall knowingly avail himself of any such Mediterranean passport, sea letter, or certificate of registry, he shall forfeit and pay a sum not exceeding five thousand dollars, to be recovered by action of debt, in the name of the United States, in any court of competent jurisdiction; and if an officer of the United States, he shall forever hereafter be rendered incapable of holding any office of trust or profit under the authority of the United States.—(Act 2d March, 1803, sect. 1.)

§ 1305. *Counterfeiting any instrument purporting to be an official copy or certificate of recording, registry, or enrolment of any vessel, &c.*—If any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting any instrument in imitation of, or purporting to be, an abstract or official copy, or certificate of the recording, registry, or enrolment of any vessel in the office of any collector of the customs of the United States, or a license to any vessel for carrying on the coasting trade, or fishing, or fisheries of the United States, or a certificate of ownership, pass, passport, sea letter, or clearance granted for any vessel under the authority of the United States, or a permit, debenture, or other official document, granted by any collector or other officer of the customs, by virtue of his or their office; or shall falsely alter any abstract, official copy, or certificate of any recording, registering, or enrolling of any vessel in the office of any collector of the customs of the United States, or any license to any vessel for carrying on the coasting trade or fisheries of the United States, or any certificate of ownership, pass, passport, sea-letter, or clearance granted for any vessel under the authority of the United States, or any permit, debenture, or other official document granted by any collector or other officer of the customs, by virtue of his or their office; or shall pass, utter, or publish, or attempt to pass, utter, or publish, as true, any such false, forged or counterfeited instrument, or any such falsely altered abstract, official copy, certificate, license, pass, passport, sea-letter, clearance, permit, debenture, or other official document, as aforesaid, knowing the same to be false, forged or counterfeited; or falsely altered, with an intent to defraud the United States, or any other body politic or corporate, or person whatsoever; every person so offending, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labour, not exceeding three years.—(Act 3d March 1825, sect. 19.)

§ 1306. *Issuing, re-issuing, &c., as money, any note, bill, &c., by corporation or officer, whose charter has expired.*—In all cases where the charter of any corporation which has been or may be created by act of Congress of the United States, shall have expired, or may hereafter expire, if any director, officer or agent of the said corporation or any trustee thereof, or any agent or officer of such trustee, or any person having in his possession or under his control the property of the said corporation for the purpose of paying or redeeming its notes and obligations, shall knowingly issue, re-issue or utter as money, or in any other way knowingly put in circulation, any bill, note, check, draft, or other security purporting to have been made by any such corporation whose charter has expired, or by any officer thereof, or purporting to have been made, under authority derived therefrom, or if any person or persons shall knowingly aid and assist in any such act; every person so offending, shall be deemed guilty of a high misdemeanor, and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment and confinement not less than one year, nor exceeding five years, or by both such fine and imprisonment: Provided, that nothing herein contained shall be construed

to make it unlawful for any person not being such director, officer or agent of the said corporation or any trustee thereof, or any agent or officer of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose aforesaid, who shall have received or may hereafter receive such bill, note, check, draft or other security *bona fide* and in the ordinary transactions of business, to utter as money or otherwise circulate the same.—(Act 7th July, 1837.

§ 1307. *In a corporation whose charter has expired, the several Circuit Courts of United States shall have jurisdiction to grant injunctions to prevent re-issuing, &c., of any notes.*—In all cases in which any corporation has been or may be created by acts of Congress of the United States, or in which the United States shall have been interested as a stockholder, the term of corporation has expired, and in which any bills, notes, checks, drafts or other securities, made under authority derived or alleged to have been derived from such act, shall be in possession or under the control of any director, officer, or agent of the said expired corporation, or any trustee thereof, or any agent or officer of such trustee, or any person having in his possession or under his control, the property of the said corporation, for the purpose of paying or redeeming its notes and obligations, the several Circuit Courts of the United States shall have jurisdiction on the bill or petition of the United States to grant injunctions to prevent the issuing, re-issuing or transfer of any such bills, notes, checks, drafts, or other securities; and also to cause such of the said bills, notes, checks, drafts, or other securities, as have been redeemed, to be delivered up and cancelled, and the said several courts shall have power to make all necessary decrees and orders for the purpose of carrying into effect the jurisdiction hereby conferred, and to execute the same by due process of law.—(Ibid. sect. 3.)

§ 1308. *Forging, &c., any coin, either gold or silver, in resemblance of gold or silver coin which has been or may be coined at mint, &c.*—If any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any coin,[b] in the resemblance or similitude of the gold or silver coin which has been or hereafter may be coined at the mint of the United States; or in the resemblance or similitude of any foreign gold or silver coin which by law now is or hereafter may be made current in the United States; or shall pass, utter, publish or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any body politic, or corporation, or any other person or persons whatsoever; every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labour, not exceeding ten years, according to the aggravation of the offence.[c]—(Act 3d March, 1825, sect. 20–21; April, 1806, sect. 1, 2.)

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[b] See U. S. *v.* Burns, 5 M'Lean, C. C. 24.

[c] The designation in the indictment of the coins alleged to have been made, as coins called fifty cent pieces and twenty-five cent pieces, instead of the half dollar and the quarter dollar, by which names they are called in the act of Congress, regulating the coinage of the country, is not a material variance, and will not support a motion in arrest of judgment. (U. S. *v.* Burns, 5 M'Lean, C. C. R. 24.)

An indictment framed on the 20th section of the Crimes Act of the 3d of March, 1825, it is not a misjoinder to add to the counts charging the making of false coin, a count for aiding and assisting in making such coins, and one for producing them to be made. (U. S. *v.* Burns, 5 M'Lean, C. C. R. 24.)

§ 1309. *Forging or counterfeiting copper coin of United States.*—If any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any coin in the resemblance or similitude of any copper coin which has been or hereafter may be coined at the mint of the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish, or sell, as true, any such false, forged, and counterfeited coin, with intent to defraud any body politic or corporate, or any other person or persons whatsoever; every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labour, not exceeding three years.—(Act 3d March, 1825, sect. 21.)

§ 1310. *Debasing any coin, either gold or silver, which may be coined at mint, by any of the officers employed there.*—If any of the gold or silver coins which shall be struck or coined at the mint of the United States, shall be debased or made worse, as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than the same ought to be, pursuant to the several acts relative thereto, through the default, or with the connivance of any of the officers or persons who shall be employed at the said mint, for the purpose of profit or gain, or otherwise, with a fraudulent intent, and if any of the said officers or persons shall embezzle any of the metal which shall at any time be committed to their charge for the purpose of being coined, or any of the coins which shall be struck or coined at the said mint, every such officer or person who shall commit any or either of the said offences shall be deemed guilty of felony, and shall be sentenced to imprisonment and hard labour, for a term not less than one year, nor more than ten years, and shall be fined in a sum not exceeding ten thousand dollars.—(Ibid. sect. 24.)

§ 1311. *Debasing, &c., for gain's sake, any gold or silver coins which have been or shall be coined at mint of United States, &c.*—If any person shall fraudulently and for gain's sake, by any art, way or means whatsoever, impair, diminish, falsify, scale or lighten the gold or silver coins which have been, or which shall hereafter be coined at the mint of the United States, or of any foreign gold or silver coins which are by law made current, or are in actual use and circulation as money, within the United States, such person, so offending, shall be deemed guilty of a high misdemeanor, and shall be imprisoned not exceeding two years, and fined not exceeding two thousand dollars.—(Act 21st April, 1806, sect. 3.)

If the spurious coin, from its incompleteness, or the defectiveness of its manufacture is not fitted to deceive persons of the most ordinary caution and intelligence, the inference of a criminal intention in making it does not arise. (U. S. *v.* Burns, 5 M'Lean, C. C. R. 24.)

It is not necessary to prove, in support of a charge for making American coin, or coins made current by act of Congress, that there are genuine coins, of which, those alleged to have been made, were counterfeits. The court and jury will take notice without proof, of the legal coins made at the mint of the United States, pursuant to law, and of foreign coins made current by law. (U. S. *v.* Burns, 5 M'Lean, C. C. R. 24.)

On an indictment under the section of the act of Congress, providing a penalty against any one who shall *falsely* make, forge, or counterfeit any silver coin, &c., it must appear that it was the intention of the party, in making such coin, fraudulently to pass them as genuine. U. S. *v.* King, 5 M'Lean, C. C. R. 208.)

If it appear that the counterfeit coins were made for any other purpose—though that purpose may not be defensible in a moral aspect—the party is not guilty of the offence contemplated by the statute. (U. S. *v.* King, 5 M'Lean, C. C. R. 208.)

§ 1312. *Nothing in the act shall deprive courts of individual States of jurisdiction.*—Nothing in the act (April 21st, 1806,) contained, shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States over offences made punishable by that act.—(Ibid. sect. 4.)

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§ 1313. *Falsely making or forging, &c., any public record, wherein such return or certificate may be received as legal proof, &c.*—Every person who shall falsely make, alter, forge, or counterfeit any public record, or any certificate, return, or attestation of any clerk of a court, public register, notary public, justice of the peace, town clerk, or any other public officer, in relation to any matter wherein such certificate, return or attestation may be received as legal proof, or any charter, deed, will, testament, bond, or writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or any order, acquittance or discharge for money or other property, or any acceptance of a bill of exchange, or endorsement, or assignment of a bill of exchange, or promissory note for the payment of money, or any accountable receipt for money, goods, or other property, with intent to injure or defraud any person, shall be punished by imprisonment in the state prison not more than ten years, or in the county jail not more than two years.[d]—(Rev. Stat. ch. 127, sect. 1.)

§ 1314. *Punishment for the above.*—Every person who shall utter and publish as true, any false, forged, or altered record, deed, instrument, or other writing, mentioned in the preceding section, knowing the same to be false, altered, forged, or counterfeit, with intent to injure or defraud, as aforesaid, shall be punished by imprisonment in the state prison not more than ten years, or in the county jail not more than two years.—(Ibid. sect 2.)

§ 1315. *Falsely making or forging any note, &c., issued by treasurer of Commonwealth.*—Every person who shall falsely make, alter, forge or counterfeit any note, certificate, or other bill of credit, issued by the treasurer of this commonwealth, or by any commissioner or other officer, authorized to issue the same, for any debt of this commonwealth, with intent to injure or defraud as aforesaid, shall be punished by imprisonment in the state prison for life, or for any term of years. —(Ibid, sect. 3.)

§ 1316. *Forging or counterfeiting any bank bill or promissory note.*—Every person who shall falsely make. alter, forge or counterfeit any bank bill, or promissory note, payable to the bearer thereof, or to the order of any person, issued by any incorporated banking company in this state, or payable therein, at the office of any banking company, incorporated by any law of the United States, with intent to injure or defraud any person, shall be punished by imprisonment in the state prison for life, or for any term of years.[e]—(Ibid. sect. 4.)

§ 1317. *Possession at same time of ten or more forged notes.*—If any person shall have in his possession, at the same time, ten or more similar false, altered, forged, or counterfeit notes, bills of credit, bank bills or notes, payable to the bearer thereof, or to the order of any person, such as are mentioned in any of the preceding sections, knowing the same to be false, altered, forged or counterfeit,

[d] Where, to a bill of parcels of this, tenor, viz., "Mr. J. L. bo't of E. and C., the above charged to G. C." the purchaser, J. L., added these words, "by order of E. C." —it was held that this addition amounted to an acquittance or discharge, and was a forgery within the statute. (Com. *v.* Ladd, 15 Mass. 526.)

[e] A bill issued by a bank in another state, is a promissory note under this section. (Com. *v.* Ripley, Thacher's C. C. 67.) Nor forms, see Wh. Prec. 353, etc.

with intent to utter or pass the same as true, and thereby to injure or defraud, as aforesaid, he shall be punished by imprisonment in the state prison for life, or for any term of years.[f]—(Ibid. sect. 5.)

§ 1318. *Uttering or passing, as true, any forged note, for any debt of commonwealth.*—Every person who shall utter, or pass, or tender in payment, as true, any such false, altered, forged, or counterfeit note, certificate, or bill of credit, for any debt of this commonwealth, or any bank bill, or promissory note, payable to the bearer thereof, or to the order of any person, issued as aforesaid, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud as aforesaid, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than one year.[g]—(Ibid. sect. 6.)

§ 1319. *Second conviction for like offence.*—If any person who has been convicted of the offence mentioned in the preceding section, shall be again convicted of the like offence, committed after the former conviction, or if any person shall, at the same term of the court, be convicted upon three distinct charges of the said offence, he shall be deemed a common utterer of counterfeit bills, and shall be punished by imprisonment in the state prison not more than ten years.—(Ibid. sect. 7.)

§ 1320. *Bringing into state any forged notes.*—Every person who shall bring into this state, or shall have in his possession, any false, forged, or counterfeit bill or note, in the similitude of the bills or notes payable to the bearer thereof, or to the order of any person, issued by or for any bank or banking company established in this state, with intent to utter or pass the same, or to render the same current as true, knowing the same to be false, forged, or counterfeit, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding

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[f] Under this section a number of cases have arisen—Com. *v.* Morse, 2 Mass. 128; Com. *v.* Cone, 2 Mass. 132; Com. *v.* Houghton, 8 Mass. 107; Brown *v.* Com. 8 Mass. 59; Com. *v.* Whitemarsh, 4 Pick. 233. It has, in general, been held that it is sufficient to show an intent in the offender to pass the bill merely, without showing an intent to pass it for its full value.—(Hopkins *v.* Com., 3 Metcalf, 460.)

[g] Under the statute of 1804, ch. 1820, sect. 2, providing that if any person shall falsely make, pass, &c., any bank bill, or if "any person having knowledge of such false making," &c., shall "assist in rendering current or true," any such false bank bill," &c., and for "that purpose shall possess at any one time any number not less than ten of such similar false," &c., bank bills, "knowing the same to be false," &c., "with intent to utter and pass the same," it was not necessary, in order to constitute the offence of having in his possession ten or more counterfeit bank bills, that the offender should have the knowledge of the false making at the time of fabrication.—(Brown *v.* Com. 8 Mass. 59; Com. *v.* Houghton, 8 Mass. 107.)

The indictment need not aver the incorporation of the bank, if it charge the intent to defraud an individual.—(Com. *v.* Carey, 2 Pick. 47.) It is sufficient to aver that the counterfeit bills "purported" to be bills of such a bank—(Brown *v.* Com. 8 Mass. 59;) and that they were payable to the bearer thereof—(Ibid.;) and that they were promissory notes and bank bills—(Ibid.;) and that the defendant aided in rendering them current as true, knowing that they were false, forged, and counterfeit, without charging, in the words of the statute, that he "had knowledge of the false making" at the time of the fabrication.—(Brown *v.* Com. 8 Mass. 59; Com. *v.* Houghton, 8 Mass. 107)

A bank bill of any other state is a promissory note within the statute.—(Com. *v.* Ripley, Thacher's C. C., 67.) If a person procure a counterfeit bank bill to be passed as true, by an innocent agent, it will be a passing by the former, within the section.—(Com. *v.* Hill, 11 Mass. 136.)

"Passing," within the statute, does not necessarily mean passing as true, but extends to passing generally as for money, or to be used as money.—(Hopkins *v.* Com., 3 Met. 460.)

one thousand dollars, and imprisonment in the county jail not more than one year.[h] —(Ibid. sect. 8.)

§ 1321. *Engraving, making, &c., any plate, block, or instrument for forging or making any counterfeit note.*—Every person who shall engrave, make or mend, or begin to engrave, make or mend any plate, block, press, or other tool, instrument or implement, or shall make or provide any paper or other material, adapted and designed for the forging, or making any false or counterfeit note, certificate, or other bill of credit, in the similitude of the notes, certificates, or bills of credit, issued by lawful authority for any debt of this commonwealth, or any false or counterfeit note or bill, in the similitude of the notes or bills issued by any bank or banking company established in this state, or within the United States, and every person who shall have in his possession any such plate or block, engraved in any part, or any press or other tool, instrument or implement, or any paper or other material, adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used, in forging or making any such false and counterfeit certificates, bill or notes, shall be punished by imprisonment in the state prison not more than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than two years.—(Ibid. sect. 9.)

§ 1322. *In prosecutions for forgery, &c., the testimony of president and cashier may be dispensed with.*—In all prosecutions for forging or counterfeiting any notes or bills of the banks before mentioned, or for uttering, publishing, or tendering in payment as true, any forged or counterfeit bank bills, or for being possessed thereof, with the intent to utter and pass the same as true, the testimony of the president and cashier of such banks may be dispensed with, if their place of residence shall be out of this state, or more than forty miles from the place of trial; and the testimony of any person acquainted with the signature of the president or cashier of such banks, or who has knowledge of the difference in the appearance of the true and the counterfeit bills or notes thereof, may be admitted to prove that any such bills or notes are counterfeit.—(Ibid. sect. 10.)

§ 1323. *In prosecutions for forgery the certificate, under oath, of the treasurer, admitted as evidence.*—In all prosecutions for forging or counterfeiting any note, certificate, bill of credit, or other security, issued on behalf of the United States, or on behalf of any state or territory, or for uttering, publishing, or tendering in payment as true, any such forged or counterfeit note, certificate, bill of credit or security, or for being possessed thereof, with intent to utter and pass the same as true, the certificate under oath of the secretary of the treasury, or of the treasurer of the United States, or of the secretary or treasurer of any state or territory, on whose behalf such note, certificate, bill of credit or security, purports to have been issued, shall be admitted as evidence, for the purpose of proving the same to be forged or counterfeit.—(Ibid. sect. 11.)

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[h] By the fifteenth section of the act of amendment, (Rev. Stat. p. 808,) after the words "established in this state," the words "or in any other of the United States, or in any of the British provinces in North America, or in any other foreign state or government" are inserted. Bank bills purporting to be signed by the president and cashier of a bank, and having the external appearance of bills issued by the bank," though of different denominations from any ever issued by it, are in the "similitude" of the genuine bills. (Com. *v.* Smith, 7 Pick. 137.)

Under the provision of the same section, that if any person shall have in his possession any counterfeit bank bill, "for the purpose of rendering the same current or true, or with intent to pass the same," it is sufficient to show an intent in the offender to pass the bill merely, without showing intent to pass it as a genuine or for full value.—(Hopkins *v.* Com., Met. 460.)

§ 1324. *Connecting together different parts of several bank notes.*—If any person shall fraudulently connect together different parts of several bank notes, or other genuine instruments in such a manner as to produce one additional note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery in like manner as if each of them had been falsely made or forged.—(Ibid. sect. 12.)

§ 1325. *Fictitious signature purporting to be signature of an officer.*—If any fictitious or pretended signature, purporting to be the signature of an officer or agent of any corporation, shall be fraudulently affixed to any instrument or writing, purporting to be a note, draft, or other evidence of debt, issued by such corporation, with intent to pass the same as true, it shall be deemed a forgery, though no such person may ever have been an officer or agent of such a corporation, nor ever have existed.[i]—(Ibid. sect. 13.)

§ 1326. *Case where intent to defraud is required to constitute offence of forgery.*—In any case where an intent to defraud is required to constitute the offence of forgery or any other offence, that he may be prosecuted, it shall be sufficient to allege, in the indictment, an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town or parish, or any body corporate, or any public officer, in his official capacity, or any copartnership or members thereof, or any particular person.—(Ibid. sect. 14.)

§ 1327. *Counterfeiting gold or silver coin, or possessing at same time ten or more pieces of false money.*—Every person who shall counterfeit any gold of silver coin, current by law or usage, within this state, and every person who shall have in his possession, at the same time, ten or more pieces of false money, or coin counterfeited in the similitude of any gold or silver coin, current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, shall be punished by imprisonment in the state prison for life, or for any term of years.[j]—(Ibid. sect. 15.)

§ 1328. *Possession of any number of pieces less than ten.*—Every person who shall have in his possession any number of pieces less than ten, of the counterfeit coin mentioned in the preceding section, knowing the same to be counterfeit, with intent to utter or pass the same as true, and any person who shall utter, pass, or tender in payment as true, any such counterfeit coin, knowing the same to be false and counterfeit, shall be punished by imprisonment in the state prison, not more

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[i] To affix a fictitious signature to a pretended bank note was not, in Massachusetts, considered an offence at common law, or under the statute of 1800, c. 64.—(Com. *v.* Boynton, 2 Mass. 77; Com. *v.* Morse, 2 Mass. 138; Com. *v.* Cone, 2 Mass. 132.)

[j] Under this section, one indicted for having in his possession more than ten pieces of counterfeit coin, may be found guilty of, and sentenced for, having in his possession less than ten, according to the next section.—(Com. *v.* Griffin, 21 Pick. 523.)

It was held sufficient, under a former statute, if the offender has in his possession ten pieces of either kind of coin, though not all of the same denomination.—(Brown *v.* Com., 8 Mass. 59, 71.

Gold coin, not issued by the authority of Congress, nor of any foreign government, but made within one of the United States, contrary to the Constitution of the United States, although in circulation in that state, and not "gold coin current by law or usage within this state," the counterfeiting of which, or having the counterfeits of which, with intent to utter, or uttering, &c., as true, is prohibited by these sections.—(Com. *v.* Bond, 1 Gray R. 564.)

than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail, not more than two years.[k]—(Ibid. sect. 16.)

§ 1329. *Second conviction of offence mentioned in preceding section.*—If any person who has been convicted of either of the offences mentioned in the preceding section, shall be again convicted of either of the same offences, committed after the former convictions, or if any person shall, at the same term of the court, be convicted upon three distinct charges of the same offence, he shall be deemed a common utterer of counterfeit coin, and shall be punished by imprisonment in the state prison not more than twenty years.—(Ibid. sect. 17.)

§ 1330. *Casting or stamping any mould, pattern, &c., for making false coin, either gold or silver.*—Every person who shall cast, stamp, engrave, make or mend, or shall knowingly have in possession any mould, pattern, die, puncheon, engine, press, or other tool or instrument, adapted and designed for coining, or making any counterfeit coin, in the similitude of any gold or silver coin, current by law or usage in this state, with intent to use or employ the same, or to cause or permit the same to be used or employed in coining or making any such false and counterfeit coin as aforesaid, shall be punished by imprisonment in the state prison, not more than ten years, or by fine not exceeding one thousand dollars and imprisonment in the county jail, not more than two years.—(Ibid. sect. 18.)

§ 1331. *Rewards allowed for informing and prosecuting, in cases hereafter mentioned.*—There shall be allowed and paid to the person who shall inform and prosecute, in the cases hereinafter mentioned, the following rewards, that is to say, the sum of sixty dollars for each person convicted and sentenced for the offence of forgery, or making any false and counterfeit certificate, bill, or note, in the similitude of any certificate, bill, or note, issued as aforesaid, for any debt of this commonwealth, or by or for any bank or banking company, by law established in this state, or for the offence of counterfeiting any gold or silver coin, current by law or usage, as aforesaid; and the sum of forty dollars for each person so convicted and sentenced for the offence of possessing, with intent to utter as true, or of knowingly uttering as true, any such false and counterfeit certificate, bill, or note, or any such counterfeit certificate, bill, or note, or any such counterfeit coin as aforesaid; which reward shall be paid out of the public treasury by the warrant of the governor, with advice of the council, to be granted upon the certificate of the judge of the court, before whom such conviction shall be had; and when there shall be two or more informers and prosecutors for the same offence, the said reward shall be divided among them equally, or in such proportions as the said judge or court shall determine.—(Ibid. sect. 13.)

§ 1332. *Counterfeiting private labels or stamps of a mechanic or manufacturer.*—Sect. 1. Every person who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, upon any goods, wares, or merchandise, the private labels, or stamps, or trade marks, of any mechanic or manufacturer, with intent to defraud the purchasers, or manufacturers, of any goods, wares, or merchandise whatever, upon conviction thereof, shall be punished by imprisonment for a term not exceeding six months, or by fine not exceeding five hundred dollars.—(Gen. Laws of Mass. session, ch. 90.)

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[k] Under Rev. Stat., c. 127, it is enough to allege that the defendant "had in his possession a piece of false and counterfeit coin, counterfeited in the similitude of the good and legal silver coin, current in this commonwealth by the laws and usages thereof, called a dollar, with intent to pass the same as true, knowing the same to be false and counterfeit," without any further description.—(Com. *v.* Stearns, 10 Met. 256.)

§ 1333. *Vending goods or merchandise with counterfeited stamps or labels on.*—SECT. 2. Every person who shall vend any goods, wares, or merchandise, having thereon any forged or counterfeited stamps, labels, or trade marks, of any mechanic or manufacturer, knowing the same to be forged or counterfeited, without disclosing the fact to the purchaser, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be punished by imprisonment not exceeding six months, or by fine not exceeding fifty dollars.—(Ibid.)

§ 1334. *Time act shall take place.*—SECT. 3. This act shall not take effect until six months after its passage.—(Ibid.)

§ 1334 (*a*). SECT. 1. *Fraudulent use of trade marks prohibited.*—If any person shall use any peculiar name, letters, marks, device, or figures, cut, stamped, cast, or engraved upon, or in any manner attached to or connected with any article manufactured or sold by him, to designate it as an article of a peculiar kind, character, or quality, or as manufactured by him, it shall be unlawful for any other person, without his consent, to use the same or any similar names, letters, marks, devices, or figures, for the purpose of falsely representing any article to have been manufactured by, or to be of the same kind, character, or quality, as that manufactured or sold by the person rightfully using such name, letters, mark, device, or figure.

SECT. 2. *Liability for violation of this act.*—Any person who shall violate the provisions of the first section of this act, or shall knowingly sell, or expose for sale, any article having any name, letters, mark, device, or figure attached to or connected with them, in violation of the first section of this act, shall be liable to any party aggrieved thereby for all damages actually incurred, to be recovered in an action of tort.

SECT. 3. *Restraint by injunction.*—The supreme judicial court may restrain by injunction any person violating the provisions of this act.

SECT. 4. *Former act repealed. Act to take immediate effect.*—The act of 1852, chapter 197, is hereby repealed, and this act shall take effect from its passage.—(Supplement to Rev. Sts. 1859, chapter 234, p. 673.

NEW YORK.

Every person who shall be convicted of having forged, counterfeited, or falsely altered:

§ 1335. *Counterfeiting, &c., any will of real or personal property.*—1. Any will of real or personal property, or any deed or other instrument, being or purporting to be the act of another, by which any right or interest in real property shall be or purport to be transferred, or in any way charged or affected:

§ 1336. *Certificate or endorsement of acknowledgment.*—2. Any certificate or endorsement of the acknowledgment by any person of any deed or other instrument which by law may be recorded, made, or purporting to have been made by any officer duly authorized to make such certificate or endorsement; or,

§ 1337. *Certificate of proof of deed or will.*—3. Any certificate of the forging of any deed, will, or other instrument, which by law may be recorded, made, or purporting to have been made, by any court or officer duly authorized to make such certificate.

Punishment for preceding.—With intent to defraud shall be adjudged guilty of forgery in the first degree.—(2 Rev. Stat. sect. 22.)

Every person who shall be convicted of having forged, counterfeited, or falsely altered:

§ 1338. *Forging certificate purporting to have been issued under authority of state.*—1. Any certificate or other public security, issued or purporting to have been issued under the authority of this state, by virtue of any law thereof; or any bill of credit heretofore issued by or under the authority of the legislature of this state, or purporting to have been so issued; by which certificate, bill, or other public security, the payment of any money absolutely, or upon any contingency, shall be promised, or the receipt of any money, goods, or valuable thing, shall be acknowledged: or,

§ 1339. *Certificate or share in public stock.*—2. Any certificate of any share, right or interest in public stock, created by virtue of any law of this state, issued by any public officer; or any other evidence of any debt or liability of the people of this state, either absolute or contingent, issued or purporting to have been issued by any public officer: or,

§ 1340. *Endorsement purporting to transfer right of interest in security.*—3. Any endorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of any certificate, public security, bill of credit, certificate of stock, evidence of debt, or liability, or of any person entitled to such right or interest;

§ 1341. *Punishment for preceding.*—With the intent to defraud the people of this state, or any public officer thereof, or any other person, shall be adjudged guilty of forgery in the first degree.—(Ibid. sect. 23.)

§ 1342. *Forging privy seal of state or of any public office.*—Every person who shall forge or counterfeit the great or privy seal of this state; the seal of any public office authorized by law; the seal of any court of record, including surrogates' seals; or the seal of any body corporate, duly incorporated by or under the laws of this state; or who shall falsely make, or forge, or counterfeit any impression purporting to be the impression of any such seal; with intent to defraud, shall, upon conviction, be adjudged guilty of forgery in the second degree.—(Ibid. sect. 24.)

Every person who, with intent to defraud, shall falsely alter, destroy, corrupt or falsify:

§ 1343. *Altering, destroying, &c., record of will.*—1. Any record of any will, conveyance or other instrument, the record of which shall by law be evidence; or,

§ 1344. *Record of judgment in court of record.*—2. Any record of any judgment in a court of record, or any enrolment of any decree of a court of equity; or,

§ 1345. *Punishment.*—3. The return of any officer, court or tribunal, to any process of any court, shall, upon conviction, be adjudged guilty of forgery in the second degree.—(Ibid. sect. 25.)

§ 1346. *Forging an entry in a book of records.*—Every person who shall falsely make, forge or alter, any entry in any book of records; or any instrument purporting to be any record or return specified in the last section; with intent to defraud, shall, upon conviction, be adjudged guilty of forgery in the second degree.—(Ibid. sect. 26.

§ 1347. *Wilfully certifying that any instrument was acknowledged.*—If any officer authorized to take the proof or acknowledgment of any conveyance of real estate, or of any other instrument which by law may be recorded, shall wilfully and falsely certify that any such conveyance or instrument was acknowledged by any party thereto, when in truth no such acknowledgment was made; or that any such conveyance or instrument was proved, when in truth no such proof was made; he shall, upon conviction, be adjudged guilty of forgery in the second degree.—(Ibid. sect. 27.)

§ 1348. *Counterfeiting gold or silver coins.*—Every person who shall be convicted of having counterfeited any of the gold or silver coins, which shall be at the time current by custom or usage within this state, shall be adjudged guilty of forgery in the second degree.—(Ibid. sect. 28.)

§ 1349. *Counterfeiting foreign coin.*—Every person who shall be convicted of having counterfeited any gold or silver coin of any foreign government or country, with the intent of exporting the same, to injure or defraud any foreign government or the subjects thereof, shall be deemed guilty of forgery in the third degree.—(Ibid. sect. 29.)

Every person who shall be convicted of:

§ 1350. *Engraving plate in form of promissory note.*—1. Having made or engraved, or having caused or procured to be made or engraved, any plate in the form or similitude of any promissory note, bill of exchange, draft, check, certificate of deposit, or other evidence of debt, issued by any incorporated bank in this state, or by any bank incorporated under the laws of the United States, or of any state or territory thereof, or under the laws of any foreign country, or government, without the authority of such bank; or,

§ 1351. *Possession of plate without the authority of bank.*—2. Having or keeping in his custody or possession, any such plate, without the authority of such bank, with the intent of using or having the same used for the purpose of taking therefrom any impression to be passed, sold or uttered; or,

§ 1352. *Possession of impression taken from such plate.*—3. Having or keeping in his custody or possession, without authority of such bank, any impression taken from any such plate, with intent to have the same filled up and completed for the purpose of being passed, sold or uttered; or,

§ 1353. *Engraving upon plate figures or words, for altering evidence of debt.*—4. Having made or caused to be made, or having in his custody or possession, any plate upon which shall be engraved any figures or words, which may be used for the purpose of falsely altering any evidence of debt, issued by any such incorporated bank, with the intent of having the same used for such purpose: shall be adjudged guilty of forgery in the second degree.—(Ibid. sect. 30.)

§ 1354. *Plate deemed in similitude of genuine instrument.*—Every plate specified in the last section shall be deemed to be in the form and similitude of the genuine instrument imitated, in either of the following cases:

§ 1355. *Resemblance of parts.*—1. When the engraving on such plate resembles and conforms to such parts of the genuine instrument, as are engraved; or,

§ 1356. *Conformation of finished parts.*—2. When such plate shall be partly finished, and the part so finished resembles and conforms to similar parts of the genuine instrument.—(Ibid. sect. 31.)

Every person who shall be convicted:

§ 1357. *Conviction for selling forged note.*—1. Of having sold, exchanged or delivered for any consideration, any forged or counterfeited promissory note, check, bill, draft or other evidence of debt or engagement, for the payment of money absolutely, or upon any contingency, knowing the same to be forged or counterfeited, with intention to have the same uttered or passed; or,

§ 1358. *Offering forged note for sale.*—2. Of having offered any such note or other instrument for sale, exchange or delivery for any consideration, with the like knowledge and with the like intention; or,

§ 1359. *Receiving forged note.*—3. Of having received any such note or other instrument upon a sale, exchange, or delivery, for any consideration, with the like knowledge, and with the like intention.

§ 1360. *Punishment.*—Shall be judged guilty of forgery in the second degree.—(Ibid. sect. 32.)

Every person who with intent to injure or defraud, shall falsely make, alter, forge or counterfeit:

§ 1361. *Forging any process issued by court.*—1. Any instrument or writing, being or purporting to be any process issued by any competent court, magistrate or officer, or being or purporting to be any pleading or proceeding filed or entered in any court of law or equity: or being or purporting to be any certificate, order or allowance by any competent court or officer, or being or purporting to be any license or authority authorized by any statute;

§ 1362. *Forging instrument or writing.*—2. Any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or shall purport to be created, increased, discharged, or diminished, or by which any rights or property whatever, shall be or purport to be transferred, conveyed, discharged, diminished, or in any manner affected, the punishment of which is not hereinbefore prescribed;

§ 1363. *Punishment for the above.*—By which false making, forging, altering, or counterfeiting, any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof shall be adjudged guilty of forgery in the third degree.—(Ibid. sect. 33.)

§ 1364. *Making false entry in book kept in office of comptroller.*—Every person who, with intent to defraud, shall make false entry, or shall falsely alter any entry made in any book of accounts, kept in the office of the comptroller of this state, or in the office of the treasurer, or of the surveyor-general, or of any county-treasurer, by which any demand or obligation, claim, right or interest, either against or in favour of, the people of this state, or any county or town, or any individual, shall be, or shall purport to be discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree.—(Ibid. sect. 34.)

§ 1365. *Making false entry in book kept by moneyed corporation.*—Every person who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made, in any book of accounts kept by any moneyed corporation within this state, or in any book of accounts kept by such corporation, or its officers, and delivered or intended to be delivered, to any person dealing with such corporation, by which any pecuniary obligation, claim or credit, shall be or shall purport to be discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree.—(Ibid. sect. 35.)

§ 1366. *Possession of forged note knowing it to be so, with intention to utter.*—Every person who shall have in his possession any forged, altered, or counterfeit negotiable note, bill, draft, or other evidence of debt, issued or purporting to have been issued, by any corporation or company duly authorized for that purpose by the laws of the United States or of this state, or of any other state government or country, the forgery of which is hereinbefore stated to be punishable, knowing the same to be forged, altered or counterfeited; with intention to utter the same as true or as false, or to cause the same to be so uttered, with intent to injure or defraud, shall, upon conviction, be subject to the punishment herein prescribed for forgery in the second degree—(Ibid. sect. 36.)

§ 1367. *Possession of forged instrument with intent to utter.*—Every person who shall have in his possession any forged or counterfeited instrument, the forgery of which is hereinbefore declared to be punishable, (except such as are enumerated in the last section,) knowing the same to be forged, counterfeited, or falsely altered

with intention to injure or defraud, by uttering the same as true or as false, or by causing the same to be so uttered, shall be subject to the punishment herein provided for forgery in the fourth degree.—(Ibid. sect. 37.)

§ 1368. *Possession of counterfeit gold or silver coin.*—Every person who shall have in his possession, any counterfeit of any gold or silver coin, which shall be at the time current in this state, knowing the same to be counterfeited, with intent to defraud and injure, by uttering the same as true or as false, or by causing the same to be so uttered, shall, upon conviction, be adjudged guilty of forgery in the fourth degree.—(Ibid. sect. 38.)

§ 1369. *Uttering and publishing as true any forged instrument or gold and silver coin.*—Every person who shall be convicted of having uttered and published as true, and with intent to defraud, any forged, altered or counterfeited instrument, or any counterfeit gold or silver coin, the forging, altering, or counterfeiting of which is hereinbefore declared to be an offence, knowing such instrument or coin to be forged, altered or counterfeited, shall suffer the same punishment herein assigned for the forging, altering or counterfeiting the instrument or coin, so uttered, except as in the next section specified.—(Ibid. sect. 39.)

§ 1370. *Receiving forged instrument or coin for consideration.*—But if it appear on the trial of the indictment, that the accused received such forged or counterfeited instrument or coin, of another, in good faith and for a good or valuable consideration, without any circumstances to justify a suspicion of its being forged or counterfeited, the jury may find the defendant guilty of forgery in the fourth degree.—(Ibid. sect. 40.)

§ 1371. *Making instrument in one's own name, with intent to create, &c., any obligation.*—If any one shall, with intent to injure or defraud, make any instrument in his own name, intending to create, increase, discharge, defeat or diminish any pecuniary obligation, right or interest, or to transfer or affect any property whatever, and shall utter or pass it, under the pretence that it is the act of another who bears the same name, he shall, upon conviction, be adjudged guilty of forgery in the same degree as if he had forged the instrument of a person bearing a different name from his own.—(Ibid. sect. 41.)

Persons convicted of the different degrees of forgery herein specified, shall be punished as follows:

§ 1372. *Punishment for forgery in first degree.*—1. Those convicted of forgery in the first degree, by imprisonment in a state prison, for a term not less than ten years;

§ 1373. *Punishment for forgery in second degree.*—2. Those in the second degree by the like imprisonment, not more than ten and not less than five years;

§ 1374. *Punishment for forgery in third degree.*—3. Those in the third degree by the like imprisonment, not exceeding five years;

§ 1375. *Punishment for forgery in fourth degree.*—4. Those in the fourth degree by the like imprisonment, not exceeding five years; or by imprisonment in a county jail, not exceeding one year.—(Ibid. sect. 42.)

§ 1376. *Erasure of instrument of writing, same as alteration of it.*—The total erasure or obliteration of any instrument of writing, with intent to defraud, by which any pecuniary obligation, or any right, interest, or claim to property, shall be, or shall be intended to be, created, increased, discharged, diminished, or in any manner affected, shall be deemed forgery in the same manner and in the same degree, as the false alteration of any part of such instrument or writing.—(Ibid. sect. 43.)

§ 1377. *Connecting different parts of genuine instruments.*—Where different

parts of several genuine instruments shall be so placed or connected together, as to produce one instrument, with intent to defraud, the same shall be deemed forgery in the same manner, and in the same degree, as if the parts so put together were falsely made or forged.—(Ibid. sect. 44.)

§ 1378. *Instruments within meaning of the act.*—Every instrument, partly printed and partly written, or wholly printed, with a written signature thereto; and every signature of an individual, firm, or corporate body, or of any officer of such body, and every writing purporting to be such signature, shall be deemed a writing, and a written instrument within the meaning of the provisions of this chapter.—(Ibid. sect. 45.)

§ 1379. *Intent to defraud.*—Wherever, by any of the foregoing provisions, an intent to defraud is required to constitute forgery, it shall be sufficient if such intent appear to defraud the United States, any state or territory, any body corporate, any county, city, town or village, or any public officer in his official capacity, any copartnership, or any one of such partners, or any real person whatever.—(Ibid. sect. 46.)

§ 1380. *Counterfeiting any evidence of debt.*—The false making, forging, or counterfeiting of any evidence of debt, issued, or purporting to have been issued by any corporation having authority for that purpose, to which shall be affixed the pretended signature of any person as an agent or officer of such corporation, shall be deemed forgery in the same degree and in the same manner as if such person was at the time an officer or agent of such corporation; notwithstanding such person may never have been an officer or agent of such corporation, or notwithstanding there never was any such person in existence.—(Ibid. sect. 47.)

§ 1381. *Amendment of act to prevent fraud by use of false stamps.*—That the act entitled "an act to punish and prevent frauds in the use of false stamps and labels," passed May 14, 1845, be and the same is hereby amended so as to read as follows:

§ 1382. *Forging private stamps, &c.*—Every person who shall knowingly and wilfully forge or counterfeit or cause or procure to be forged or counterfeited, any representation, likeness, similitude, copy or imitation of the private stamps, wrapper, or label, usually affixed by any mechanic,[1] manufacturer, to and used by such mechanic or manufacturer, on or in the sale of any goods, wares, or merchandise, with intent to deceive or defraud the purchaser or manufacturer of any goods, wares or merchandise whatsoever, upon conviction thereof, shall be punished by imprisonment in the county jail for a term not exceeding six months.

§ 1383. *Possession of any die, plate or engraving, or printed label, or stamp, for purpose of fraud.*—Every person who shall have in his possession any die, plate, engraving or printed label, stamp, or wrapper, or any representation, likeness, similitude, copy or imitation of the private stamp, wrapper or label usually affixed by any mechanic or manufacturer, to and used by such mechanic or manufacturer, on or in the sale of any goods, wares, or merchandise, with intent to use or sell the said die, plate, engraving, or printed stamp, label, or wrapper, for the purpose of aiding or assisting in any way whatever in vending any goods, wares, or merchandise, in imitation of, or intended to resemble and be sold for the goods, wares, and merchandise of such mechanic or manufacturer, shall, upon conviction thereof, be punished by imprisonment in the county jail for a term not exceeding six months.

§ 1384. *Vending goods or merchandise having forged stamps on.*—Every per-

[1] Sic in original.

son who shall vend any goods, wares, or merchandise, having thereon any forged or counterfeited stamps or labels, imitating, resembling, or purporting to be the stamps or labels of any mechanic or manufacturer, knowing the same to be forged or counterfeited, and resembling or purporting to be imitations of the stamps or labels of such mechanic or manufacturer, without disclosing the fact to the purchaser, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars.

§ 1385. *Time act takes effect.*—This act shall take effect immediately.

§ 1385 (*a*). *Forging railway tickets.*—Every person who shall be convicted of having forged, counterfeited, altered, or falsely altered any railroad ticket mentioned or referred to in any of the preceding sections of this act, or having sold, exchanged, or delivered for any consideration, any such forged or counterfeited railroad ticket, knowing the same to be forged or counterfeited, with intent to injure or defraud, or having offered any such forged or counterfeited railroad ticket for sale, exchange, or delivery, for any consideration, with the like knowledge and intent, or of having received any such forged or counterfeited railroad ticket, upon a sale, exchange, or delivery, for any consideration, with the like knowledge and intent, shall be adjudged guilty of forgery in the third degree, and shall be punished in like manner as is prescribed by law in cases of conviction of forgery in the third degree.—(3 Rev. St. 680, sect. 78.)

Every person who shall have in his possession any such forged or counterfeited railroad ticket, as mentioned or referred to in the next preceding section, knowing the same to be forged, counterfeited, or falsely altered, with intention to injure or defraud, by uttering the same as true or false, or by causing the same to be uttered, or by the use of the same to procure a passage in the cars of the railroad company by which such ticket purports to have been issued, shall be subjected to the punishment provided by law for forgery in the fourth degree.—(Ibid. sect. 79.)

[*Statutes exist, also, making it forgery to counterfeit the brands of the inspectors of salt,*[m] *of flour,*[n] *of ashes,*[o] *of oil,*[p] *of leaf-tobacco,*[q] *or of any produce in general;*[r] *and to counterfeit inspection bills,*[s] *and lottery tickets.*[t]]

PENNSYLVANIA.

§ 1386. *Counterfeiting coin.*—Any person who shall falsely and fraudulently make or counterfeit any coin, resembling, or apparently intended to resemble, any gold or silver coin, which is or shall be passing, or in circulation as money, within this commonwealth, shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years; and every such offence shall be deemed complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.—(Rev. Code., Bill I., sect. 156.)

§ 1387. *Coloring counterfeit coin with intent to pass the same.*—If any person shall gild or silver, or shall with any wash or materials capable of producing the color of gold or silver, wash, color or case over any coin whatsoever, resembling or apparently intended to resemble, or pass for any gold or silver coin, which is or

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[m] 1 R. S. 271. [n] Ibid. 539.
[o] Ibid. 549. [p] Ibid. 555. [q] Ibid. 569.
[r] Ibid. 271. [s] Ibid. 271. [t] Ibid. 671.

shall be current in this commonwealth, or if any person shall gild or silver, or shall with any wash or materials capable of producing the color of gold or silver, wash, color or case over any piece of silver or copper, or of coarse gold or coarse silver or of any metal or mixture of metals, respectively, being of a fit size and figure to be coined, and with the intent that the same shall be coined into false and counterfeit coin, resembling, or apparently intended to resemble, or pass for any coin which is or shall be current in this commonwealth, or if any person shall gild, or shall with any wash or materials capable of producing the color of gold, wash, color, or case over any silver coin, which is or shall be current as aforesaid, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any current gold or silver coin, or if any person shall gild or silver, or shall with any wash or materials capable of producing the color of gold or silver, wash, color, or case over any copper coin, current in this commonwealth, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any gold or silver coin, current in this commonwealth, every such offender shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years.—(Ibid. sect. 157.)

§ 1388. *Impairing the coin.*—If any person shall impair, diminish or lighten any gold or silver coin, which is or shall be current in this commonwealth, with intent to make the coin so impaired, diminished or lightened, pass for gold or silver coin current as aforesaid, every such offender shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.—(Ibid. sect. 158.)

§ 1389. *Buying and selling counterfeit coin.*—If any person shall buy, sell, receive, pay or put off, or offer so to do, any false or counterfeit coin, resembling, or apparently intended to resemble, or pass for any gold or silver coin which is or shall be current in this commonwealth, at or for a lower rate or value than the same, by its denomination, imports, or was coined or counterfeited for, or if any person shall import into this commonwealth from any of the states of the Union, or from any foreign country, any false or counterfeit gold or silver coin, resembling, or apparently intended to resemble. or pass for any gold or silver coin which is or shall be current in this commonwealth, knowing the same to be false or counterfeit, every such offender shall be guilty of felony, and being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. —(Ibid. sect. 159.)

§ 1390. *Uttering counterfeit gold and silver coin.*—If any person shall tender, utter, pass, or put off any false or counterfeit coin, resembling, or apparently intended to resemble, or pass for any gold or silver coin which is or shall be current in this commonwealth, knowing the same to be false or counterfeit, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years.—(Ibid. sect. 160.)

§ 1391. *Making or having possession of coining tools.*—If any person shall make or mend, or proceed to make or mend, buy or sell, hide or conceal, or knowingly have in his house, custody or possession, any puncheon, matrix, dye, stamp, mould, edger or cutting engine, used or designed for coining or counterfeiting gold, silver or copper moneys, or any part of such tools or engine, with the knowledge that such tool and instrument is intended to be used in the false and fraudulent

making, forging and counterfeiting of any gold, silver or copper coin which now is or shall be current and passing in this state as money, or with the intentent to use such tool or instrument for the fraudulent purpose aforesaid, or shall aid, abet, counsel or command the perpetration of either of the said offences, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not more than six years.—(Ibid. sect. 161.)

§ 1392. *Offences relating to the copper coin.*—If any person shall falsely make or counterfeit any coin, resembling, or apparently intended to resemble or pass for any copper, nickel or bronze coin, which is or may be current in this commonwealth; or if any person shall knowingly make or mend, or procure to be made or mended, or buy or sell, or shall knowingly have in his custody or possession any instrument, tool or engine adapted to, or intended for the counterfeiting of any such coin, current as aforesaid; or if any person shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any such coin, current as aforesaid, at or for a lower rate or value than the same, by its denomination, imports, or was coined or counterfeited for, every such offender shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.[u]—(Ibid. sect. 162.)

§ 1393. *What shall be proof of being counterfeit.*—That where, upon the trial of any person charged with any offence enumerated in the seven preceding sections, it shall be necessary to prove any coin, produced in evidence against such person, to be false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any officer of the United States mint, but it shall be sufficient to prove the same false or counterfeit by the evidence of any other credible witness.—(Ibid. sect. 163.)

§ 1394. *Counterfeiting bank notes and checks, and altering and passing the same.*—If any person shall falsely and fraudulently make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or

[u] In reference to these, the revisers say:—These sections are new, and provide a system for the punishment of coining. The only laws in force on this subject are the fifth section of the act of the 22d of April, 1794, entitled "An Act for the better preventing of crimes, and for abolishing the punishment of death in certain cases." 3 Smith's Laws, 186. Brightly's Digest, 393, No. 7; and the fourth section of the act of 23d April, 1829. 10 Smith's Laws, 437. Brightly's Digest, 393, No. 8. This offence is not usually prosecuted in the courts of the Commonwealth, inasmuch as the laws of the United States are much more complete and perfect. The jurisdiction of the courts of the United States over this offence is not, however, exclusive, inasmuch as the fourth section of the act of Congress of the 21st of April, 1806, re-enacted by the twenty-sixth section of the act of the 3d of March, 1825, (Brightly's Digest of the Laws of the United States, 216,) declares that nothing in these acts shall be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States over offences made punishable by these acts. In the cities of Philadelphia and Pittsburg, where there are permanent courts of the United States, there is no difficulty in prosecuting the counterfeiting of the currency committed therein. But where this offence is committed at places distant from these centres of population, it is important that the local tribunals should possess adequate facilities to punish it, without putting the injured citizen to the inconvenience of attending the sessions of a remote tribunal. It was, obviously, this consideration which induced Congress not to interfere with State jurisdiction. The case of Fox *v.* the State of Ohio, 5 Howard, 410, decides that State jurisdiction may be properly exercised over such crimes. Our existing laws are insufficient to meet all the cases of these crimes, and these sections are intended to remedy this defect.

assist in the false making, forging or counterfeiting any bill or note, or imitation of, or purporting to be a bill or note issued by order of the president, directors and company of any bank incorporated by the laws of this commonwealth, or by the laws of any of the states or territories of the Union, or of the District of Columbia, or any order, check or draft on either of the said banks, or any cashier of the same; or if any person shall falsely alter, or cause to be falsely altered, or aid and abet in the falsely altering any bill or note issued by any of the said banks, or any check, order or draft on the same, or the cashier of any thereof, or shall pass, utter, publish, or attempt to pass, utter or publish as true, any false, forged or counterfeit bill or note issued by any of the said banks, or by order of the president and directors of any thereof, or any false, forged or counterfeited order, check, or draft, upon any of the said banks, or any cashier threreof, knowing the same to be falsely forged or counterfeited, or shall pass, utter or publish, or attempt to pass, utter or publish as true, any falsely and fraudulently altered bill or note, issued by any of the said banks, or by order of the president and directors thereof, or any falsely altered order, check or draft on any of the said banks, or on any cashier thereof, knowing the same to be falsely altered, with intent to defraud any of the said banks, or any other body politic or person, or shall sell, utter or deliver, or cause to be sold, uttered or delivered, any forged or counterfeit note or bill in imitation, or purporting to be a bill or note issued by any of the said banks, or by order of the president and directors thereof, knowing the same to be false, forged and counterfeited, such offender shall be guilty of felony, and on conviction shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years.—(Ibid. sect. 164.)

§ 1395. *Having in possession plates, bank notes or bank note paper.*—If any person shall make, engrave or prepare, or cause to be made, engraved or prepared, or shall have in his custody or possession, any metallic or other plate or substance, either made, engraved or prepared after the similitude of any plate from which any notes or bills issued by any of the said banks shall have been printed or taken, or wherefrom and by means whereof notes or bills may be made, engraved or prepared after the similitude of notes or bills issued by any such bank, with intent to use such plate or substance, or to cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by any of the said banks, or shall have in his custody or possession any note or notes, or blank note or notes, bill or bills, made, engraved, printed or otherwise prepared, after the similitude of any notes or bills issued by either of the said banks, with intent to pass, utter and publish such simulated notes, or to use such blanks, or cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said banks, or either of them, or shall have in his custody or possession any paper adapted to the making of bank notes or bills, and similar to the paper upon which any of the notes or bills of either of the said banks shall have been issued, with intent to use such paper, or cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by either of the said banks, such offender shall be guilty of felony, and be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years.—(Ibid. sect. 165.)

§ 1396. *Connecting parts of notes so as to produce more.*—If any person shall fraudulently connect different parts of several bank notes, or other instruments, in such a manner as to produce one or more additional notes or instruments, with intent to pass or utter all or any thereof as genuine, or shall utter, publish or pass

the same, or either of them, with the intent to defraud any person or body corporate, the said offence shall be deemed forgery or fraudulent uttering and publishing, in like manner, as if each of them had been falsely made, forged or counterfeited, and shall be punished accordingly.—(Ibid. sect. 166.)

§ 1397. *Having in possession more than ten forged notes with intent to defraud.*—If any person shall have in his possession or under his custody, at the same time, ten or more similar false, forged, altered or counterfeited bank bills or notes, knowing the same to be false, forged, counterfeited or altered, with intent to utter or pass the same as true and genuine, or to sell the same, and thereby injure and defraud, or cause to injure and defraud, such offender shall, on conviction, be sentenced as in cases of forgery or fraudulently uttering and passing such notes.—(Ibid. sect. 167.)

§ 1398. *Passing notes of fictitious banks.*—If any person shall fraudulently utter or pass any note or bill purporting to be the note or bill of a bank, company or association which never did in fact legally exist, knowing that the bank, company or association, purporting to have issued the same, never did legally exist, such offender shall, on conviction, be sentenced as in cases of uttering and publishing forged and counterfeited bank notes, knowing the same to be forged.—(Ibid. sect. 168.)

§ 1399. *Fraudulent making or altering any written instrument.*—If any person shall fraudulently make, sign, alter, utter or publish, or be concerned in the fraudulently making, signing, altering, uttering or publishing any written instrument, other than notes, bills, checks or drafts already mentioned, to the prejudice of another's right, with intent to defraud any person or body corporate, or shall fraudulently cause or procure the same to be done, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labour, not exceeding ten years.—(Ibid. sect. 169.[a])

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[a] In connection with these sections the revisers say:—

Sec. 165. These sections are intended to supply all our existing legislation against the forging, counterfeiting, uttering and publishing bank paper, and the amendment of the same wherever it seems inadequate. These laws are found in the eleventh and twelfth sections of the act of 25th March, 1824, entitled "An Act to re-charter certain banks." 8 Smith's Laws, 217. Brightly's Digest, 392, Nos. 4 and 5; the fifth section of the act of 22d April, 1794, entitled "An act for the better preventing of crimes, and for abolishing the punishment of death in certain cases." 3 Smith's Laws, 186. Brightly's Digests, 392, 393, No. 4 and 5, and the fourth section of the act of 23d April, 1829, entitled "A further supplement to an act, entitled 'An Act to reform the penal laws of this Commonwealth.'" 10 Smith's Laws, 430. Brightly's Digest, 393, No. 8. A clause has been introduced against "the preparing any metallic, or other plate, after the similitude of any plate from which notes or bills issued by any bank shall have been printed or taken." This is intended to cover forgeries by means of photographic plates of any kind.

Sec. 169. This section is intended to embrace the large class of forgeries of written instruments, not embraced in the preceding sections, which have special reference to bank paper, and which are now punished at common law.

Sec. 170. This section is the re-enactment and extension of the act of 1705, entitled "An Act of county seal, and against counterfeiting hands and seals." 1 Smith's Laws, 49. Brightly's Digest, 392, No. 2. The crime is now punished by the eighth section of the act of 23d April, 1829. 10 Smith's Laws, 437. Brightly's Digest, 394, No. 8. Corporation seals have been included.

Sec. 171. This section is an amendment of the act of 1700, entitled "An Act against defacers of charters." 1 Smith's Laws, 4. Brightly's Digest, 392, No. 1.

Sec. 172. This section is a consolidation of the one hundred and ninety-eighth and two hundredth sections of the act of 15th April, 1835, entitled "An Act relating to inspections." Pamphlet Laws, 393. Brightly's Digest, 446, Nos. 34 and 36.

Sec. 173, &c. These sections are nearly a transcript of the act of the 8th of May, 1855, entitled "An Act to prevent and punish frauds in the use of false stamps, labels and

§ 1400. *Forging public seals.*—If any person shall falsely and fraudulently forge or counterfeit, or falsely and fraudulently be concerned in the forging and counterfeiting the great or less seal of the commonwealth, the public and common seal of any court, office, county or corporation, or any other seal authorized by law, or shall falsely and fraudulently utter and publish any instrument or writing whatever impressed with such forged and counterfeit seal, knowing the same to be forged and counterfeit, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labour, not exceeding seven years.—(Ibid. sect. 170.)

§ 1401. *Embezzling or corrupting records.*—If any person shall forge, deface, embezzle, alter, corrupt, withdraw, falsify, or unlawfully avoid any record, charter, gift, grant, conveyance or contract, or shall knowingly, fraudulently or unlawfully, spare, take off, discharge or conceal any fine, forfeited recognizance or other forfeiture, or shall forge, deface or falsify any registry, acknowledgment or certificate, or shall alter, deface or falsify any minute, document, book or any proceeding whatever of or belonging to any public office within this commonwealth, or if any person shall cause or procure any of the offences aforesaid to be committed, or be in any wise concerned therein, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding two thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labour, not exceeding seven years; and if a public officer, he shall be removed from said office, and the same be declared vacant by the court passing sentence upon him.—(Ibid. sect. 171.)

§ 1402. *Counterfeiting public brands.*—If any person shall counterfeit or fraudulently impress the brand, mark or any number or mark of any public inspector, or mark or number in imitation thereof, upon any article subject to inspection, or upon any cask or vessel containing such article, or shall counterfeit the stamp of any such inspector upon any plug, or shall fraudulently stamp any plug put into any cask, or shall fraudulently alter, deface, conceal or erase any inspection mark duly made; or if any person shall counterfeit or fraudulently impress upon any article liable to inspection, or upon any cask or vessel containing such article, the brand, mark or other mark of any miller, manufacturer, packer or other person, or shall fraudulently alter, deface or erase any such mark, or shall fraudulently impress the brand, mark or other mark of any person upon such article or vessel, the person so offending shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two hundred dollars, and undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.—(Ibid. sect. 172.)

§ 1402 (*a*). *Counterfeiting trade marks.*—If any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, any representation, likeness, similitude, copy or imitation of the private stamps, wrappers or labels, usually affixed by any mechanic or manufacturer to and used by such mechanic or manufacturer on or in the sale of any goods, wares or merchandise, with intent to deceive or defraud the purchaser or manufacturer of any goods, wares or merchandise whatsoever, such person shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding two years.—(Ibid. sect. 173.)

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trade marks." Pamphlet Laws, 514. Brightly's Annual Digest, 1155, Nos. 1, 2 and 3, which act supplied the act of March 3d, 1837, entitled "An Act to punish and prevent frauds in the use of false stamps and labels." Pamphlet Laws, 198. Brightly's Digest, 799, Nos. 1 and 2.

§ 1402 (*b*). *Having possession of dies, plates, &c., with intent to use the same.*—If any person shall have in his possession any die, plate, engraving or printed label, stamp or wrapper, or any representation, likeness, similitude, copy or imitation of the private stamp, wrapper or label usually affixed by any mechanic or manufacturer to and used by such manufacturer or mechanic on or in the sale of any goods, wares or merchandise, with intent to use or sell the said die, plate, engraving or printed stamp, label or wrapper, for the purpose of aiding or assisting, in any way whatever, in vending any goods, wares or merchandise, in imitation of or intended to resemble and to be sold for the goods, wares or merchandise of such mechanic or manufacturer, such person shall be guilty of a misdemeanor, and upon being thereof convicted, be sentenced to pay a fine not exceeding one hundred dollars, and to undergo an imprisonment not exceeding one year.—(Ibid. sect. 174.)

§ 1402 (*c*). *Vending goods fraudulently marked.*—If any person shall vend any goods, wares or merchandise, having thereon any forged or counterfeited stamps or labels of any mechanic or manufacturer, knowing the same to be forged or counterfeited, and resembling or purporting to be imitations of the stamps or labels of such mechanic or manufacturer, without disclosing the fact to the purchaser thereof, such person shall, upon conviction, be deemed guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars.—(Ibid. sect. 175.)

§ 1402 (*d*). *Forged telegraphic despatches.*—If any person, whether an operator in any telegraph office or otherwise, shall knowingly send or cause to be sent, by telegraph, any false or forged message as from such office, or as from any other person, knowing the same to be false, forged or counterfeited, with intent to deceive, injure or defraud any individual or body corporate, such offender, on conviction, shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year.—(Ibid. sect. 196.)

§ 1402 (*e*). *Making false entries and destroying or abstracting public records.*—If any prothonotary, clerk, register, public officer or other person, shall fraudulently make a false entry in, or erase, alter, secrete, carry away or destroy any public record, or any part thereof, of any court or public office of this commonwealth, such person shall be guilty of a misdemeanor, and on conviction shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labour, not exceeding two years.—(Rev. Act 1860, Bill I., sect. 15.)

VIRGINIA.

§ 1403. *Forgery by free person of public record, &c.*—If a free person forge a public record, or a certificate, return or attestation of a clerk of a court, public register, notary public, judge, justice, or any public officer, in relation to any matter wherein such certificate, return or attestation, may be received as legal proof; or utter, or attempt to employ as true such forged record, certificate, return or attestation, knowing the same to be forged, he shall be confined in the penitentiary not less than two nor more than ten years.—(Code 1849, ch. 194, sect. 1.)

§ 1404. *Keeping or concealing instrument for forging seal of court.*—If a free person forge, or keep, or conceal, any instrument, for the purpose of forging the seal of a court, or of any public office, or body politic or corporate in this state, he shall be confined in the penitentiary not less than two nor more than ten years.—(Ibid. sect. 2.)

§ 1405. *Forging coin, note, or bill, or fraudulently making the same.*—If a free person forge any coin, current by law or usage in this state, or any note or bill of any banking company, or fraudulently make any base coin, or a note or bill pur-

porting to be the note or bill of a banking company, when such company does not exist, or utter, or attempt to employ as true such false, forged, or base coin, note, or bill, knowing it to be so, he shall be confined in the penitentiary not less than two nor more than ten years.—(Ibid. sect. 3.) See post. sect. 1411 (*a*).

§ 1406. *Making, &c., any press or thing, for forging any writing, or possession of instrument for that purpose.*—If a free person engrave, stamp, or cast, or otherwise make or mend, any plate, block, press, or other thing adapted and designed for the forging and false making any writing or other thing, the forging or false making whereof is punishable by this act, or if such person have in his possession any such plate, block, press, or other thing, with intent to use or cause, or permit it to be used in forging or false making any such writing, or other thing, he shall be confined in the penitentiary not less than two nor more than ten years.—(Ibid. sect. 4.)

§ 1407. *Forging writing to prejudice of another's right.*—If a free person forge any writing other than such as mentioned in the first and third sections of this chapter, to the prejudice of another's right, or utter or attempt to employ as true such forged writing, knowing it to be forged, he shall be confined in the penitentiary not less than two nor more than ten years.—(Ibid. sect. 5.)

§ 1408. *Possession of forged notes or coins, either more or less than ten.*—If a free person have in his possession forged bank notes, or pieces of forged or base coin such as are mentioned in the third section of this chapter, knowing the same to be forged or base, with intent to utter or employ the same as true, he shall, if the number of such notes or pieces of coin in his possession at the same time be ten or more, be confined in the penitentiary not less than one or more than five years, and if the number thereof be less than ten, be punished as for a misdemeanor.—(Ibid. sect. 6.)

§ 1409. *Destroying or concealing Will or Codicil.*—If a free person fraudulently destroy or conceal any will or codicil, with intent to prevent the probate thereof, he shall be confined in the penitentiary not less than two nor more than five years.—(Code 1849, chap. 192, sect. 29.)

§ 1410. *In prosecution for forgery, not necessary to set forth a fac simile of the thing.*—In a prosecution for forging, or altering, or attempting to employ as true any forged instrument, or other thing, it shall not be necessary to set forth any copy or fac simile thereof, but it shall be sufficient to describe the same in such manner, as would sustain an indictment for stealing such instrument or other thing, supposing it to be the subject of larceny.—(Ibid. chap. 207, sect. 7.)

§ 1411. *Sufficient in an indictment to allege an intent to defraud, &c., without naming persons intended to be injured.*—Where an intent to injure, defraud, or cheat, is required to constitute an offence, it shall be sufficient in an indictment or accusation therefor, to allege generally an intent to injure, defraud or cheat, without naming the person intended to be injured, defrauded or cheated, and it shall be sufficient, and not be deemed a variance, if there appear to be an intent to injure, defraud, or cheat, the United States, or any state, county, corporation, officer, or person.—(Ibid. sect. 11.)

§ 1411 (*a*). *Forging coin or bank notes.*—If a free person forge any coin current by law or usage in this state, or any note or bill of a banking company, or fraudulently make any base coin, or a note or bill purporting to be the note or bill of a banking company, when such company does not exist, or utter or attempt to employ as true, or sell, exchange or deliver, or offer to sell, exchange or deliver, or receive on sale, exchange or delivery, with intent to utter or employ, or to have the same uttered or employed as true, any such false, forged or base coin, note or

bill, knowing it to be so, he shall be confined in the penitentiary not less than two nor more than ten years.

If a free person have in his possession forged bank notes, or pieces of forged or base coin, such as are mentioned in the third section of this chapter, knowing the same to be forged or base, with the intent to utter or employ the same as true, or to sell, exchange or deliver them, so as to enable any other person to utter or employ them as true, he shall, if the number of such notes or pieces of coin in his possession at the same time be ten or more, be confined in the penitentiary not less than one nor more than five years, and if the number thereof be less than ten, be punished as for a misdemeanor.—(Act of March 29, 1858, sect. 1.)

OHIO.

§ 1412. *Forging, &c., record of public nature, charter, letters patent, notes, bonds, &c.*—That if any person[t] shall falsely make, alter, forge or counterfeit[u] any record or other authentic matter, of a public nature; or any charter, letters patent, deed, lease, writing obligatory, will, testament, annuity, bond, covenant, bank bill or note, check, draft, bill of exchange, contract of promissory note, for the payment of money or other property; or any acceptance of a bill of exchange, or the number or any principal sum of any accountable receipt, for any note; or any order,[v] or any warrant or request, for the payment of money, or the delivery of goods and chattels of any kind; or any acquittance or receipt, either for money or goods; or any acquittance, release or discharge of any debt, account, action, suit, demand, or other thing, real or personal; or any plat, draft or survey of land; or any transfer or assurance of money, stock, goods, chattels, or other property whatever; or any

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[t] Upon a trial under this act, one Gano was called as a witness for the prosecution, to prove the counterfeit character of the twenty dollar notes. He testified that he had never seen the president or cashier write; but was a teller in the Cincinnati Branch, and had frequently seen notes, letters, &c., received in the Branch Bank as genuine, with their signatures. He was then allowed to give his opinion to the jury, that the notes were counterfeit. (Hess *v.* State, 5 Ohio, 6, 9, 12.)

In a prosecution for having counterfeit notes in possession, proof that other counterfeits were found secreted in the prisoner's house, and in the possession of his wife, is admissible.

An indictment for having counterfeit bank notes in possession, and for making sale of them, need not charge that the sale was for a consideration, or to the injury of any one, or that the notes were endorsed. And if such acts are charged to be felonious, it is not error. (Ibid.)

[u] An endorsement on a note of partial payment, in the handwriting of the maker, without any signature, but made in the presence, with the concurrence, and by the direction of the payee, is a receipt, the alteration of which by the payee is forgery. (Kegg *v.* State, 10 Ohio, 75.)

The fraudulent alteration of the settlement of a book account, with the intent to defraud A., by including, thus falsely, within the terms of the settlement, a claim of A. against B., which accrued after the settlement was in fact made, is forgery. (Ibid.)

To constitute forgery, the instrument must be such, that it does, or may tend to prejudice the rights of another. The intent to defraud some one must be averred and proved, as laid. (Ibid.)

Evidence which goes to prove that the forged instrument, could not, under any circumstances, prejudice the rights of any one, is competent to go to the jury. (Barnum *v.* State, 10 Ohio, 717.)

A charge in an indictment for forgery, that the defendant had forged a promissory note described in the indictment as a note without a seal, is not supported by evidence tending to prove that the defendant had committed forgery of a note under seal. (Hart *v.* State, 20 Ohio, 49.)

In a prosecution for forgery, the person whose name is alleged to have been forged, is a competent witness to prove the fact. (Simmons *v.* State, 7 Ohio, 116.)

[v] Ante, § 349.

letter of attorney, or any power to receive money, or to receive and transfer stock or annuities; or to let, lease, dispose of, alien or convey any goods or chattels, lands or tenements, or other estate, real or personal; or any bills drawn by the auditors of public accounts, for the payment of money at the treasury, with intent to damage or defraud any person or persons, body politic or corporate; or shall utter or publish, as true and genuine, or cause to be uttered or published, as true and genuine, any of the above named false, altered, forged or counterfeited matter, above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, damage or defraud any person or persons, body politiq or corporate; every person so offending shall be deemed guilty of forgery, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, for any space of time not exceeding twenty years, nor less than three years.—(Act of March 7, 1835, Swan's Stat., sect. 22, 272.)

§ 1413. *Counterfeiting coin; altering or putting off such coin, or making or keeping instruments to counterfeit coin.*—That if any person shall counterfeit[w] any of the coins of gold, silver or copper, currently passing in this state; or shall alter or put off counterfeit coin or coins, knowing them to be such; or shall make any instrument for counterfeiting any of the coins aforesaid, knowing the purpose for which such instrument was made; or shall knowingly have in his possession, or secretly keep, any instrument for the purpose of counterfeiting any of the coins aforesaid; every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than fifteen, nor less than three years.—(Ibid. sect. 28, 273.)

§ 1414. *Disposing of counterfeited notes, the same not being filled up, or signatures forged or affixed, or same being filled up, &c.*—That if any person shall sell, barter, or in any manner dispose of any false, forged[x] or counterfeit bank note or

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[w] An indictment, charging that the defendant uttered in payment, counterfeit coins, "made and counterfeited to the likeness and similitude of the good, true and current money, and silver coin, currently passing in this state, called 'Spanish dollars,'" is good, but must be sustained by proof. (Fight *v.* State, 7 Ohio, 181.)

The common pleas has jurisdiction to punish the offence of counterfeiting foreign coins, circulating in this state as money. (Sutton et al. *v.* State, 9 Ohio, 133.)

[x] "An indictment for forgery must describe the instrument alleged to be forged, specifically. In an indictment for larceny, it is enough to set forth, that bank notes of a general description, to a specific amount, in value, were stolen. It is not the specific character of the notes, but the theft, that constitutes the essence of the crime. In a prosecution for forgery it is different. The forged instrument must be set out, that the court may determine, advisedly, whether the fabrication of it constitute the crime inhibited by the law. All the precedents are so, and so are the authorities." By the Court. (McMillen *v.* State, 5 Ohio, 269.)

Proof of uttering and publishing counterfeit bank notes, as true and genuine, will not sustain an indictment under the 28th section of the statute, for selling and bartering such notes. (Van Valkenburg *v.* State, 11 Ohio, 404. See also, Hutchins *v.* State, 13 Ohio, 198.)

It is no variance between the note offered to the jury and the one set out in the indictment, that in the latter the letter *s* is added to the word "promise," the sound and sense being the same.

Experts who never saw the officers of the bank write, may be called in to prove the note a counterfeit. (May *v.* State, 14 Ohio, 461.)

On the trial of a person charged with passing counterfeit bank notes, it is competent to prove that he has passed other counterfeit paper, without producing it, if out of the jurisdiction of the court. (Reed *v.* State, 15 Ohio, 217.)

Mr. Warren (C. L., 266,) thus sums up the decisions:

An indictment charging that the defendant uttered, in payment, counterfeit coins, made and counterfeited to the likeness and similitude of the good, true, and current money and silver coin, currently passing in this State, called "Spanish Dollars," is good. And whether there is such coin as is called "Spanish Dollars," and whether the

notes; or shall sell, barter, or in any manner dispose of any counterfeit bank note or notes, the same not being filled up, or the signatures thereto forged or affixed, whether by single bill, or by sheets; or shall sell, barter, or in any manner dispose of any bank note or notes, the same being filled up, but having the signatures of persons, not the officers of the bank from which such note or notes purport to have been issued, or having the names of fictitious persons thereto; or if any person shall be detected with any such counterfeit or spurious bank note or notes, in his possession, for the purpose of selling, bartering[y] or disposing of the same; or if any person shall make, alter, publish, pass or put in circulation, any note or notes, bill or bills, purporting to be the note or notes, bill or bills, of a bank, company or association, which never did in fact exist[z] such person or persons, knowing at the time of publishing, passing or putting in circulation, any such note or notes, bill or bills, that the bank, company or association, purporting to have issued the same, never did exist; every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than fifteen nor less than three years.—Ibid. sect. 20.)

§ 1415. *Gilding of silver coins.*—That if any person shall gild any of the silver coins currently passing in this State, or shall gild any other metal having the likeness and similitude of any of the coins currently passing in this State, so as to give it the appearance of any of the gold coins of the United States, or any other gold

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same is currently passing in this State, is a question of fact, exclusively for the jury. (Fight *v.* Ohio, 7 Ohio R., 180.) An averment that the defendant secretly kept instruments for counterfeiting, sufficiently charges a scienter. The word "secretly" implies guilty knowledge. (Sutton et al. *v.* Ohio, 9 Ohio R., 133.)

The Court of Common Pleas has jurisdiction to punish the offence of counterfeiting foreign coins, circulating in this State as money. (Ib.) An indictment for putting off counterfeit coin, need not allege that the coin that was counterfeited, was currently passing in the State of Ohio. If it does so, however, it will not vitiate the indictment; the allegation will be regarded as superfluous, and need not be proved. (Smith *v.* Ohio, 8 Ohio R., 294.)

[y] Under the 29th section, the crime consists, not in the intention or purpose to perpetrate a fraud, but in the criminal act of being engaged in dealing in counterfeit paper *as such*, or having possession of the spurious paper *for sale*, which places the means in the reach of others to procure it, and put it into circulation as genuine. (Bevington *v.* State. 2 Ohio St. Rep. 160.)

The cases of Van Valkenburg *v.* State, 11 O. R. 404, and Hutchins *v.* State, 13 O. R. 198, approved; Bevington *v.* State, 2 Ohio St. Rep. N S. 160.

The criminality of the act, made punishable by the 29th section of the Act for the Punishment of Crime, does not comprehend an intention to defraud or deceive any particular person. It consists in dealing in counterfeit bank paper *as such;* the section of the law mentioned being more peculiarly applicable to the wholesale dealer, who furnishes the spurious supply to the retailers, who put it into circulation as *genuine*, (Bevington *v.* State, 22 O. R. 160.)

Neither under the section making it punishable to *attempt* to pass a counterfeit bank note, nor under the section here drawn in question, does the law provide punishment for a mere *intention* or *purpose* to commit a crime, without any act or movement towards it. (Beverington *v.* State, 23 O. R. 160.)

On an indictment for having in possession false and counterfeit bills on a foreign bank, with intent to barter, &c., the State is not bound to prove it to be an incorporated bank by the production of its charter.

Possession of such bills with intent to sell or dispose of them for the benefit of another, is within the statute. (Sasser *v.* State, 13 Ohio, 453.)

[z] The existence of a bank whose paper is alleged to have been counterfeited, may be proved by reputation. (Reed *v.* State, 15 Ohio, 217.)

Individual notes intended to pass as currency or money, are not competent evidence against the person issuing them on an indictment for acting as the officer of a bank, without proving that there was a company, or association of individuals formed for the purpose of putting in circulation such notes. (Steedman *v.* State, 11 Ohio, 82.)

coins currently passing in this State, with intent to injure or defraud; or if any person shall pass or put in circulation any such false or gilded money, knowing that it is not genuine, the person so offending shall, upon conviction thereof, be imprisoned in the penitentiary, and kept at hard labor, not more than five years, nor less than one year.—(Ibid. sect. 30.

§ 1416. *Engraving or keeping plate for counterfeiting or altering, &c., bank bills.*—That if any person shall engrave any plate for striking or printing any false or counterfeit bank notes, knowing it to be designed for that purpose, or shall, knowingly, have in his possession,[a] and secretly keep, any plate for the purpose aforesaid; and if any person shall engrave, cut, indent, or cause any piece or pieces of

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[a] An averment that the defendant had *secretly* in his possession instruments for counterfeiting, is a sufficient evidence of a scienter. (Sutton et al. *v.* State, 9 Ohio, 133.)

The following cases are taken from Warren's C. L., 261:

An indictment for having counterfeit bank notes in possession, and for making sale of them, need not charge that the sale was for a consideration, or to the injury of any one, or that the notes were indorsed. (Hess *v.* Ohio, 5 Ohio R. 12, 13.)

The word feloniously does not vitiate an indictment for this offence, but it is of no use or benefit to insert it, its presence doing neither good nor harm. (Ibid.)

The indictment need not set out the indorsements on the back of the note. (Ibid.)

Intent.—It is unnecessary to allege in the charge that the criminal acts mentioned in the 29th section were committed with intention to injure or defraud any one. (Ibid.)

Description of the Notes.—An indictment for having in possession counterfeit bank notes not filled up, must describe the notes, alleged to be counterfeit, specifically. In an indictment for larceny, it is enough to set forth, that bank notes of a general description, to a specific amount, in value, were stolen. It is not the specific character of the notes, but the theft, that constitutes the essence of the crime. In a prosecution for forgery it is different. The forged instrument must be set out, that the court may determine, advisedly, whether the fabrication of it, constitutes the crime inhibited by the law. All the precedents are so and so are the authorities. (McMullen *v.* Ohio, 5 Ohio R. 269.)

Joinder of Defendants.—Two may be joined in an indictment for having counterfeit bank notes in their possession. (Hess *v.* Ohio, 5 Ohio R. 1.)

In a prosecution for having counterfeit notes in possession for the purpose of selling or bartering the same, proof that other counterfeits, besides those described in the indictment, were found secreted in the prisoner's house, and in possession of his wife, is admissible to prove the guilty knowledge of the defendant. (Hess *v.* Ohio, 5 Ohio R. 9.)

Proof of handwriting.—The teller of a bank is a competent witness to testify concerning the handwriting of the president and cashier, although he may never have seen either of them write, being skilled in a knowledge of handwritings. (Hess *v.* Ohio, 5 Ohio R. 7; Reed *v.* Ohio, 15 Ohio R. 217.)

Proof of the Bank as charged.—An indictment that charges the defendant with passing and putting in circulation a certain note purporting to be issued by a bank that never did in fact exist, will not be supported by proof of passing and putting in circulation a note of a bank that does exist, although it may be unincorporated. (Cahoon *v.* Ohio, 8 Ohio R. 537.)

As to the Intention.—A person charged with having in his possession a counterfeit bank note, for the purpose of selling, bartering and disposing of the same, cannot be convicted, by proof of having in possession such note, with intent to pass the same to an innocent person as true and genuine. There must be proof that it was the prisoner's intention to barter, sell, or dispose of the note, in a manner different from the usual mode of passing bank notes. (Hutchins *v.* Ohio, 13 Ohio R. 198.)

The existence of the Bank proved by reputation.—On an indictment for having in possession false and counterfeit bills on a foreign bank, with intent to barter and sell the same, the State is not bound to prove it an incorporated bank, by the production of its charter. A charter may be presumed from a long exercise of corporate rights. Proof that paper, of the description alleged to be counterfeited, was current in Ohio, and reputed to be the paper of a legally established institution of another State,—that such paper had obtained general circulation, and acquired universal confidence, in this State, raises a presumption that the bank had a legitimate existence, and lawfully possessed the powers which they had exercised. Coupled with another legal presumption, that

brass, copper or any other metal, for striking, printing or altering any of the writing, printing or figures of any bank note or notes, bill or bills, knowing them to be designed for that purpose; or shall knowingly have in his possession, and secretly keep the same for the purpose aforesaid, every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than fifteen, nor less than three years.—(Ibid. sect. 31.)

§ 1417. *Attempting to pass counterfeit coin or bank notes.*—That if any person shall attempt to pass any base or counterfeit coin or coins, knowing them to be such, or shall attempt to pass any false, forged, and counterfeited bank note or notes, knowing them to be such; every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than five years nor less than one year. —(Ibid. sect. 22.)

§ 1417(*a*). *Fraud in the use of false stamps, brands, labels, or trade marks.*—Any person or persons who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited any representation, likeness, similitude, copy or imitation of the private stamp, brand, wrapper, label, or trade mark, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to and upon the goods, wares, merchandise, preparation or mixture of such mechanic, manufacturer, druggist, merchant or tradesman, with intent to pass off any work, goods, manufacture, compound, preparation or mixture, to which such forged or counterfeit representation, likeness, similitude, copy or imitation is affixed or intended to be affixed, as the work, goods, manufacture, compound, preparation or mixture of such mechanic, manufacturer, druggist or tradesman, shall, upon conviction thereof, be imprisoned in the county jail for a period of not less than three months, nor more than twelve months, and fined not exceeding five hundred dollars.—(Act of March 29th, 1859, sect. 1.)

§ 1417(*b*). *Frauds in the use of false stamps, &c.*—Any person or persons who shall have in his or their possession any die or dies, plate or plates, brand or brands, engraving or engravings, or printed labels, stamps, imprints, wrapper or trade marks, or any representation, likeness, similitude, copy or imitation of the private stamps, imprint, brand, wrapper, label, or trade mark usually affixed by any mechanic, manufacturer, druggist, merchant or tradesman, to or upon articles made, manufactured, prepared or compounded by him or them, for the purpose of making impressions, or selling the same when made, or using the same upon any other article made, manufactured, prepared or compounded, and passing the same off upon the community as the original goods, manufactures, preparations or compounds of any other person or persons, or who shall so in fact sell or use the same, or who shall wrongfully and fraudulently use the genuine stamp, brand, imprint, wrapper, label, or trade mark, with intent to pass off any goods, wares, merchandise, mixtures, compounds, or other article not the manufacture of the person or persons to whom such stamp, brand, imprint, wrapper, label, or trade mark properly belongs, as genuine and original, shall, upon conviction thereof, be imprisoned in the county jail not less than three months, nor more than twelve months, and be fined not exceeding five hundred dollars.—(Ibid. sect. 2.)

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no one will counterfeit the valueless paper of an unauthorized bank, and the proof, unrebutted, is sufficient for the prosecution; it makes out a prima facie case. (Per Birchard, J. Sasser *v.* Ohio, 13 Ohio R. 486; The People *v.* Davis, 21 Wendell, 309; Dennis *v.* The People, 1 Parker's Crim. Rep. 469; Reed *v.* Ohio, 15 Ohio R. 217.)

§ 1417 (c). *Fraud in the use of false stamps, &c.*—Any person who shall vend or keep for sale any goods, merchandise, mixture or preparation, upon which any forged or counterfeit stamps, brands, imprints, wrappers, labels or trade marks be placed or affixed, and intended to represent the said goods, merchandise, mixture or preparation, as the true and genuine goods, merchandise, mixture or preparation of any other person or persons, knowing the same to be counterfeit, shall, on conviction thereof, be punished by a fine not exceeding one hundred dollars, in each case so offending; the complainant entitled to one-half the amount so recovered.—(Ibid. sect. 3.)

B.—Forgery at common law.

I. What may be the subject of forgery.

§ 1418. Forgery at common law is defined by Sir Wm. Blackstone, as the fraudulent making or alteration of a writing to the prejudice of another's rights,[b] and by Mr. East as the false making or altering, *malo animo*, of any written instrument for the purposes of fraud and deceit.[c] The offence is consummated by the false making of the instrument, with intent to defraud, without any uttering.[d]

§ 1419. The instrument must be such, when forged, that it does or may tend to prejudice the rights of another.[e]

The offence of forging a note within a certain county, cannot be inferred from its having been uttered in that county.[f]

The crime may be committed by an agent, as well as by the party himself, he himself being present and commanding.[g] As, if B. make the paper, C. engrave the plate, and D. fill up the instrument, each without knowing that the others are employed for that purpose, they are all principals.[h]

§ 1420. In Massachusetts, the common law relating to the crime of forgery is not superseded by the Rev. Sts. c. 127.[i]

Any forgery, which is not enumerated in the statutes, is still indictable at common law.[j] Consequently the false making of an acceptance of a conditional order for the delivery of goods is forgery at common law.[k]

§ 1421. Any alteration of a genuine instrument, in the material part, whereby a new operation is given to it, is a forgery of the whole; as, for instance, the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the D. to S;[l] the making a bill of exchange

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[b] 4 Blac. Com. 247.

[c] See 2 Russ. on Cr., 6 Am. ed. 317, &c., for a full examination of the English cases, and see also Penn. *v.* M'Kee, Addison, 33; 2 East, P. C. 852; Van Horne *v.* State, 5 Pike's Ark. R. 349; Com. *v.* Chandler, Thacher's C. C. 187.

[d] Com. *v.* Ladd, 15 Mass. 526; Com. *v.* Chandler, Thacher's C. C. 187.

[e] Barnum *v.* State, 15 Ohio, 717.

[f] Com. *v.* Parmenter, 5 Pick. 279.

[g] Com *v.* Stevens, 10 Mass. 181; R. *v.* Bingley, R. & R. 446.

[h] R. *v.* Dade, 1 Mood. C. C. 307; R. *v.* Kirkwood, Id. 304, ante § 112–6.

[i] See ante, § 1312. &c.; People *v.* Hoag, 2 Parker C. R. 36.

[j] Com. *v.* Ayer, 3 Cush. 150; State *v.* Morton, 1 Williams, (Vt.) 310.

[k] Com. *v.* Ayer, 3 Cush. 130.

[l] 1 Hawk. c. 70, s. 2.

of eight pounds appear to be for eighty pounds, by adding a cipher to the 8;[m] or erasing a genuine endorsement and inserting another.[n] But it has been held in Massachusetts, that to cut or tear bank notes so as to make a greater number of notes afterwards by piecing the parts together, is not altering at common law, so as to constitute forgery.[o]

§ 1422. An indictment for forgery lies for making and issuing a false instrument in the name of another, requesting persons to whom goods have been sent by the owners, to deliver them to the bearer, the latter having induced the owner so to send the goods by falsely representing that he was directed by those to whom the goods were sent, to buy the same for them.[p] And it is sufficient to allege in such indictment that the forgery was with intent to defraud the persons to whom the goods were sent, and to whom the order was directed.[q]

§ 1423. If there be a bank of the same name in two different cities, one of which is insolvent and the other sound, erasing the name of the city on a note of the former bank, and inserting the name of the latter city, is a material alteration and a forgery. So is pasting the name of the latter city over the name of the former, in such a way that the alteration may be detected by a close examination.[r]

§ 1424. Obliterating by erasure or otherwise, a release or acquaintance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not a forgery in North Carolina.[s]

Falsely putting a witness's name to a bond not required to be attested by a subscribing witness, does not affect the validity of the bond, and is not forgery.[t]

It was doubted, in South Carolina, whether the alteration of the marginal emblems or marks amounted to forgery.[u]

§ 1425. The prisoner cut out the centre of a one-pound note of the British Linen Banking Company, and took the ornamental border to an engraver, representing that he wanted to have a plate made of this border, intending to fill up the centre with the title of some oil or cosmetic, of which the firm, in whose employ he represented himself to be, were the venders. A plate was accordingly made and delivered to him; when he was immediately apprehended with the plate in his possession, and was tried and convicted upon an indictment framed upon the 18th section of the 2 Geo. IV., and 1 Will. IV., c. 66. It was held that by the word "note" is not meant merely the obligation or writing, but the whole paper, or thing

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[m] R. *v.* Elsworth, 2 East, P. C. 986, 988; Bayley on Bills, 430; and see R. *v.* Teague, 2 East, P. C. 979; R. & R. 33 S. C.; R. *v.* Post, R. & R. 101; R. *v.* Atkinson, 3 C. & P. 669.

[n] R. *v.* Birkett, Bayley, B. 63, 430. State *v.* Hitchens, 2 Harrington, 527; Com. *v.* Ladd, 15 Mass. 526; State *v.* Walters, 3 Brevard, 507; 2 Tr. Com. R. 569.

[o] Com. *v.* Hayward, 10 Mass. 34.

[p] Harris. *v.* People, 9 Barb. Sup. Ct. 664; U. S. *v.* Green, 2 Cranch, C. C. R. 520.

[q] Ibid. [r] State *v.* Robinson, 1 Har. 507. [s] State *v.* Thornbury, 6 Iredell, 79.

[t] State *v.* Gherkin, 7 Iredell, 206.

[u] State *v.* Waters, 4 Brevard, 507. 2 Tr. Con. R. S. C. 669.

which circulates as a note; and, therefore, the border, or ornamental margin, is part of a note, within the meaning of the statute. And it was held, also, that the engraving need not show upon the face of it that it purports to be part of a genuine note, but that a comparison may be made with a genuine note in order to see whether it does or does not purport to be part of that note.[v]

§1426. Adding to a copy of a receipt other words, as for example, "in full of all demands," which were not in the original, is a forgery, if the copy be offered in evidence on the supposed loss of the original.[w] The counterfeit making of any part of a genuine note, to give it greater currency, is forgery. To alter the name of one banker to that of another, with whom the maker makes his other notes payable, after failure of the first, is also forgery.[x] But the forgery of a mere addition to the instrument, which has not the effect of altering it, but is merely collateral to it, as for instance, a forged acceptance or endorsement to a genuine bill of exchange, will not support an indictment charging the forgery of the entire instrument; the forgery of such addition must be specially alleged, and must be proved as laid.[y] Forging the signature of the drawer to a bill of exchange, however, is the same precisely as forging the entire bill, and may be laid as such.[z] So, on the charge of uttering and publishing a promissory note with the names of several persons upon it as endorsers, all of which endorsements are alleged to be forged, it is not necessary for the purpose of sustaining the indictment, to prove all the endorsements to be forgeries; it is enough that one or more are shown to be such.[a]

§ 1427. The fraudulent alteration of the settlement of a book account with the intent to defraud the creditor, by falsely including within the terms of settlement a claim which accrued against the debtor after the settlement was in fact made, is a forgery. That such claim existed, may be proved, though there be no book of original entries, or no book account in which the items of such claim were charged.[b]

§ 1428. Whether the name forged be that of a merely fictitious person, who never existed, or of a person actually existing, or a dead person, is wholly immaterial; it is as much a forgery in one case as in the other:[c] provided the fictitious name be capable of being used for fraud, in a particular instance in question.[d] Thus, it is an indictable offence to utter and

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[v] R. *v.* Keith, 29 Eng. Law & Eq. 558.
[w] Upfold *v.* Leit, 5 Esp. 100, Ellenborough.
[x] R. *v.* Treble, 2 Taunt. 328; R. & R. 164.
[y] See R. *v.* Birkett, R. & R. 251.
[z] See Jarvis' Archb. C. P., 9th ed. 365; R. *v.* Dunn, 1 Leach, 57.
[a] People *v.* Rathbun, 21 Wendell, 509.
[b] Barnum *v.* State, 15 Ohio, 717.
[c] R. *v.* Lewis, Foster, 116; R. *v.* Wilks, 2 East, P. C. 957; R. *v.* Bolland, 2 East, P. C. 957; R. *v.* Lockett, 1 Leach, 94; R. *v.* Parks et al., 2 Leach, 775; 2 East, P. C. 963; R. *v.* Froud, 1 B. & B. 300; R. & R. 389; R. *v.* Sheppard, 1 Leach, 226; R. *v.* Whiley, 2 Leach, 983; R. & R. 90; R. *v.* Francis, R. & R. 209; and see R. *v.* Webb, 3 B. & B. 228; R. *v.* Watts, R. & R. 436; Com. *v.* Chandler, Thach. C. & C. 187; State *v.* Givens, 5 Ala. 747; Henderson *v.* State, 14 Texas, 503; post, § 1498.
[d] R. *v.* Bontien, R. & R. 260; R. *v.* Peacock, Id. 278; post, § 1498.

publish a counterfeit bank note of a private banker, although the legislature have prohibited the issuing of notes by private bankers.[e]

§ 1429. In Georgia, proof that the bills of a bank are received by public officers of the state, and that such bills are in general circulation, is sufficient;[f] and in New York and Ohio it is said that the existence of a bank whose paper is alleged to be counterfeit, may be proved by parol;[g] but in New Jersey, if the bank be of another state, its incorporation under the laws of that state must be proved in the same manner as the statute laws of other states are proved—by a copy of the act of incorporation, duly certified according to the act of congress, or by the production of a sworn copy.[h]

In Tennessee, where an indictment for passing counterfeit bank notes alleged the existence of the banking corporation in another state, whose bills were counterfeited, it is held that it was necessary upon the trial to produce in evidence an authenticated copy of the charter of said bank, or a book purporting to be the public statute book of said state in which said charter is printed.[hh]

§ 1430. Forgery of a name to an assignment of a bond, is indictable, although there be no seal to the forged assignment; as it gives a possibility to defraud.[i] In Texas, however, it is said that the forgery of a deed, void on its face, is not indictable.[ii] The signing a bill of exchange in the name of a non-existing firm, or in the defendant's own name to represent a fictitious firm, with intent to defraud, is forgery.[j] But if one signs the name of another to an instrument with the honest belief that he had authority to do so, it negatives the intent to defraud.[k]

A. desired William Wilkinson, a mechanic in his service at Leeds, at weekly wages, to write his name across a blank stamp, which he did. A. wrote on it a bill of exchange for 148*l.* 7*s.* 9*d.*, drawn on "Mr. Wm. Wilkinson, Halifax," and A. wrote over the acceptance "Payable at Smith, Payne & Co., Bankers, London." A. intended at the time the acceptance was written, to make the drawing to be on a Mr. Wm. Wilkinson, of Halifax, there being persons of that name resident there, but none of whom had given him any authority to draw:—The case was held to be forgery.[l]

§ 1431. Endorsing a bill of exchange under a false assumption of authority, to endorse it per procuration, is not forgery, there being no false making.[m]

The forgery of a railway pass or ticket,[mm] to allow the bearer to pass

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[e] Butler *v.* Com., 12 Serg. & Rawle, 237, post, § 1437.
[f] State *v.* Calvin, R. M. Charl. 151; see State *v.* Hayden, 15 N. Hamp. 355.
[g] Reed *v.* State, 15 Ohio, 217; People *v.* Davis, 21 Wend. 309; Dennis *v.* People, 1 Harris, C. C. 469.
[h] Stone *v.* State, 1 Spencer, 401. [hh] Jones *v.* State, 5 Sneed, 346.
[i] Penna. *v.* Misner, Add. 44; see State *v.* Greenlee, 1 Devereux, 523.
[ii] Henderson *v* State, 14 Texas, 503.
[j] R. *v.* Rogers, 8 C. & P. 629; and see Jerv. Archb. 9th ed. 365.
[k] Com. *v.* Whitney, Thacher's Crim. Cas. 588.
[l] R. *v.* Blenkinsop, 2 Car. & Kir. 530; S. C. 1 Den. C. C. 276.
[m] R. *v.* White, 2 Car. & Kir. 413; S. C. 1 Den. C. C. 208.
[mm] Com. *v.* Ray, 3 Gray, 441.

free on a railway, is a forgery at common law; but the *uttering* of it *per se* was once thought in England to be no misdemeanor.[n] It seems now, however, to be the law that the fraudulent uttering of a forged paper is always indictable at common law.[n]

§ 1432. If there be two persons of different descriptions and addresses, but of the same name, and one signs his name with the address of the other for the purpose of fraud, it is forgery.[p] So if a bill get into the hands of a person of the same name as the payee, and such person, knowing that he is not the real person in whose favor it is drawn, endorse it, he is guilty of forgery.[q] But if a man, who has long been known by a fictitious name, draw a bill in that name, it will not be forgery.[qq]

If a man pass himself off as the drawer of a bill, when in fact he is not so, but the endorsement is genuine, this cannot be deemed forgery, even although it be done for purposes of fraud, and in concert with the real endorser.[r]

§ 1433. Where a person for a series of years forged the name of his friend as the endorser of his notes and bills, with the knowledge of his friend, who, although judgments were obtained and executions issued against him in suits on such forged endorsements, never disavowed such acts until the person committing the forgeries had absconded and fled from justice, it was held, in a case where the endorser was sued and suffered a default, and attempted no defence until after the escape of the maker of the notes, that proof of these facts was admissible in evidence, and that from it the jury might imply an authority from the endorser to the maker thus to use his name.[s]

It is a forgery for a person, having authority to fill up a blank acceptance for a certain sum, to fill up the bill for a larger sum.[t]

§ 1434. A man, it seems, may even sometimes be guilty of forgery by signing his own name, if done falsely, with intent to defraud. Thus, where certain coal being consigned to P. of New York, arrived there, and was claimed by another of the name of P., who resided in the same city, but was not the true assignee; and he, knowing this, obtained an advance of money, on endorsing the permit for the delivery of the coal, with his own proper name; it was held, that this was a forgery, and not merely the obtaining goods under false pretences.[u]

§ 1435. If a party put the name of another to a bill of exchange without his authority, it is equally a forgery, although the party expected to be able to meet it when due.[v] It must appear beyond doubt, however, that no such authority was delegated. Thus, where a man drew a bill on Wil-

[n] R. *v.* Boult, 2 Car. & Kir. 603.
[o] R. *v.* Sharman, 24 Eng. Law & Eq. 553.
[p] R. *v.* Webb, Bayl. Bills, 432.
[qq] Mead *v.* Young, 4 T. R. 28.
[q] R. *v.* Aickles, 2 East, P. C. 968; R. *v.* Bontien, R. & R. 260.
[r] R. *v.* Hevy, 1 Leach, 229; 2 East, P. C. 856.
[s] Weed *v.* Carpenter, 4 Wendell, 219.
[t] R. *v.* Hart, 1 Mood. C. C. 486; 7 C. & P 632.
[u] People *v.* Peacock, 6 Cow. 72.
[v] R. *v.* Forbes, 7 C. & P. 224; see R. *v.* Hill, 8 C. & P. 274; R. *v.* Cooke, Id. 582.

liams & Co., bankers, 3 Birchin Lane, London, and at the time he paid away the bill he was asked if the drawees were Williams, Burgess & Co., the London bankers, and he answered in the affirmative; the bill was presented not at Williams, Burgess & Co.'s who lived at No. 20, in the same street, but at a counting-house, No. 3, where the words "Williams & Co." were on a brass plate on the door, and it was there accepted in the names of "Williams & Co." Proof was given at the trial that the acceptance was not that of Williams, Burgess & Co., and that there were no other London bankers of that name. The prisoner was convicted; but upon the point being afterwards argued before the judges, ten of them held that it was not a forgery.[w]

§ 1436. Under the Ohio statute of 1835, against publishing, passing, &c., bills and notes purporting to be of a bank which never did in fact exist, an indictment will not lie for publishing, &c., the bills of a bank in fact existing, although unincorporated and illegal.[x]

§ 1437. A bank note under the denomination of five dollars, although prohibited by statute from being "passed," as a circulating medium, is the subject of forgery and counterfeiting, the statute not affecting the validity of such small notes.[y]

A. gave to B., his clerk, a blank check, and directed him to fill it up with the amount of a bill and expenses (for which A. had to provide, and which amount B. was to ascertain), and get the check cashed, and pay the amount to Mr. W., and take up the bill. The bill was for £156 9*s.* 9*d.*, the expenses about 10*s.* B. filled up the check with the sum of £250, got it cashed, and kept the whole of the amount, alleging that it was due to him for salary: It was held that this was forgery, and that this was so even if B. bona fide believed that £250 were due to him from A., or even if it were really due to him.[z]

A bill of exchange was payable to "Mrs. E. S., widow, M. I., spinster, A. M. I., spinster, and A. M., the wife of E. B., Esq., or order, the executrices of the late J. I., Esq." A. was indicted for forging "a certain endorsement of the said bill of exchange, which last-mentioned endorsement is as follows, that is to say, 'A. M. I.'" It was objected that the bill was only negotiable on the endorsement of all the payees, and, therefore, that this was not a forged endorsement of the bill. The prisoner was convicted, and the judges held the conviction right.[a]

§ 1438. The instrument must appear, upon the face of it, to have been made to resemble a true instrument of the denomination mentioned in the indictment, so as to be capable of deceiving persons using ordinary obser-

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[w] R. *v.* Watts, 3 B. & B. 197; R. & R. 436, S. C.
[x] Calhoun *v.* State, 8 Ham, 537; and see De Bon *v.* People, 1 Denio, 9.
[y] State *v.* Vanhart, 2 Harr. 327; and see Clary *v.* Com., 4 Barr, 410; Twitchell *v.* Com., 9 Barr, 211; ante, § 1428
[z] R. *v.* Wilson, 2 Car. & Kir. 527.
[a] R. *v.* Winterbottom, 2 Car. & Kir. 36; S. C. 1 Den. Cr. C. 41.

vations,[b] although not those scientifically acquainted with such instrument.[c] But a person may be convicted of forging a check on a bank, although the counterfeit does not so much resemble the genuine check of the drawer, as to be likely to deceive the officers of the bank on which it is drawn.[cc] And the instrument counterfeited must be such as would, if genuine, be valid for the purpose intended.[d] Thus, an indictment will not lie for forging a certificate of the acknowledgment of a deed, which certificate does not state that the grantor acknowledged the execution of the conveyance.[e]

§ 1439. But upon an indictment for forging a bank note, where there appeared to be no water-mark in the forged note, and the word "pounds" was omitted in the body of it; the defendant being convicted, the judges held the conviction to be right.[f] A country bank note, however, which for want of signature is incomplete, or a navy bill payable to ——— or order,[g] is not the subject of an indictment for forgery.[h] But still, as will be seen more fully hereafter, if there be at any time a bare possibility of fraud, it is enough to constitute the offence.[i] Thus, on the trial of an indictment in the Circuit Court of North Carolina for the forgery of, and an attempt to pass, &c., a certain paper writing in imitation of, and purporting to be a bill or note issued by the president, directors, and company of the Bank of the United States, founded on the 18th section of the act of 1816, establishing the Bank of the United States, the note appeared to be signed by the name of John Huske, who, it appears, had not been at any time president of the Bank of the United States, but who, at the time of the date of the counterfeit, was the acting president of the office of discount at Fayetteville; and was countersigned by the name of John W. Sandford, who at no time was cashier of the mother bank, but was at the said date cashier of the said office of discount and deposit; it was held, that this was an offence within the provisions of the law.[j] "The policy of the act," it was held, "extends to such a case. The object was to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank. It could not be presumed that persons in general could be cognizant of the fact who, at particular periods, were the president and cashier of the bank. They were officers liable to be removed at the pleasure of the directors, and the times of their appointment or removal, or even their names, could

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[b] See Jervis' Arch. C. L., 6th ed. 305; R. v. Collicott, 2 Leach, 1048; 4 Taunt. 300, Russ. & R. 212, 219; R. v. Jones, 1 Leach, 204; U. S. v. Morrow, 4 Wash. C. C R. 738. The bills should have the external appearance of those issued by the bank named, and a paper containing all the words and figures upon a genuine bank bill, with no other resemblance to it, cannot be said to be in the similitude of the latter, within the meaning of the statute. State v. McKenzie, 42 Maine, 392.

[c] See R. v. Heost, 2 East, P. C. 950.

[cc] Commonwealth v. Stephenson, 11 Cush., (Mass.) 481.

[d] People v. Harrison, 8 Barb. S. C. 560; State v. Humphreys, 10 Humph. 442.

[e] People v. Harrison, 8 Barb. Sup. Ct. 560.

[f] R. v. Elliott, 1 Leach, 175; R. v. Fitzgerald, et al., 1 Leach, 20.

[g] R. v. Richards, R. & R. 193; R. v. Randall, R. & R. 195; R. v. Pateman, R. & R. 455.

[h] And see R. v. Burke, Russ. & R. 496.

[i] Post, 1498, ante, § 1428, &c. [j] U. S. v. Turner, 7 Peters, 132.

not ordinarily be within the knowledge of the body of the citizens. The public mischief would be equally great, whether the names were those of of the genuine officers, or of fictitious or unauthorized persons, and ordinary diligence would not protect them against imposition."[k]

§ 1440. A man may be convicted of forging a will, although it appear in evidence that the pretended testator is alive;[l] for the instrument, if genuine, would be a will, notwithstanding the testator were still alive; his death would merely give effect to the instrument. On the other hand, where the defendant was indicted for forging a will of lands, and the will produced was attested by two witnesses only, the judges held that the defendant could not be convicted, although it did not appear, either in evidence or upon the face of the will, whether the lands were freehold or not, for they must be presumed to be freehold, unless the contrary appear.[m]

The endorsement of another name on a bill, though intending to meet it when due, is forgery.[n]

§ 1441. Where a man induces another by false representations and false reading, to sign his name to a note for a different amount than that agreed upon, it is not forgery,[o] though in Tennessee is said to be a cheat, for which the party may be indicted.[p]

§ 1442. It is no forgery in an attorney to alter the figures indicating the day appointed for executing a writ of inquiry served upon him, in order to make the notice served on him apparently irregular, and with intent to defraud.[q]

§ 1443. An endorsement on a note of partial payment, in the handwriting of the maker, without any signature, but made in the presence, with the concurrence, and by the direction of the payee, is a receipt, the alteration of which, by the payee, is a forgery.[r]

Forging a letter, representing that the publisher, and he whose act it purports to be, are partners, not with the design of depriving the latter of his property, is not a criminal offence.[s]

§ 1444. In forgery it is not required, in order to constitute in point of law an intent to defraud, that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequences of his act would necessarily or possibly be to defraud any person; but there must, at all events, be a possibility of some person being defrauded by the forgery.[t]

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[k] U. S. *v.* Turner, 7 Peters, 132.

[l] R. *v.* Sterling, 1 Leach, 99; R. *v.* Coogen, 1 Leach, 499; 2 East, P. C. 948, S. C.

[m] R. *v.* Wall, 2 East, P. C. 953; and see R. *v.* Maffatt, 1 Leach, 431.

[n] R. *v.* Forbes, 7 C. & P. 224, and see R. *v.* Croke, 8 C. & P., 582.

[o] Putnam *v.* Sullivan, 4 Mass. 53; Com. *v.* Sankey, 10 Harris, 390; Hill *v.* State, 1 Yerger, 76: see post, § 2081.

[p] Hill *v.* State, 1 Yerger, 76, Haywood, J., contra; though see Wright *v.* People, 1 Breese, 66, and the comments in 1 Bennett & H. Lead Cas. 16.

[q] People *v.* Cady, 6 Hill, 490.

[r] Kegg *v.* State, 10 Ohio, 75.

[s] Jackson *v.* Weisinger, B. Monroe, 214.

[t] R. *v.* Marcus, 2 Car. & Kir. 355.

II. Uttering, &c.

§ 1445. To utter and publish an instrument, is to declare or assert, directly or indirectly, by words or actions, that it is good.[u] Passing a paper, under the act, it is said, is putting it off in payment or exchange. Uttering it is a declaration that it is good, with an intention to pass, or an offer to pass it.[v] Pledging, however, a counterfeit note, which was to be redeemed at a future day, is not a passing within the meaning of the act in force in Tennessee.[w]

§ 1446. Passing a counterfeit note in the name of a fictitious person, an assumed name, or on a bank which never existed, is indictable. It is not necessary that the note, if genuine, would be valid, if, on its face, it purports to be good; the want of validity must appear on its face.[x]

§ 1447. The uttering of a forged instrument, the forgery of which is only a forgery at common law, it has been said in England, is no offence, unless some fraud was actually perpetrated by it; and where, in such a case, the indictment contained some counts for forging the instrument and others for uttering it, and the defendant was acquitted on the counts for the forgery, and convicted on the counts for the uttering, the judgment was arrested.[y] Such, however, seems no longer to be the law, when there is an intent to defraud.[z]

§ 1448. The publishing of a forged writing of a private nature, though not under seal, with intent to defraud, is an offenee indictable at common law;[a] and *a fortiori*, is this the case with the note of a broken bank.[b]

The prisoner, in payment for some goods at a shop, put down on the counter a counterfeit shilling, and the shopman took it up and said that it was bad. The prisoner then quitted the shop, leaving the coin there. It was held that the prisoner, had "uttered and put off" the counterfeit shilling within the meaning of the statute.[c]

§ 1449. The party accused of passing, or uttering counterfeit paper, must be either present when the act is done, privy to it, or aiding, consenting, or procuring it to be done. If done by consent, all are equally guilty.[d] Proof of passing, or attempting to pass, counterfeit money, by an agent employed by the defendant, for that purpose, is the same as proving the acts to have been done by himself.[e] But where several, by concert, are

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[u] Com. *v.* Searle, 2 Binney, 339.
[v] U. S. *v.* Mitchell, 1 Bald. C. C. R. 367.
[w] Gentry *v.* State, 3 Yerger, 451, Catron, J., diss.; but see R. *v.* Birkett, R. & R. 86.
[x] U. S. *v.* Mitchell, 1 Baldwin's C. C. R. 367; 12 Serg. & Rawle, 237; see ante, § 1428–1437.
[y] R. *v.* Boult, 2 Car. & Kir. 604. [z] R. *v.* Sharman, 21 Eng. Law & Eq. 553.
[a] Com. *v.* Searle, 2 Binney, 332; contra, State *v.* Middleton, Dud. 275.
[b] Lewis *v.* Com., 2 S. & R. 551; State *v.* Stroll, 1 Rich. 244; Com. *v.* Sheer, 2 Virg. Cases, 65.
[c] R. *v.* Welch, 1 Eng. R., 387, 2 Den. C. C. 78.
[d] U. S. *v.* Mitchell, 1 Baldwin, C. C. R. 367.
[e] U. S. *v.* Morrow, 4 Wash. C. C. R. 733; Com. *v.* Hill, 11 Mass. 136; Hopkins *v.* Com., 3 Metc. 466; R. *v.* Palmer, 1 N. & R. 96; R. & R. 72; R. *v.* Giles, 1 Mood. C. C. 166.

privy to the uttering of a forged note, which is uttered by one only, in the absence of the others, he only who utters it is a principal, but the others are accessories before the fact.[f] Where one delivered a counterfeit bank bill to an ignorant boy to pass, on agreement that he should have half the proceeds for his trouble, the boy, nevertheless, having knowledge that it was counterfeit, and the boy passed it, and paid back half of what he received to his principal, it was held, that this was sufficient evidence against the principal of passing.[g]

§ 1450. The having in one's possession several forged bank notes, of different banks, at one time, with intent to pass them, and thereby to defraud the person taking them, constitutes but one offence; and the defendant can not be pursued severally on each note.[h]

An indictment for having counterfeit money in possession with intent to dispose, barter, or sell the same, is not supported by proof of possession with intent to pass the same as genuine.[i]

§ 1451. The crime of uttering and publishing is not complete until the paper is transferred and comes to the hands or possession of some person other than the felon, his agent or servant;[ii] thus, where a note, with forged endorsement, is sent by the felon, per mail, from one county to an individual in another county, for the purpose of obtaining credit upon it, the crime is not consummated until the note is received by the person to whom it was sent; and the proper place of trial is the county to which the note was sent.[j]

The drunkenness of the accused at the time of passing the alleged counterfeit bill, is a circumstance proper to be submitted to the consideration of the jury, and should have its just weight in determining whether the accused knew the bill to be counterfeit.[k]

III. Guilty knowledge and intent.

§ 1452. The intention to defraud some one[kk] is an essential to the completion of the offence, though it seems that it is not necessary to show that the prosecutor was actually defrauded.[l] If the jury can presume, from the circumstances, that it was the defendant's intention to defraud the party, if, in fact, the party 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, although, from circumstances, of which he is not apprized, he

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[f] R. v. Seares, R. & R. 25; R. v. Baddock, Id. 249; R. v. Stewart, Id. 373; R. v. Davis, Id. 113; see R. v. Morris, Id. 2.0; 2 Leach, 1096; see also, R. v. Harris et al., 7 C. & P. 416.

[g] Com. v. Hill, 11 Mass. 136.

[h] State v. Benham, 7 Con. 414.

[i] Hutchins v. State, 13 Ohio, 198.

[ii] Com. v. Searle, 2 Binney, 332.

[j] People v. Rathbun, 21 Wendell, 509.

[k] Pigman v. State, 14 Ohio, 555; ante, § 42.

[kk] R. v. Hodgson, 36 Eng. Law and Eq. 626.

[l] Com. v. Ladd, 15 Mass, 526; Penn. v. Misner, Addison, 44; R. v. Cook, 2 Strange, 901; State v. Washington, 1 Bay, 120; Com. v. Goodenough, Thacher's C. C. 132; R. v. Goate, 1 Lord Raym. 737; Hess v. State, 5 Ohio R. 12; Snell v. State, 2 Humph. 347; ante, § 1444; post, § 1492.

could not, in fact, defraud the prosecutor,[m] even though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him.[n]

§ 1453. From the mere fact of forging or altering the instrument, the law presumes an intent to defraud the person who would have to pay the instrument, if it were genuine,[o] although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him; and, although the object was to defraud whoever might take the instrument, and the intention of defrauding the person in particular who would have to pay the instrument if genuine, did not enter into the prisoner's contemplation.[p]

Under the provision of the statute of Massachusetts of 1804, c. 120, s. 6, that if any person shall have in his possession any counterfeit bank bill, "for the purpose of rendering the same current as true, or with intent to pass the same," it is sufficient to show an intent in the offender to pass the bill merely, without showing an intent to pass it as genuine, or for full value."[q]

§ 1454. It must be noticed, however, that there may be circumstances, the existence of which will tend to rebut the presumption of guilty intention, and which will require distinct proof of such intention on part of the prosecution. Thus, a co-obligor may be guilty of forgery, in assigning a bill given by himself and another; but his having it in his possession, may be evidence of authority over it, and if there be no intention to defraud, it is not forgery.[r]

§ 1455. Where a forged bill of exchange, payable to the order of the defendant, was given as a pledge only, but to obtain credit, it was holden that there was a fraudulent intent, within the meaning of the statute.[s]

§ 1456. On the trial of an indictment for uttering a forged instrument, if the jury are satisfied that the prisoner uttered the instrument as true, meaning it to be taken as such, and that he knew it to be forged, they are bound to infer the intent to defraud.[t]

It is enough if the indictment points the intent to defraud at the person who was primarily to be defrauded.[u] Thus, in a case where H. employed L. to do work for him, L. had a partner, S., who took no active part in the business, which H. knew. H., knowingly, paid L. for the work by a forged bill of exchange, which L. endorsed in his own name only, and delivered to S., who also endorsed it in his own name, and negotiated it.

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[m] R. *v.* Holden, R. & R. 154; Jervis' Arch. 9th ed. 370.
[n] R. *v.* Sheppard, R. & R. 169; see R. *v.* Harvey, 2 B. & C. 257; 3 D. & R. 464; post, § 1493.
[o] Ante, § 712, 725.
[p] U. S. *v.* Shelmire, 1 Bald. 371; R. *v.* Mazagora, R. & R. 291.
[q] Hopkins *v.* Com., 3 Metc. 460.
[r] Penn. *v.* Misner, Add. 44.
[s] R. *v.* Birkett, R. & R. 86.
[t] R. *v.* Hill, 8 C. & P. 274; R. *v.* Vaughan, 8 C. & P. 276; R. *v.* Cooke, 8 C. & P. 582, 586; R. *v.* Geach, 9 C. & P. 49; ante, § 712, 725.
[u] People *v.* Cushing, 1 Johnson R. 320.

H. was held to be properly convicted on a count charging an uttering with intent to defraud L. only.[v]

A forged check, drawn on Worcester old bank, was presented by the prisoner, to Rufford's bank, at Stourbridge, and refused; and, upon an indictment for forging and uttering a check, with intent to defraud the Messrs. Rufford, it was objected, that as it was not drawn upon them, it could not defraud them; but Bosanquet, J., held, that as it was presented at their bank for payment, it was evidence of an intent to defraud them.[w]

§ 1457. As has been shown, under a preceding head, on the trial of an indictment for forging, or passing counterfeit notes, or money, evidence may be given of the defendant passing similar counterfeit notes, and counterfeit notes of other banks, at the same time; but not, it seems, of passing counterfeit notes of another bank at another time.[x] In a prosecution for forgery of bank notes, the prosecutor, after laying a foundation for connecting the prisoner with other persons, in the general transaction, may give evidence that different parts of the machine employed in the counterfeiting were found in the possession of other persons respectively.[y] So, on the trial of an indictment for uttering and publishing a forged promissory note, knowing it to be forged, it is admissible, in proof of the defendant's knowledge of the forgery, to show that another note passed by him, was also forged. Nor does it render such evidence inadmissible, that the defendant had been formerly acquitted upon an indictment for uttering the last mentioned note, knowing it to be forged; but the objection goes only to weaken its effect with the jury.[z] When, in a prosecution for passing counterfeit bank notes, the prisoner appeared clearly to have been confederated with L. in passing them, and to have been present when L. passed such notes, and the notes so passed by L. were produced in evidence against the prisoner, it was held that they were proper evidence.[a] So, in a prosecution for having counterfeit notes or coins in possession, proof that other counterfeits were found secreted in the prisoner's person or house, or in possession of his wife, is admissible[b]

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[v] R. v. Hanson, 1 C. & M. R. 334; see post, § 1459. [w] R. v. Crowther, 5 C. & P. 316.

[x] U. S. v. Rodenback, 1 Bald. 514; U. S. v. Doebler, 1 Bald. 519; Hendrick' cases, 8 Leigh, 707; State v. McAllister, 11 Shep. 139; State v. Odell, 3 Brev. 562; Peck v. State, 2 Humph. 78; Reed v. State, 15 Ohio, 217; State v. Williams, 2 Rich. 418, and this, though indictment be pending for the prior offences. Com. v. Stearns, 10 Metc. 256. But on the trial of a party indicted for forging a bank note on the Bank of the State of North Carolina, the Circuit Court permitted evidence to go the jury, of a supposed attempt by the defendant, three years previously, to utter some forged notes of the Northern Bank of Kentucky, and it was held, that the evidence was manifestly illegal. Morris v. State, 8 S. & M. 762; see ante, § 631-2-3-4-5, 639, 647-8-9, 712.

[y] U. S. v. Craig, 4 W. C. C. R. 729.

[z] State v. Houston, 1 Bail, 300; Ohio v. Hess, 5 Ohio R. 9; State v. Antonio, 2 Tr. Con. R. 776; Martin v. Com., 2 Leigh, 745; Hendrick v. Com., 5 Leigh, 708; Com. v. Percival, Thacher's C. C. 293; State v. Twitty, 2 Hawks, 248; U. S. v. Hinman, 1 Baldwin, 292; R. v. Fuller, R. & R. 308; State v. Smith, 5 Day, 175; State v. Hereten, 2 Penn. 672; R. v. Wylie, 1 N. R. 92; R. v. Tattersal, Id. 94, n; and see R. v. Ball, 1 Campb. 324; R. & R. 132; R. v. Hough, R. & R. 120.

[a] Martin's case, 2 Leigh, 745; U. S. v. Hinman, 1 Bald. 292.

[b] Hess v. State, 5 Ham. 5; U. S. v. Burns, 5 McLean, 23; Ante, § 631-2-3-4-5.

But it has been decided, that if a subsequent uttering be made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering.[c]

Upon an indictment for uttering a counterfeit half crown, in order to prove the guilty knowledge, evidence was given of a subsequent uttering by the prisoner of a counterfeit shilling. It was held, by the English Central Criminal Court, in 1855, that this evidence was admissible.[d]

It is not necessary, in order to constitute the offence of uttering, &c., that the defendant should have the knowledge of the false making at the time of the forgery.[e]

§ 1458. On an indictment for uttering and publishing a forged paper purporting to be a bank note of a certain bank, with intent to defraud one J. S., it is not necessary to prove the existence of the bank, unless the indictment states it to be a chartered bank, or lays the act as done with an intent to defraud such a bank.[f]

Evidence that the prisoner uttered as genuine, what purported on its face to be a bank note, is competent proof that it was a bank note, though it is not otherwise shown that such a bank existed.[g]

§ 1459. In Virginia, it is held that the existence of a bank out of the state may, under such circumstances be proved by parol.[h]

In New York, on an indictment against a prisoner for having in his possession, with intent to pass, forged bank notes, purporting to have been issued by a banking corporation of a state other than that of New York, or by any company or corporation duly authorized for that purpose, it is not necessary to show that there is in fact such a corporation in existence: at all events, proof, of the most general character, of its existence, is sufficient.[i] Where, however, the intent is charged to have been to defraud the bank purporting to have issued the notes, the bank must be shown to be a real body capable of being defrauded; and, in the case of an association existing in New York under the general banking law, it is enough for that purpose to prove the articles of association.[j] Afterwards, however, upon the general banking law being held void, this decision was overuled.[k]

An averment of an intent to defraud one individual is sustained by proof of an intent to defraud a body of which such individual was a member. Thus, on an indictment for uttering and publishing a forged bank bill, with an intent to defraud P. P., the indictment is supported by proof, that the

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[c] R. *v.* Smith, 2 C. & P. 633; and R. *v.* Smith, 4 C. & P. 411; Com. *v.* Stearns, 10 Metc 256; though see Hoskins *v.* State, 11 Georg. 92; R. *v.* Foster, 29 Eng. Law and Eq. 547.

[d] R. *v.* Foster, 29 Eng. Law and Eq. Rep. 548; see ante, § 631-2-3-4-5, 639, 547-8-9.

[e] Com. *v.* Houghton, 8 Mass. 107; Brown *v.* Com., 8 Mass. 59.

[f] Com. *v.* Smith, 6 Serg. & Rawle, 568; People *v.* Davis, 21 Wendell, 309; People *v.* Peabody, 25 Wend. 472; State *v.* Jones, 1 McM. 236; U. S. *v.* Foye, 1 Curtis, C. C. R. 364; see State *v.* Hayden, 15 N. H. 355.

[g] U. S. *v.* Foye, 1 Curtis Ct. Ct. 364.

[h] Cady *v.* Com., Grattan, 776.

[i] People *v.* Davis, 21 Wend. 309; Dennis *v.* People, 1 Harris, 469; People *v.* Peabody, 25 Wend. 472.

[j] People *v.* Peabody, 25 Wend. 472.

[k] De Bow *v.* People, 1 Denio, 9; and see Cahoon *v.* State, 8 Ham. 537.

counterfeit bill was passed to P. P., in payment for goods purchased of the firm of P. & B., of which P. P. was a member, good money belonging to the firm being also given in change.[l]

Under the Ohio statute of 1835, against publishing and passing bills and notes purporting to be of a bank which never did, in fact, exist, an indictment will not lie for publishing, &c., the bills of a house in fact existing, although unincorporated and illegal.[m]

§ 1460. Upon a trial for forgery of a written instrument, the commonwealth may, without producing as a witness the party by whom the instrument purports to be signed, and without accounting for his absence, prove that the instrument is not genuine by the evidence of other witnesses; such evidence not being in its nature secondary to that of the party whose signature is in question.[n] And, as will be seen, an expert may prove a bank note to be a counterfeit.[o] And this, though he has never seen the officer of the bank write.[p]

§ 1461. On an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity, and the delivering one note, parol evidence was admitted of the contents of a letter to an accomplice from the defendant, on the subject of counterfeit notes, for which the accomplice could not account, and had not searched, but believed he had lost.[q] The law presumes that an accomplice would destroy a letter which would implicate him, and no search is necessary before admitting secondary evidence.[r] And if the letter to which it is an answer, is in the hands of the defendant, it need not be produced, or notice given to the defendant to produce it, before evidence is given of the contents of such answer.[s] No notice is necessary in such case, to produce a paper in the hands of the defendant, or an accomplice, or a third person who secretes it to protect the defendant, though such paper is not the subject of the indictment.[t]

IV. Handwriting.

§ 1462. The party whose name is forged, is admissible in this country, as has been seen, to prove the forgery.[u]

His handwriting, however, may be proved by any person who has a knowledge of it from having seen him write.[v] Thus, on the trial of an indictment for passing counterfeit bank-bills, a witness acquainted with

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[l] Stoughton *v.* State, 22 Ohio R. 562; see ante, § 1456.

[m] Cahoon *v.* State, 8 Ham. 537.

[n] Foulker's case, 2 Robinson, 836; see ante, § 1322.

[o] Post, § 1462; State *v.* Harris, 5 Iredell, 287. As to evidence of the fact of the writing being forged, see ante, § 865–8.

[p] State *v.* Candler, 3 Hawks, 393; Watson *v.* Cresap, 1 B. Monr. 195; May *v.* State, 14 Ohio, 461; State *v.* Spence, 2 Harring, 348.

[q] U. S. *v.* Doebler, 1 Bald. 519 [r] Ibid. [s] Ibid.

[t] Ibid.; see ante, § 657. [u] See ante, § 778–9.

[v] See Garrels *v.* Alexander, 4 Esp. 36; 1 Esp. 14; 2 Stark. 164; 1 Holt 420; Lewis *v.* Sapio, M. & M. 39; State *v.* Stalmaker, 2 Brevard 1; State *v.* Hess, 5 Ohio, 7; State *v.* Harper, 2 Bailey, 37; State *v.* Anderson, 2 Bailey, 565; State *v.* Tuft, 2 Bailey, 44;

the handwriting of the president of the bank, will be permitted to prove the falsity of the signatures to the bills.[w]

A witness to handwriting may refresh his memory by inspecting genuine writing. But he is incompetent if such inspection enables him to speak only from comparing the two signatures.[ww]

§ 1463. Handwriting may also be proved by one who has been in the habit of corresponding with the writer,[x] or acting upon his correspondence with others,[y] even though he never saw him write;[z] or the handwriting of a party may be proved by his own acknowledgment or admission.[a] In England it cannot be proved by comparing it with other writings, although confessedly of his handwriting.[b] In New York, Virginia, North Carolina, Illinois and the District of Columbia, the English rule is adopted, and such testimony is rejected.[c] In Massachusetts, Maine, Alabama and Connecticut, it is the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting.[d] In New Hampshire and South Carolina, the admissibility of such papers has been confined to cases where other proof of handwriting is already in the cause, and for the purposes of turning the scale in doubtful cases.[e] In Pennsylvania, the admission was limited by the courts to papers conceded to be genuine,[f] or concerning which there is no doubt.[g] The Revised Acts of 1860, however, provide as follows:

Witnesses in forgeries. Upon the trial of any indictment for making or passing, and uttering, any false, forged or counterfeited coin, or bank note, the court may receive in evidence, to establish either the genuineness or falsity of such coin or note, the oaths or affirmations of witnesses who may, by experience and habit, have become expert in judging of the genuineness, or otherwise, of such coin or paper, and such testimony may be submitted to the jury without first requiring proof of the handwriting or the other tests of genuineness, as the case may be, which have been

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Com. *v.* Smith, 6 Serg. & Rawle, 568; U. S. *v.* Prout, 4 Cranch, C. C. R. 301; ante § 865-8.

[w] State *v.* Stalmaker 2 Brevard, 1.

[ww] McNair *v.* Commonwealth, 26 Penn. State R. (2 Casey) 388.

[x] Com. *v.* Smith, 5 Serg. & R. 568; Gould *v.* Jones, 1 W. Bl. 384; Harrington *v.* Fry, R. & M. N. P. 90; see ante § 865-8.

[y] R. *v.* Slaney, 5 C. & P. 212. [z] State *v.* Spence, 2 Harring. 348; ante § 1460.

[a] Waldridge *v.* Kennison, 1 Esp. 143.

[b] Garrels *v.* Alexander, 4 Esp. 37, 117; Macferson *v.* Thoyte, Peake, N. P. C. 20; Stranger *v.* Searle, 1 Esp. 14; Bromage *v.* Rice, 7 C. & P. 548; Waddington *v.* Cousins, 7 C. & P. 595; Doe *v.* Newton, 5 Ad. & El. 514; Hughes *v.* Rogers, 8 M. & W. 123; Griffits *v.* Ivery, 11 Ad. & El. 322; see, also, R. *v.* Murphy, 1 Arms. Macar. & Ogle's R. 204; ante 865-8.

[c] Jackson *v.* Phillips, 9 Cowen, 94, 112; Titford *v.* Knott, 2 Johns. Cas. 210; Rout *v.* Kile, 1 Leigh, 216; State *v.* Allen, 1 Hawks, 6; Pope *v.* Askew, 1 Iredel, 16; Jumpertz, *v.* People, 21 Ill. 375; U. S. *v.* Prout, 4 Cranch, C. C. R. 301.

[d] Homer *v.* Wallis, 11 Mass. 309; Moody *v.* Rowell, 17 Pick. 490; Richardson *v.* Newcomb, 21 Pick. 315; Hammond's case, 2 Greenl. 33; Mayo *v.* State, 30 Alab. 32; Lyon *v.* Lymen, 9 Conn. 55.

[e] Myers *v.* Toscan, 3 N. Hamp 47; State *v.* Carr, 5 N. Hamp. 365; Boman *v.* Plunkett, 3 McC. 518; Duncan *v.* Beard, 2 Nott & McC. 401; see, also, Crist *v.* State, 21 Ala. 137.

[f] M'Corkle *v.* Binns, 5 Binney, 340; Bank of Lancaster *v.* Whitehall, 10 S. & R. 110.

[g] Baker *v.* Haines, 6 Wharton, 284; see Greenleaf on Evid. s. 581.

heretofore required by law; and in prosecutions for either of the offences mentioned or described in the one hundred and sixty-fourth, one hundred and sixty-fifth, one hundred and sixty-sixth and one hundred and sixty-seventh sections of the act to consolidate, revise and amend the penal laws of this commonwealth, the courts shall not require the commonwealth to produce the charter of either of said banks, but the jury may find that fact upon other evidence, under the direction of the court.—Rev. Act, 1860, Pamp. L. 444.

§ 1464. It is conceded, even in England, that on a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is inscribed, if such writings are in evidence for other purposes of the cause.[h] The same rule has been extended to cases where the writing is so ancient that no witness can be found who can prove it.[i]

§ 1465. It is competent to offer the testimony of those skilful in respect to money and handwriting, and who have seen what passed as genuine signatures of the president and cashier, though they never saw them write.[j] It has been ruled, also, that one skilled in such subjects, is competent to prove, by a comparison with a genuine bill, that the note, the subject matter of the indictment, is a counterfeit.[k]

V. Indictment.[l]

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

§ 1466. A crime, which may be committed by the agency of several means is well described, if charged to be by the agency of all.[m] Thus, an indict-

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[h] Solita *v.* Yarrow, 1 M. & Rob. 133; R. *v.* Morgan, Id. 134, n; Griffith *v.* Williams 1 C. & J. 47; Waddington *v.* Cousins, 7 C. & P. 595; Doe d. Perry *v.* Newton, 1 Nev. & P. 1; 5 Add. & Ell. 514; see ante, § 865–8.

[i] Gilb. Evid. 25, 26; see Peake, N. R. 20.

[j] Furbee *v.* Hilliard, 2 N. Hamp. 480; Carr *v.* State, 5 N. Hamp. 371; State *v.* Ravelin, 1 Chapman, 295; Com. *v.* Tutt, 2 Bailey, 44; Com. *v.* Riley, Thacher's C. C. 67; People *v.* Caryl, 12 Wend. 547; Com. *v.* Smith, 6 Serg. & Rawle, 568; State *v.* Harper, 2 Bailey, 37; U. S. *v.* Kean, 1 M'Lean, 429; People *v.* Hewitt, 2 Parker, C. R. 20; Martin *v.* Com., 2 Leigh, 745; R. *v.* Cator, 4 Esp. 117; 1 Esp. 14; Goodtitle *v.* Braham, 3 T. R. 496, *sed quære;* see Carey *v.* Pitt, Peake, Ad. Cas. 130; see 2 Esp. 714; 5 B. & Ald. 330; R *v.* Backler, 5 C. & P., 118; State *v.* Harris, 5 Iredell, 287; ante § 865–8.

[k] State *v.* Calvin, Charlton, 152; ante, § 1460.

[l] See for forms of indictment, Wh. Prec., as follows:

(264) General frame of indictment at common law.

(265) 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.

(266) Second count. Publishing the same.

(267) Forgery. Altering a certificate of an officer of the American army in 1778, to the effect that 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.

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[m] State *v.* Haney, 2 Dev. & Bat. 390; Perkins *v.* Com., 7 Gratt. 71; Hoskins *v.* State, 11 Geo. 92; ante § 390.

ment which charges a prisoner with the offences of falsely making, forging and counterfeiting, of causing and procuring to be falsely made, forged and

(268) Forgery. Altering and defacing a certain registry and record, &c., under the Pennsylvania act of 1700.
(269) For forging, &c., a bill of exchange, an acceptance thereof, and an endorsement thereon.
(270) Second count, for uttering.
(271) Third count, for forging an acceptance.
(272) Fourth count, same stated differently.
(273) Fifth count, for forging an endorsement, &c.
(274) Sixth count, for publishing a forged endorsement, &c.
(275) For forgery at common law in ante-dating a mortgage deed, with interest, to take the place of a prior mortgage.
(276) At common law. Against a member of a dissolved firm for forging the name of the firm to a promissory note.
(277) Forging a letter of attorney at common law.
(278) Forgery of a bill of exchange. First count. Forging the bill.
(279) Second count. Uttering the same.
(280) Third count. Forging an acceptance on the same.
(281) Fourth count. Offering, &c., a forged acceptance.
(282) Sixth count. Offering, &c., forged endorsement.
(283) Forging and publishing a receipt for payment of money.
(284) Second count for uttering.
(285) Forging a receipt under the North Carolina statute.
(286) Forging a fieri facias at common law.
(287) Second count. Uttering same.
(288) Forgery of a bond at common law.
(289) At common law, by separating from the back of a note an endorsement of part payment.
(290) Forgery in altering a pedlar's license at common law.
(291) Forgery of a note which cannot be particularly described in consequence of its being destroyed.
(292) Forgery of a note whose tenor cannot be set ont on account of its being in defendant's possession.
(293) Forgery of bond when forged instrument is in defendant's possession.
(294) Forgery at common law in passing counterfeit bank notes.
(295) Forgery of the note of a foreign bank as a misdemeanor at common law.
(296) Forging a bank note, and uttering the same, under English statute.
(297) Second count. Putting away same.
(298) Third count. Forging promissory note.
(299) Fonrth count. Putting away same.
(300) Fifth count. Same as first with intent to defraud J. S.
(301) Sixth count. Putting away same.
(302) Seventh count. Same as second with intent to defraud J. S.
(303) Eighth count. Putting away same.
(304) Attempt to pass a counterfeit bank note under Ohio stat.
(305) Forging a certificate granted by a collector of the customs.
(306) Causing and procuring forgery, &c.
(307) Altering generally.
(308) Altering, &c., averring specially the alterations.
(309) Same in another shape.
(310) Uttering certificate as forged.
(311) Uttering certificate as altered.
(312) Forging a treasury note.
(313) Causing and procuring, &c.
(314) Altering same.
(315) Passing note, &c.
(316) Same in another shape.
(317) Feloniously altering a bank note.
(318) Having in possession forged bank notes without lawful excuse, knowing the same to be forged.
(319) Uttering and passing a counterfeit bank bill, under s. 4, c. 96 of Revised Statutes of Vermont.
(320) Uttering forged order under Ohio stat.

counterfeited, and of willingly acting and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of those charges are contained in a single count, the words of the statute being pursued; and where there is a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct.[n] So also, the description of a bank note as "false, forged, and counterfeited" is not repugnant.[o] 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 is convicted, the judgment will be arrested.[p]

An indictment (described in the record of the finding, and in the entry of the arraignment, as an indictment, for "forgery") contained a count for forging and counterfeiting a note, and a count for feloniously using and employing as true a counterfeit note. The verdict found the prisoner guilty of "forgery," as alleged in the indictment. It was held, that an acquittal must be entered on the second count.[q]

2d. How the instrument may be generally designated.

§ 1467. If the indictment declare the instrument to be of a particular class, a variance between the evidence and the indictment in this respect is, it seems, fatal.[r] In a former chapter, the meaning of the designations in most general use is considered as follows:—

(*a*) "Purporting to be," § 342.

(*b*) "Receipt," § 343.

(*c*) "Bill of Exchange," § 344.

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(321) Another form for same.
(322) Uttering a forged note purporting to be issued by a bank in another State, under the Vermont statute.
(323) Having counterfeit bank note in possession under Ohio statute.
(324) Having in possession counterfeit plates, under Ohio statute.
(325) Secretly keeping counterfeiting instruments, under Ohio statute.
(326) Having in possession counterfeit bank notes under Ohio stat.
(327) Having in possession forged notes of United States Bank, under the Vermont statute.
(328) Forgery, &c., in New York. Having in possession a forged note of a corporation.
(329) Second count. Uttering the same.
(330) Forging an instrument for payment of money, under the New York statute.
(331) Second count. Uttering the same.
(332) Having in possession forged notes, &c., with intent to defraud, under the New York statute.
(333) Forgery of a note of a bank incorporated in Pennsylvania, under the Pennsylvania statute.
(334) Second count. Passing same.
(335) Forgery of the note of a bank in another State, under the Virginia statute.

[n] Rasnick *v.* Com., 2 Virg. Cas. 356; State *v.* Morton, 1 Williams, (Vt.) 310; see ante § 294, 389–390.

[o] Mackey *v.* State, 3 Ohio St. R. 362, overruling Kirby *v.* State, 1 Ibid. 185.

[p] People v. Wright, 9 Wend. 193; ante § 381. [q] Paige's case, 9 Leigh, 683.

[r] Ante, § 341.

(*d*) "Promissory note," § 345.

(*e*) "Bank note," § 346.

(*f*) "Money," § 347.

(*g*) "Goods and chattels," § 348.

(*h*) "Warrant, order, or request for the payment of money," § 349.

Where a full setting out of the instrument is given, a technical designation of its character may, it seems, be dispensed with,[s] and in such case, the misnomer of the instrument may, it has been held, be rejected as surplusage.[t]

3d. How the instrument is to be set forth.

§ 1468. The indictment should not only set forth the tenor of the bill or note forged, but should profess to do so.[u]

The instrument charged as fictitious, must be set out in words and figures, so that the court may be able to judge from the record whether it is an instrument in respect of which forgery can be committed.[v]

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.[w]

If the forged writing is not set forth, a sufficient reason should be given in the indictment why such is not done, e. g., that the instrument has been destroyed, or, in the possession of the defendant.[x]

§ 1469. Though an indictment for passing counterfeit money purport to

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[s] Ante, § 341–2, 348.

[t] R. *v.* Williams, 2 Denio, C. C. 61; 1 Temple & Mew. C. C. 382; 4 Cox, C. C. 256; 2 Eng. Law and Eq. Rep. 533. (1850). The indictment here charged the defendant with having forged "a certain warrant, order, and request, in the words and figures following," etc. It was objected that the paper being only a request, did not support the indictment, which described it as a warrant, order, and request. But was held, that there was no variance, as the document being set out in full in the indictment, the description of its legal character became immaterial. Parke, B., suggested that the correct course would have been, to have alleged the uttering of one warrant, one order, and one request. "The principle of this decision seems to be," says the Reporter, "that where an instrument is described in an indictment by several designations, and then set out according its tenor, either with or without a videlicet, the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material, only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the court to treat as material only the tenor of the indictment itself, all the descriptive averments may be treated as surplusage. The principal case seems reconcilable with Regina *v.* Newton, 2 Moody, C. C. 59, but to overrule Regina *v.* Williams, 2 Carrington & Kirwan, 51. See Bristow *v.* Wright, Douglas, 66; 1 Smith's Leading Cases, (Am. ed. 1852, 620.) In Regina *v.* Charretie, 3 Cox, C. C. 503, (1849,) Davison *amicus curiæ*, mentioned that Cresswell, J., in a subsequent case, had declined to act upon the authority of Regina *v.* Williams, 2 Carrington & Kirwan, 51. See Th. & H. Prec. 222; ante § 341, &c.

[u] State *v.* Twitty, 2 Hawks, 248; State *v.* M'Maner, 5 Ohio, 269; State *v.* Morton, 1 Williams, Vt. 310; Dana *v.* State, 2 Ohio St. R. 91; ante § 307.

[v] State *v.* Jones, 1 M'M. 236; see ante, § 305–12, 606–9.

[w] See R. *v.* Szudurskie, 1 Mood. C. C. 419; R. *v.* Warshaner, Id. 466; R. *v.* Harris, 7 C. & P. 416, 429, ante § 313.

[x] Com. *v.* Houghton, 8 Mass. 107; Com. v. Ross, 2 Mas. 373; Com *v.* Hutchinson, 1 Mass. 7; R. *v.* Haworth, 4 Car. & Pay. 254; R. *v.* Hunter, Id. 128; People *v.* Badgeley, 16 Wendell, 53; Pendleton *v.* Com., 4 Leigh, 694; U. S. *v.* Doebler, 1 Baldw. 519; see ante, § 311.

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.[y]

An averment that the defendant secretly kept instruments of counterfeiting, is a sufficient allegation of a *scienter*.[z]

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.[a]

It is enough to set forth what constitutes the contract of the bill; but that must be done truly and precisely.[b] But the omission of any item of the contract, (*e. g.* the name of the state in the upper margin of the bill, where the name does not occur in the body,) is fatal.[c]

In an indictment for the forgery of an order, it is not necessary to set out the figures and character in the margin of it.[d]

§ 1470. 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 description of the note in the indictment, did not appear on the note produced. The counsel for the prosecution 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 that he would have been able to do so without his knowledge of that fact, but that the words had since become indistinct, as he supposed, by the handling of the note. The court thereupon overruled the motion to exclude the note, and permitted evidence to be given of passing it.[e]

In setting out a counterfeit bank note, in *hæc verba*, in an indictment for feloniously passing the same, it was held that the omission of an endorsement appearing to have been made on the note after it was passing was no variance.[f] And so of the omission of the endorsement on a promissory note.[g]

§ 1471. An omission of part of the date is fatal.[h] But where the indictment charges the note to be in "purport and effect" following, it was held that "I promise" was an immaterial variance from "I promised."[i] It would seem, however, that the distinction taken in the last case between the averments "words and figures following," and "tenor and effect," if

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[y] State *v.* Potts. 4 Halst. 25.

[z] Sutton *v.* State, 9 Ham. 133; as to scienter generally, see ante, § 297.

[a] Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Taylor, 5 Cush. 605; State *v.* Franklin, 3 John. Cas. 299; Com *v.* Stevens, 1 Mass. 203; Com. *v.* Searle, 2 Binney, 332; State *v.* Carr, 5 N. Hamp. 371; Com. *v.* How, 1 Mass. 54; State *v.* Van Hart, 2 Harr. 227; see Butler *v.* State, 22 Ala. 43; see ante, § 305–6, 312.

[b] Ibid [c] Com. *v.* Wilson, 2 Gray, 70.

[d] State *v.* Hyde, 26 Maine, 13 Shep. 312. [e] Buckland's case, 8 Leigh, 732.

[f] Ibid. Com. *v.* Ward, 2 Mass. 397; ante, § 312.

[g] Ante, § 312; Com. *v.* Ward, 2 Mass. 3 7; Perkins *v.* Com. 7 Gratt. 659.

[h] Com *v.* How, 1 Mass. 203.

[i] Com. *v.* Parmentea, 5 Pick. 279.

such was actually intended, is not in conformity with precedent. The words "tenor" binds the pleader to the strictest accuracy.[j]

Merely clerical variances, particularly when the sound is not changed, do not vitiate.[k]

§ 1472. 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*.[l]

§ 1473. On an indictment for forging a receipt, by adding a further sum, judgment was arrested after conviction, because the presumption arising from the manner of stating the offence was that the additional sum was added after the name, so that no one could be deceived by it.[m]

§ 1474 An indictment for retaining possession of an instrument for counterfeiting, &c., should describe by name or otherwise the instrument retained, and allege that it was knowingly retained.[n]

§ 1475. Sewing to the parchment, on which the indictment is written, impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment.[o]

§ 1476. An indictment for forgery of an instrument, professing to set it out according to its tenor, should give the names, in describing the instrument, spelt as they appear spelt in the original.[p]

§ 1477. 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 witness, 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 constitute the instrument a deed.[q]

§ 1478. An indictment charging the defendant with selling counterfeit bank notes, need not aver that the sale was for a consideration, or to the injury of any one, or that the notes were endorsed.[r]

§ 1479. An indictment for uttering as true a forged promissory note, purporting to be made by A., payable to B., or order, is proved by evi-

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[j] R. *v.* Powell, 2 East's P. C. 976: as to meaning of "Tenor," "Purport," and "Substance," see ante, § 307.

[k] Ante, § 405, 606–7–8.

[l] State *v.* Rowley, Prayt. 76; see ante, § 305–6, 606.

[m] Penn'a *v* M'Kee, Add. 33, 36. [n] Chamberlain *v.* State, 6 Blackf. 573.

[o] R. *v.* Harris, 7 C. & P. 429; R. *v.* Warshaner, 1 Mood. C. C. 466.

[p] State *v.* Weaver, 13 Iredell, 491; State *v.* Morton, 1 Williams, (Vt.) 310.

[q] State *v.* Ballard, 2 Murphey, 186. [r] Hess *v.* State, 5 Ohio R. 12.

dence of the uttering of such note with the endorsement of B.'s name on the back thereof.[s]

§ 1480. Where a genuine instrument is altered, so as to give it a different effect, the forgery may be specially alleged, as constituted by the alterations, or the forgery of the entire instrument may be charged.[t]

§ 1481. A charge, in an indictment for forgery, that the defendant had forged a promissory note described in the indictment as a note without a seal, is not supported by evidence tending to prove that the defendant had committed forgery of a note under seal; nor is such evidence admissible.[u]

§ 1482. In an indictment for forging a receipt, it is not necessary that it should be averred that the person charged with the offence is indebted to the individual against whom the receipt is forged, in order to show that the latter stands in a situation to be defrauded by the former.[v]

§ 1483. 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 purports on its face to be executed by James G. Fogg, and Joseph G. Fogg, the defendants, it was held that there was no repugnance in the charge in the indictment.[w]

An indictment was found for forging an indorsement on a negotiable note, stating the amount, date, payee, and when due, but not the maker, nor where payable. This was held to be a good indictment.[ww]

§ 1484. 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.[x]

An indictment for forging an order for nineteen dollars, is supported by evidence that the order was originally made for nine dollars, and genuine, and that it had been altered to nineteen dollars.[y]

An indictment for passing a counterfeit bank note to a slave, with intent to defraud the bank, is good.[z]

§ 1485. 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.[a]

An indictment charging the forging of "a certain bond," instead of a certain paper writing purporting to be a bond, is proper.[b]

§ 1486. 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.[c]

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[s] Com. v. Adams, 7 Met. 50.
[t] State v. Weaver, 13 Iredell, 491.
[u] Hart v. State 20 Ohio, 49.
[v] Snell v. State, 2 Humph. 347; see, per contra, Rice v. State, 1 Yerger, 432.
[w] Fogg v. State, 9 Yerger, 392.
[ww] Cocke v. Com., 13 Gratt, (Va.) 750.
[x] Crown v. Com., 2 Leigh, 769.
[y] State v. Hye, 26 Maine (13 Shep.) 312.
[z] Ibid.
[a] U. S. v. Harmon, 1 B. C. C. R. 292.
[b] State v. Gardiner, 1 Iredell, 27; as to meaning of "Purporting to be," see ante, § 342.
[c] Com. v. Ladd, 15 Mass. 526.

Where an indictment charged that A. did feloniously and fraudulently forge a certain writing, as follows, "Mr. Bostick's charge A.'s account to us, A. and C.," with intent to defraud B. and C., it was held, that the indictment was not valid, without charging that A. was indebted to Bostick, as there could be no fraud unless debt existed.[d]

§ 1487. The indictment is good, if in it be set forth the instrument or writing 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 or body corporate may thereby be injured or affected; it is not necessary that the facts and circumstances of the case showing the intent should be especially set forth in the indictment: it is enough that they be given in evidence on the trial.[e] 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 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.[f] 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.[g]

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

§ 1488. In Delaware, and in New York, as has been just seen, in an indictment for the forgery of a bank note, it is not necessary to aver that the bank, whose note it is alleged to be, is an incorporated institution.[h] So, in Virginia, an indictment for passing a counterfeit note of a bank is good and sufficient, within the meaning of the statute,[i] though it does not allege that the bank is a chartered bank, or that there is no such bank, or that the note was passed "to the prejudice of another's right," or "for the prisoner's own benefit, or for the benefit of another."[j]

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[d] State *v.* Humphreys, 10 Humph. 442.

[e] People *v.* Stearns, 21 Wend. 409; see as to general pleading of intent, ante, § 297.

[f] People *v.* Stearns, ut supr. S. C. 23 Wend. 634. [g] People *v.* Stearns, 21 Wend. 409.

[h] State *v.* Van Hart, 2 Harr. 327; People *v.* Stearns, 21 Wend. 409; see as to Tennessee, Jones *v.* State, 5 Sneed, 346; Owens *v.* State, Ibid. 493.

[i] 1 Rev. Code, ch. 154, sec. 4. [j] Murrey's case, 5 Leigh, 720.

§ 1489. The averment of the authorization of the bank of another State is surplusage.[k]

§ 1490. In South Carolina, the words "false, forged and counterfeited promissory note, 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," contain a sufficient averment of the existence of such a bank as the Bank of the State of South Carolina.[l]

§ 1491. In Vermont, the allegation that the bill "was made in imitation of, and did then 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," is a sufficient averment of the existence of such bank, and that it is an incorporated institution.[m]

How the incorporation of a bank may be proved, has been already shown.[n]

5th. Averment of intent to defraud.

§ 1492. How far intent to defraud is necessary to be averred and proved has been examined elsewhere.[o] 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.[p]

§ 1493. It is clear that if there be a possibility of fraud, it is enough to complete the offence. Thus, even the forgery of a name to an assignment of a bond is indictable, though there is no seal to the bond, as there still is a chance of fraud.[q] As has already been mentioned, it is not essential that an actual fraud should have been committed;[r] 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 apprized, he could not in fact defraud the prosecutor;[s] even though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him.[t]

§ 1494. The uttering and publishing a promissory note with forged en-

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[k] Cady *v.* Com. 10 Grattan, 776.
[l] State *v.* Ward, 2 Hawks, 443.
[m] State *v.* Wilkins, 7 Verm. 151.
[n] Ante, § 297, 631 5.
[o] Ante, § 1429.
[p] State *v.* Greenlee, 1 Dev. 523; ante, § 297, 1452.
[q] Penn'a *v.* Misner, Addison, 44.
[r] R. *v.* Crooke, 2 Strange, 901; R. *v.* Goate, 1 Ld. Raym, 737; ante, § 1428, 1439, 1452.
[s] R. *v.* Holden, R. & R. 154.
[t] R. *v.* Shepherd, R. & R. 169; see R. *v.* Harvey, 2 B. & C. 261.

dorsements upon, 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. If by possibility the endorsers may be injured, the crime is perpetrated.[u]

§ 1495. At common law, indictments for forgery or uttering forged instruments must charge the offence to have been done with intent to defraud some particular person or corporation.[v] It is not necessary, however, it is said in Georgia, 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."[w]

§ 1496. In Massachusetts, if an indictment charges the forgery to be with intent to defraud an incorporated bank, and its corporate name is set forth, it is sufficient if it appear to be an incorporated bank within the statute.[x]

§ 1497. The defendant was indicted for forging a check on the president, directors, and company of the Manhattan Company; and 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 company; 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.[y]

6th. Averment of damage or injury.

§ 1498. As a general rule it is not necessary to aver or prove damage or injury to have accrued. It is enough if the instrument was calculated to defraud.[z]

Where a party is charged with counterfeiting or forging a check on a bank, it is sufficient to allege in the indictment, that he falsely made, forged, and counterfeited a certain check, with an intent to defraud, &c., setting forth the check in *hæc verba*, with the name of the drawer as appearing upon it; and it is not necessary to aver that by such forgery any person is affected or injured in his person or property.[a] But on the face of the indictment the instrument must be one by which the party

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[u] People *v* Rathburn, 21 Wen. 509.

[v] State *v.* Ordel, 2 Tr. Con. Rep. S. C. 758; 3 Brevard, 552; State *v.* Greenlee, 1 Devereux, 523; Roscoe's Cr. Ev. 400; Com. *v.* Goodenough, Thacher's C. C. 132; see as to general averment of intent, ante, § 297.

[w] State *v.* Calvin, &c., Charlton, 151.

[x] State *v.* Jones, 1 McM.; Com. *v.* Smith, 6 Serg. & Rawle; People *v.* Davis, 21 Wend. 309; People *v.* Peabody, 25 Wend., 472.

[y] People *v.* Cushing, 1 Johns. R. 320; R. *v.* Hanson, 1 C. & M. R. 334; ante, § 635.

[z] Hess *v.* State, 5 Ohio R. 12; Snell *v.* State, 2 Humph. 347; R. *v.* Croke, 2 Strange, 901; R. *v.* Goate, 1 Ld. Raym. 737; State *v.* Washington, 1 Bay, 120; Com. *v.* Ladd, 15 Mass. 526; R. *v.* Holden, R. & R. 154; West *v.* State, 2 Zabr. (N. J.) 202, ante § 1452, 1493.

[a] People *v.* Rynders, 12 Wend. 425.

whom it was alleged to have been intended to be defrauded, could have been injured.[b] It is enough, however, if there be a mere possibility to defraud.[c]

Where an indictment charged that C., *with intent to defraud* L., had falsely altered a receipt made to L., by a county treasurer, for the payment of certain taxes due from L. for a given year, so that the receipt in its altered form, represented the payment of a sum larger than that originally expressed therein, but did not aver any extrinsic circumstances giving to the receipt an operation beyond that imported by its terms it was held, that the indictment was bad because upon the face thereof the receipt had no legal efficacy as against L., and could not, therefore, in contemplation of law impair any of his rights.[cc]

7th. AVERMENT AS TO PERSON ON WHOM INSTRUMENT WAS PASSED.

§ 1499. As a general rule it is sufficient to aver generally that the defendant uttered the instrument as true, without saying to whom. In Iowa, however, it is necessary that the name of the person on whom the note is passed should be averred, or if not known, that such fact should be stated.[d]

Charging the defendant with passing counterfeit coin in payment to A., will not be sustained by evidence that the defendant passed it in payment to B., through A., who was the innocent agent of the prisoner in the transaction.[e]

VI. COINING.[f]

[The statutes of the United States on the subject of coining, and the decisions under them, are already given.[g]]

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[b] People *v.* Stearns, 21 Wend. 409; S. C. 23 Wend. 634; Clarke *v.* State, 8 Ohio, St. R. (N. S.) 630.

[c] Penn. *v.* Missner, Addis. 44; West *v.* State, 2 Zab. 212; People *v.* Rathbun, 21 Wend. 509; ante, § 1428, 1439.

[cc] Clark *v.* The State, 8 Ohio State R. (N. S.) 630.

[d] Buckley *v.* State, 2 Greenl., 162 [e] Rouse *v.* Stote, 4 Georg. 146.

[f] See, for forms of indictment, Wh. Prec., as follows:

(336) For making, forging and counterfeiting, &c., American coin, under act of Congress.
(337) Second count. Same, averring time of coining.
(338) Third count. Passing, &c.
(339) Fourth count. Same in another shape.
(340) Fifth count. Same specifying party to be defrauded.
(341) Counterfeiting half dollars, under act of Congress.
(342) Passing counterfeit half dollars, with intent to defraud an unknown person, under act of Congress.
(343) Second count. Same with intent to defraud R. K.
(244) Having coining tools in possession, at common law.
(345) Making, forging and counterfeiting, &c., foreign coin, quarter dollar, under act of Congress.
(346) Second count. Procuring forgery.
(347) Passing, uttering and publishing counterfeit coin of a foreign country, under act of Congress, specifying party to be defrauded.
(348) Debasing the coin of the United States, by an officer employed at the mint, under act of Congress.

[g] Ante, § 1308.

§ 1500. Congress, as already has been noticed,[h] has given the state courts concurrent jurisdiction in all cases of counterfeiting of United States coin; and in exercise of the authority thus deputed, the several legislatures have passed acts making the offence highly penal.[i] With few exeeptions, however, the United States Courts have had practically the sole control of all cases where the current federal coin is forged or altered.

§ 1501. An indictment may be maintained in the State Courts, for counterfeiting the United States coin, it being treated in the latter case as an offence against the State.[j]

In a prosecution for passing counterfeit money, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person using ordinary caution.[k] In England, under a similar statute, where the defendant had counterfeited the resemblance of a half guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was, the judges held that the offence was incomplete.[l] In a later case, where the defendants were taken in the very act of coining shillings, but the shillings coined by

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(349) Fraudulently diminishing the coin of the United States, under act of Congress.
(350) Uttering a counterfeit half guinea, at common law.
(351) Passing counterfeit coin, similar to a French coin, at common law.
(352) Counterfeiting United States coin, under the Vermont statute.
(353) Having in possession coining instruments, under the Rev. stats. of Massachusetts, c. 127, s. 18.
(354) Having in possession ten counterfeit pieces of coin, with intent to pass the same, under Rev. stats. of Mass., c. 127, s. 15.
(355) Having in custody less than ten counterfeit pieces of coin, under Rev. stats. of Massachusetts, § 16.
(356) Uttering and publishing as true a forged promissory note. Rev. stats. of Mass., ch. 127, § 2.
(357) For forging a promissory note. Rev. stats. of Mass., ch. 127, § 1.
(358) For counterfeiting a bank bill. Rev. sts. of Mass., ch. 127, § 4.
(359) For having in possession at the same time, ten or more counterfeit bank bills, with intent to utter and pass the same as true. Rev. sts. of Mass., ch. 127, § 5.
(360) Passing a counterfeit bank bill. Rev. sts. of Mass., ch. 127, § 6.
(361) Having in possession a counterfeit bank bill, with intent to pass the same. Rev. sts. of Mass., ch. 127, § 8.
(362) Making a tool to be used in counterfeiting bank notes. Rev. sts. of Mass., ch. 127, § 9.
(363) Having in possession a tool to be used in counterfeiting bank notes, with intent to use the same. Rev. sts. of Mass., ch. 127, § 9.
(364) Counterfeiting current coin. Rev. sts. of Mass., ch. 127, § 15.
(365) Uttering and passing counterfeit coin. Rev. sts., of Mass., ch., 127, § 16.
(366) Coining, &c., under the North Carolina statute.

[h] See ante, § 174–8; Sutton *v.* State, 9 Ham. 133; Com. *v.* Fuller, 8 Met. 313; contra, Rouse *v.* State, 4 Geo 136.

[i] See State *v.* Tutt, 2 Bailey, 44; Chew *v.* State, 1 Blackford, 198; Com. *v.* Fuller, 8 Met. 313.

[j] Sutton *v.* State, 9 Ohio, 133; Prigg *v.* Com. 16 Peters, 630; Fox *r.* Ohio, 5 Howard, U. S. 410; State *v.* Antonio, 3 Brev. 562; Manley *r.* People, 3 Seld. 295; Hendrick *v.* Com. 5 Leigh, 707; State *v.* Pitman, 1 Brev. 32; Sutton *v.* State, 9 Hammond, 133; Chew *v.* State, 1 Blackf. 198; Com. *v.* Fuller, 8 Metc. 313; though see Rouse *v.* State, 4 Ga. 136; Mattesin *v.* State, 3 Missouri, 421; State *v.* Shoemaker, 7 Ibid. 177.

[k] U. S. *v.* Morrow, 4 Wash. C. C. 733; U. S. *v.* Burns, 5 McLean, C. C. 24.

[l] 2 W. Bl. 682; 1 East, P. C. 164.

them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in diluted *aqua fortis*, before they could pass as shillings; the judges held that the offence was not yet consummated.[m] The same general view has been taken in this country.[n]

§ 1502. A person, it is said in Virginia, who takes base pieces of coin, which are brought to him ready made, having the impression and appearance of real coin, though of different color, and brightens them so as to give them the resemblance of real coin and render them fit for circulation, is guilty of counterfeiting. He completes the offence, and subjects thereby, to the penalties of the law, not only himself, but all who acted a part, and were present assisting in the transaction.[o]

The jury also found that the prisoner intended to make only a few counterfeit coins in England, with a view merely of testing the completeness of the apparatus before he sent it out to Peru. Held, that even to make a few coins in England with that object would be to commit the offence of making counterfeit coins, within the statute.[p]

The prisoner with intent of coining counterfeit half-dollars of Peru, procured dies in this country for stamping and imitating such coin. He was apprehended before he had obtained the metal and chemical preparations necessary for making counterfeit coins. It was held that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent, to support an indictment founded on it for a misdemeanor, although the same facts would not have supported an indictment for attempting to make counterfeit coin.[oo]

§ 1503. The staking counterfeit coin at a gaming table, as good money, is an attempt to utter or pass the same; and losing it at play is a passing of the same against law.[pp]

An indictment does not lie for forging a Spanish head pistareen, as it is not a coin of Spain made current by law in the United States.[q]

Under the Connecticut statute, aiding in the act of counterfeiting is within both the letter and reason of the law, as much as assisting in making the implement.[r]

§ 1504. In an indictment for uttering counterfeit coins, it is sufficient to describe them as "made and counterfeited" to the likeness and similitude of the good, true, and correct money and silver coins currently passing in the state and commonly called Spanish dollars.[s]

§ 1505. An indictment on the Virginia statute of 1834–5, c. 66, charging that the prisoner "did knowingly have in his custody, without lawful authority or excuse, one die or instrument, for the purpose of producing

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[m] 1 Leach, 165.
[n] U. S. *v.* Burns. 5 McLean, C. C. R. 24.
[o] Rasnick *v.* Com. 2 Virg. Cas. 356.
[oo] R. *v.* Roberts, 33 Eng. Law and Eq. 553.
[p] R. *v.* Roberts, 33 Eng. L. & E. 553.
[pp] State *v.* Beeler, 1 Brevard, 482.
[q] U. S. *v.* Gardner, 10 Pet. 618.
[r] State *v.* Stutson, Kirby, 52.
[s] Fight *v.* State, 7 Ham. 180.

and impressing the stamp and similitude of the current silver coin called a half dollar," (no further describing the die or instrument,) is insufficient.[t]

§ 1506. An indictment charging the defendant with having passed counterfeit "dollars," describes with sufficient certainty the character of the coin counterfeited.[u]

§ 1507. An indictment which alleges that the defendant had in his possession a coin, counterfeited in the similitude of the good and legal silver coins of this commonwealth, called a dollar, with intent to pass the same as true, knowing it to be counterfeit, is supported by proof that the defendant had in his possession a coin counterfeited in the similitude of a Mexican dollar, with such intent and knowledge.[v]

§ 1508. Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth, under pretence of trying whether it was good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor, saying it was not good; this (which is called ringing the changes) was holden to be an uttering within the meaning of the statute 16 G. 2, c. 28.[w]

§ 1509. The giving of a piece of counterfeit coin in charity was held not to be an uttering within the statute, although the party knew it to be a counterfeit; for there must be some intention to *defraud*.[x]

The giving of counterfeit coin to a woman, as the price of connection with her, was holden to be within the statute.

§ 1510. It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered.[y]

The presumption to be drawn from other attempts to pass counterfeit coin, or its possession on the person, has been already noticed.[z]

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[t] Scott's Case, 1 Robinson, 695.
[u] Peck *v.* The State, 2 Humph. 78.
[v] Com. *v.* Stearns, 10 Met. 256.
[w] R *v.* Franks, 2 Leach, 736.
[x] R. *v.* Page, 8 C. & P. 122, *sed quære*; see R. *v.* ——, Cox Cr. L. Ca. 250.
[y] R. *v.* Welch, 2 Den. C. C. 78; see R. *v.* Radford, 1 Den. C. C. 59; R. *v.* Ion, 2 Den. C. C. 475.
[z] Ante, § 631–39; 647–52.

CHAPTER II.

BURGLARY.

A. STATUTES.

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VI. INTENTION, § 1598.
VII. INDICTMENT, § 1607.

A.—Statutes.

United States.

§ 1511. *Burglary in vessel, boat, or raft.*—If any person upon the high seas, or in any of the other places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any vessel, boat, or raft; or if any person shall wilfully and maliciously cut, spoil, or destroy, any cordage, cable, buoys, buoy-ropes, headfast, or other fast, fixed to any anchor or moorings belonging to any vessel, boat, or raft; every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, and by imprisonment and confinement to hard labor not exceeding five years, according to the aggravation of the offence.—(Act of 3d March, 1825, sect. 4.)

Massachusetts.

§ 1512. *Burglary in dwelling-house in night-time, &c., and armed with dangerous weapons.*—Every person who shall break and enter any dwelling-house, in the night-time, with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, or after having entered with such intent, shall break any such dwelling-house, in the night time, any person being then lawfully therein, and the offender being armed with a dangerous weapon, at the time of such breaking or entry, or so arming himself in such house, or making an actual assault on any person being lawfully therein, shall suffer the punishment of death.—(R. S. ch. 126, sect. 9; see Larceny.)[a]

§ 1513. *Same not armed with dangerous weapon.*—Every person who shall break and enter any dwelling-house, in the night-time, with such intent, as is mentioned in the preceding section; or who, having entered with such intent, shall break such dwelling-house in the night time, the offender not being armed, nor arming himself in such house with a dangerous weapon, nor making an assault upon any person then being lawfully therein, shall be punished by imprisonment in the state prison, not more than twenty years.—(Ibid. sect. 10.)[b]

(*See, however, post* § 1706, *&c., where by a later statute those sections have been revised.*)

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[a] Since the passing of the statute of 1847, c. 13, for defining "the time of night-time in criminal prosecutions," it is sufficient to allege, generally, that the offence was committed in the night-time, without designating the particular hour of the night, and by such allegation is to be understood the period of night-time as defined in that statute. (Com. *v.* Williams, 2 Cushing, 583.)

[b] In an indictment on this section, charging the defendant with breaking and entering a dwelling-house in the night-time, with intent to commit a felony, it is not necessary to aver that the offence was committed "burglariously." (Tully *v.* Com. 4 Met. 357; see Th. & H. Prec. 67; Wh. Prec. 37.)

The Massachusetts stat. of 1839, c. 31, by prescribing the same punishment for breaking and entering, in the night-time, an office adjoining to a dwelling-house, with intent to steal therein, which was before prescribed by the Rev. Sts. c. 126, s. 11, for breaking and entering in the night-time, an office not adjoining to a dwelling-house, with the like intent, has not made it necessary, in an indictment for breaking and entering an office in the night-time, with intent to steal therein, to allege that the office was or was not adjoining to a dwelling-house. (Larned *v.* Com. 12 Met. 240.)

Where an indictment for breaking and entering a building, with intent to steal therein, is correctly framed, an additional charge, that the defendant committed a larceny therein though defective, and such as would not, of itself, be a sufficient indictment for larceny, is no cause for reversing a judgment rendered on a general verdict of guilty. (Ibid.)

NEW YORK.

§ 1514. *Burglary in the first degree.*—Every person who shall be convicted of breaking into and entering, in the night-time, the dwelling-house of another, in which there shall be at the time some human being, with intent to commit some crime therein, either,

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window, of such house, or the lock or bolt of such door, or the fastening of such window or shutter:[bb] or,

2. Breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present, aiding and assisting: or,

3. By unlocking an outer-door by means of false keys, or by picking the lock thereof, shall be deemed guilty of burglary in the first degree.—(2 R. S. 668, sect. 10.)[c]

§ 1515. *Burglary in the second degree.*—Every person who shall be convicted of breaking into any dwelling-house in the day-time under such circumstances as would have constituted the crime of burglary in the first degree, if committed in the night-time; shall be deemed guilty of burglary in the second degree.—(Ibid. sect. 11.)

§ 1516. Every person who shall be convicted of breaking into any dwelling-house in the night-time, with intent to commit a crime, but under such circumstances as shall not constitute the offence of burglary in the first degree, shall be deemed guilty of burglary in the second degree.—(Ibid. sect. 12.)

Every person who shall enter into the dwelling-house of another by day or by night, in such manner as not to constitute any burglary hereinbefore specified, with an intent to commit a crime; or being in the dwelling-house of another, shall commit a crime; and shall in the night-time break any outer-door, window, or shutter of a window, or any other part of such house, to get out of the same, shall be adjudged guilty of burglary in the second degree.—(Ibid. sect. 13.)

Every person who having entered the dwelling-house in the night-time, through an open outer-door or window or other aperture, not made by such person, shall break any inner-door of the same house, with the intent of committing any crime, shall be adjudged guilty of burlary in the second degree.—(Ibid. sect. 14.)

Every person who being admitted into any dwelling-house with the consent of

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In an indictment on the Rev. Sts. of Massachusetts, c. 126, s. 10, charging the defendant with breaking and entering a dwelling-house in the night-time, with the intent to commit a felony, it is not necessary to aver that the offence was committed "burglariously." (Tully *v.* Com. 4 Met. 357.) This case, however, has been much doubted. (See 6 Law Rep. (N. S.) 199.)

The offence of breaking and entering in the night-time "a house not occupied as a dwelling-house, and committing a larceny therein, constitutes only a larceny." (Wilde *v.* Com., 2 Met. 408.)

Upon a general verdict of guilty on an indictment charging, in one count, the breaking and entering a dwelling house in the day-time with intent to steal and actually stealing therefrom, the convict is to be sentenced as for house-breaking, and is not liable to a distinct sentence for larceny. (Com. *v.* Hope, 22 Pick. 1.)

In an indictment on statute in Massachusetts of 1804, c. 143, s. 4, for breaking and entering an office in the night-time, it was not necessary to aver, in the words of the statute, that the office was "not adjoining to or occupied with a dwelling-house." (Devoe *v.* The Com., 3 Met. 316; but see Com. *v.* Tuck, 20 Pick. 356.

[bb] Under statute 2, Rev. Sts. 668, to constitute burglary, there must be a breaking of an outside fastening, and to take property after entering through an open window and committing a real or technical breaking upon an inside fastening, is larceny only. People *v.* Fralick, Hill & Denio (N. Y.) 63.

[c] See for form of indictment Wh. Prec. 372.

the occupant thereof, or who, being lawfully in such house, shall in the night-time break any inner-door of the same house, with the intent of committing any crime, shall be adjudged guilty of burglary in the second degree.—(Ibid. sect. 15.)

No building shall be deemed a dwelling-house, or any part of a dwelling-house, within the meaning of the foregoing provisions, unless the same be joined to, immediately connected with, and part of a dwelling-house.—(Ibid. sect. 16.)

§ 1517. *Burglary in the third degree.*—Every person who shall be convicted of breaking and entering in the day or in the night-time,

1. Any building within the curtilage of a dwelling-house, but not forming a part thereof: or,

2. Any shop, store, booth, tent, warehouse, or other building in which any goods merchandise, or valuable thing shall be kept for use, sale or deposit, with intent to steal therein, or to commit any felony, shall, upon conviction, be adjudged guilty of burglary in the third degree.—(Ibid. sect. 17)

Every person who shall be convicted by breaking and entering into the dwelling-house of another, in the day-time, under such circumstances as would have constituted the offence of burglary in the second degree, if committed in the night-time, shall be deemed guilty of burglary in the third degree.—(Ibid. sect. 18.)[cc]

The breaking out of any dwelling-house, by any person being therein, shall not be deemed such a breaking of a dwelling-house, as to constitute burglary in any case other than such as are herein particularly specified.—(Ibid. sect. 19.)

The breaking of the inner-door of any house, by any person being therein, shall not be deemed such a breaking of a dwelling-house, as to constitute burglary in any case other than such as are herein particularly specified.—(Ibid. sect. 20.)

§ 1518. *Punishment.*—Burglary in the first degree shall be punished by imprisonment, in a state prison for a term not less than ten years; burglary in the second degree, shall be punished by imprisonment in a state prison, for a term not more than ten years, nor less than five years: and burglary in the third degree, shall be punished by like imprisonment for a term not exceeding five years.—Ibid. sect. 21.)

PENNSYLVANIA.

§ 1519. *Burglary.*—If any person shall, by night, wilfully and maliciously break or enter into the state capitol, or other public building belonging to the commonwealth, or to any city or county thereof, or to any body corporate, society or association, or into any church, meeting-house or dwelling-house, or out-house, parcel of said dwelling-house, with an intent to kill, rob, steal or commit a rape, or any felony whatever, whether the felonious intent be executed or not, the person so offending shall on conviction, be adjudged guilty of felonious burglary, and be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.[*] —(Rev. Act, Bill I., sect. 135.)

[cc] An indictmement for burglary in the third degree, (that is breaking and entering, &c., in the day-time,) need not state that the offence was committed in the day-time. (Butler *v.* People, 4 Denio, 68.)

[*] Of this the revisers say:—This section is a consolidation and amendment of the the various acts of Assembly providing against and punishing burglary. The proviso to this section is introduced to avoid a technical difficulty in the proof of the crime which sometimes occurs. The acts of Assembly alluded to, are the twelfth section of the act of 31st May, 1818, entitled "An Act for the advancement of justice, and the more certain administration thereof." 1 Smith, 105. Brightly's Digest, 106, No. 1. Second section of the act 21st March, 1772, entitled "A supplement to the act, entitled 'An Act for the advancement of justice, and the more certain administration thereof.'"

§ 1520. *Entering a dwelling-house in the day-time to commit felony.*—If any shall, in the day-time, break and enter any dwelling-house, shop, warehouse, store, mill, barn, stable, out-house or other building, or wilfully and maliciously, either by day or by night, without breaking, enter the same with intent to commit any felony whatever therein, the person so offending shall be guilty of felony, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement, at hard labor, not exceeding four years.[b]—(Ibid. sect. 136.)

VIRGINIA.

§ 1524. *Burglary—punishment and definition.*—Any free person who shall be guilty of burglary, shall be confined in the penitentiary not less than five nor more than ten years. If a person break and enter the dwelling-house of another in the night-time, with intent to commit larceny, he shall be deemed guilty of burglary, though the thing stolen or intended to be stolen, be of less value than twenty dollars.[c]—(Code, 1849, chap. 192, sect. 11.)

§ 1525. *Entry without breaking dwelling-house, office, shop, banking-house, &c., ship or vessel.*—If a free person shall in the night, enter without breaking, or shall, in the day-time, break or enter a dwelling-house, or an out house adjoining thereto, and occupied therewith, or shall in the night-time enter without breaking, or break and enter either in the day-time or in the night-time, any office, shop, storehouse, warehouse, banking-house, or other house, not adjoining to or occupied with a dwelling-house, or any ships or vessels within the jurisdiction of any country, with intent to commit murder, rape or robbery, he shall be confined in the penitentiary not less than three nor more than ten years.—(Ibid. sect. 12.) See § 1526 (*a*).

§ 1526. *Punishment.*—If a free person do any of the acts mentioned in the preceding section, with intent to commit larceny or any felony other than murder, rape, or robbery, he shall be confined in the penitentiary not less than one nor more than ten years, or at the discretion of the jury if the accused be white, or of the court, if he be a negro, be confined in jail not less than one or more than twelve months, and in the latter case may also be punished, at the discretion of the court, with stripes —(Ibid. sect. 13.)

§ 1526. (*a*) If a free person shall in the night enter without breaking, or shall in the day-time break and enter a dwelling-house, or an out-house adjoining thereto, and occupied therewith, or shall in the night-time enter without breaking, or break and enter either in the day-time or night-time, any office, shop, storehouse, warehouse, banking-house, or other house, or any ship or vessel, within the jurisdiction of any county, with intent to commit murder, rope, or robbery, he shall be confined

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1 Smith's Laws, 382. Brightly's Digest, 109, No 2. The second section of the act 5th April, 1790, entitled "An Act to reform the penal laws of this State." 2 Smith's Laws, 531. Brightly's Digest, 107, No. 3, and the fourth section of the act of 23d April, 1829, entitled "A further supplement to an act, entitled 'An Act to reform the penal laws of this Commonwealth.'" 10 Smith's Laws, 430. Brightly's Digest, 107, No. 4. The restriction contemplated by those acts for property feloniously taken, has been provided for in the bill regulating criminal procedure, by a general section, embracing all cases in which such restitution is to be made.

[b] "This section is new, and provides against the breaking and entering of any of the buildings therein enumerated, either by day or by night, or entering the same without breaking, by day or night, with intent to commit any felony whatever therein. This is intended to meet a class of cases of frequent occurrence in our large cities, where plunder of this sort is reduced to a system." Reviser's Report.

[c] See 4 Leigh, 652; 3 Gratt, 593.

in the penitentiary not less than three nor more than ten years.—(Act March 29, 1858, sect. 1.)

OHIO.

§ 1527. *Burglary in dwelling-house, kitchen, church, school, &c.*—That if any person shall, in the night season, wilfully, maliciously, and forcibly, break and enter[e] into any dwelling-house, kitchen, smoke-house, shop, office, storehouse, warehouse, malt-house, still-house, mill, pottery, factory, water-craft, school-house, church, or meeting-house, with intent to kill, rob, commit a rape, or with intent to steal property of any value, or to commit any deed by this act made criminal; every person so offending shall be deemed guilty of burglary, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor for not more than ten nor less than three years.—(Act of March 2, 1835, Swan's St., sect. 14.)

§ 1528. *Entering in day or night, dwelling, &c., with intent to commit certain offences.*—That if any person shall wilfully and maliciously, either in the day-time or night season, enter any dwelling-house, kitchen, shop, store, warehouse, malt-house, still-house, mill, factory, pottery, water-craft, school-house, church or meeting-house, smoke-house, barn or stable, and shall attempt to kill, disfigure, or maim any person, rob, stab, commit a rape or arson; every person so offending, his or her aidors or abettors, counsellors or procurers, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than ten years, nor less than one year.—(Act of March 7, 1834, Swan's Stat. sect. 16, 271.)

§ 1529. *Breaking open house in the night and committing, or attempting to commit personal violence.*—That if any person shall, in the night season, unlawfully break open and enter[f] any mansion, house, shop, store, ship, boat, or other water-craft, in which any person shall reside or dwell, and shall commit, or attempt to commit any personal violence, or abuse, or shall be so armed with any dangerous weapon as to indicate a violent intention, the person so offending shall upon conviction thereof, be fined in any sum not exceeding three hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding thirty days, at the discretion of the court.—(Act of March 8, 1831, Swan's Stat. sect. 1, 284.)

§ 1530. *Committing like offence in the day.*—That if any person shall, in the day-

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[e] In an indictment for burglary with intent to steal goods and chattels, it is not necessary to aver what specific goods were intended to be stolen.

The term "goods and chattels," imports value, and it is not necessary under the statute to aver any certain value. Proof of their value is not necessary on trial.

In an indictment for burglary, a description of the premises, as "the warehouse of W. M., at Sciota county," is sufficient. (Spencer *v.* State, 13 Ohio, 401.)

In an indictment for burglary, it is sufficient to lay the ownership of the house in a married woman who lives apart from her husband, and has the occupancy and control of the dwelling.

Proof of a constructive breaking, at common law, is sufficient to warrant a conviction under the Ohio statute, which provides against a *forcible* breaking and entry. (Ducher *v.* State, 18 Ohio, 308.)

For forms of indictment under this stat. see Wh. Prec. 379-80, &c.

[f] A married woman is incapable in law to give consent to the breaking and entering of her husband's house with a view to the commission of adultery with herself.

An indictment for house-breaking, and committing whilst in the house an assault and battery under the statute, must aver that some person resided in the house. (Forsyth *v.* State, 6 Ohio, 19.)

time, unlawfully break open and enter any mansion, house, shop, store, ship, boat or other water-craft, in which any person shall, or may dwell or reside, and shall commit or attempt to commit, any personal abuse, force or violence, he or she so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding twenty days, at the discretion of the court.—(Ibid. sect. 2.)[f]

§ 1530. (*a*) *Breaking in day-time, &c., with intent to steal.*—If any person shall wilfully and maliciously, in the day-time, break and enter any dwelling-house, kitchen, shop, store, warehouse, malt-house, still-house, mill, factory, pottery, water-craft, school-house, church or meeting-house, smoke-house, barn, stable, railroad depot, car factory, station-house or railroad car, with intent to steal, every person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding three hundred dollars, and be imprisoned in the cell of the county jail, and be fed on bread and water only, not exceeding sixty days, at the discretion of the court.—(Act of March 25, 1844, sect. 1.)

§ 1530. (*b*) *Crime of burglary defined.*—That section fourteen of an act, entitled "An act providing for the punishment of crimes," passed March seventh, eighteen hundred and thirty-five, be amended so as to read as follows: Section 14. That if any person shall, in the night season, wilfully, maliciously, and forcibly break and enter into any dwelling-house, kitchen, smoke-house, shop, office, storehouse, warehouse, malt-house, still-house, mill, pottery, factory, water-craft, school-house, church or meeting-house, barn or stable, with intent to kill, rob, commit a rape, or with intent to steal property of any value, or to commit any deed made criminal by this act, or the act to which this is amendatory, every person so offending shall be deemed guilty of burglary, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than ten or less than one year.—(Act of April 3, 1857, sect. 1.)

That the original section fourteen of the act aforesaid be and the same is hereby repealed.—(Ibid. sect. 2.)

B.—Burglary at common law.

§ 1531. Burglary, at common law, is the breaking and entering the dwelling house of another in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not.[g] In the examination of burglary, the following points are to be considered:—

I. BREAKING, § 1532.
II. ENTRY, § 1549.
III. DWELLING-HOUSE, § 1555.
IV. OWNERSHIP, § 1577.
V. TIME, § 1592.
VI. INTENTION, § 1598.
VII. INDICTMENT. § 1607.

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[f] For forms of indictment under this stat. see Wh. Prec. 369, 380, &c.

[g] Hale's Sum. 49; 1 Russ. on Cr. 6 Am. ed. 786; 4 Bla. Com. 227; 1 Root, 59. State *v.* Wilson, Coxe, 441; Com. *v.* Newell, 7 Mass. 247.

I. Breaking.

1st. Entering door or window partially open.

§ 1532. There must be an actual or constructive breaking into the house.[h] Every entrance into the house by a trespasser is not a breaking. There must be evidence to prove that the doors were shut,[i] for, should the door of a mansion-house stand open, and the thief enter, this is not breaking. When the window of the house is open, and a thief, with a hook, or other instrument, draws out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaks the glass of a window, and, with hook or other instrument, draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house.[j] Where a window was a little open, and not sufficiently so to admit a person, and the prisoner pushed it wide open and got in, this was held to be no sufficient breaking;[k] though it is otherwise if the door is closed, in which case it is not necessary to constitute the difference that the door should be latched.[l] When there is room enough in a cellar-window to admit light, through which a thief enters in the night, this is not burglary.[m]

It is admissible for the prosecution to show that the street door and room door were generally kept shut, and that both were latched ten or fifteen minutes before the entry, in the absence of evidence of their condition at the precise time of the entry, and that raising the latch of the outer door with a felonious intent constituted the offence of burglary at common law.[mm]

2d. Where the place broken into is not part of the dwelling house.

§ 1533. Where the prisoner opened the area gate with a skeleton key, and from the area passed into the kitchen, through a door which it appeared was open at the time, the judges held, that opening the area gate was not a breaking of the dwelling-house, as there was no free passage at the time from the area into the house.[n]

Removing a loose plank, (not fixed to the freehold,) in a partition-wall of a building, is not a breaking.[o]

§ 1534. The breaking of the outside fence of the curtilage of a dwelling-house, which opened not into any building, but into a yard only, was holden not to be the breaking of the dwelling-house. In this case the pre-

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[h] 1 Russ. on Cr. 6 Am. ed. 786.
[i] State *v.* Wilson, Coxe, 439.
[j] 3 Inst. 64; 1 Hale, 551, post, § 1542.
[k] R. *v.* Smith, Car. C. L. 293; R. & M. 178, S. C., post, § 1542, 1544.
[l] State *v.* Boon, 13 Ired. 244.
[m] R. *v.* Lewis, 2 Car. & P. 628; R. *v.* Spriggs, 1 Moo. & R. 357.
[mm] People *v.* Bush, 3 Parker, C. R. (N. Y.) 552.
[n] R. *v.* Davis, R. & R. 322.
[o] Com. *v.* Trimmer, 1 Mass. 476; see R. *v.* Paine, 7 C. & P. 135, and remarks of Mr. Greaves, 1 Rus. on Cr. 790.

mises consisted of a dwelling-house, ware-house and stable, surrounding a yard; there was an immediate entrance to the dwelling-house from the street, and a gate and gateway, under one of the ware-houses, leading into the yard; the prisoner entered the premises by breaking this gate; the judges held, that this was not burglary; that breaking this gate, which was part of the outward fence of the curtilage, and not opening into any of the buildings, was not a breaking of any part of the dwelling-house.[p]

3d. Breaking through outer covering.

§ 1535. Cutting and tearing down a netting of twine, which is nailed to the top, bottom and sides of a glass-window, so as to cover it, and entering the house through such window, though it be not shut, constitute a sufficient breach and entry.[q] But where a shutter-box partly projected from a house, and adjoined the side of the shop-window, which side was protected by wooden panelling, lined with iron, it was held, that the breaking and entering the shutter-box did not constitute burglary.[r] And where the only covering to an open space in a dwelling-house, was a cloak hung upon two nails at the top and loose at the bottom, and it was removed from one of the nails: it was doubted whether that was a sufficient breaking to constitute a burglary.[s]

4th. Breaking on the inside.

§ 1536. A burglary may be committed by a breaking on the inside; for though a thief enter the dwelling house in the night time, through the outer door being left open, or by an open window, yet if, when within the house he turn the key, or unlatch a chamber door, with intent to commit felony, this is burglary.[t] Where a servant, who sleeps in an adjacent room, unlatches his master's door, and enters his apartment with intent to kill him,[u] or to commit a rape on his mistress,[v] it is burglary.

Whether a guest at an inn is guilty of a burglary by rising in the night, opening his own door and stealing goods from other rooms, has been doubted.[w]

5th. Breaking chest or trunk.

§ 1537. Breaking open a chest or trunk is not, in itself, burglarious;[x] and according to the views of Mr. Justice Foster, the same rule holds good in relation to all other fixtures, which, though attached to the freehold, are intended only the better to supply the place of movable depositories.[y]

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[p] R. *v.* Bennett, R. & R. 289
[q] Com. *v.* Stephenson, 8 Pick. 354.
[r] R. *v.* Paine, 7 Car. & P. 135.
[s] Hunter *v.* Com. 7 Gratt. 641.
[t] R. *v.* Johnson, 2 East's P. C. 488; State *v.* Wilson, Coxe, 439.
[u] 1 Hale, 544; 2 East's P. C. 488; U. S. *v.* Bowen, 4 Cranch, C. C. 604.
[v] Gray's case, 1 Stra. 481.
[w] 1 Hale, 554; see R. *v.* Wheelden, 8 C. & P. 749.
[x] Fost. 108, 109; 2 East's C. P. 488,
[y] Fost. 109; see on this point, 1 Bennett & H. Lead. Cas. 531–2.

Thus, when the doors are open and the thief thereby enters, though he afterwards break open a chest or cupboard, it is not such a breaking as to constitute burglary.[z]

6th. Manual violence not necessary.

§ 1538. It is not necessary that there should be any demolition of the walls, or any manual violence, to constitute a breaking. Lord Hale says, "These acts amount to an actual breaking, viz.: opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched."[a] Where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken; this was ruled to be burglary by Ward, C. B., Powis and Tracy, Justices, and the Recorder; but they thought this the extremity of the law; and on a subsequent conference, Holt, C. J., and Powell, C. J., doubting and inclining to another opinion, no judgment was given.[b] In a later case, where an entry was effected by taking the glass out of a door, it was holden to be a burglary;[c] and so where a glass already cracked was burst through,[d] and where one partially broken was broken more largely.[e] Opening by a servant of a chamber door, fastened only by a spring lock, with intent to commit a rape on his mistress, is burglary.[f]

7th. Entrance by trick.

§ 1539. In cases where the offender, with intent to commit a felony, gains admission by some trick for the purpose of effecting it, the offence is burglary, for this is a constructive breaking.[g] Thus where thieves, having intent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they robbed the owner and bound the constable; this was held a burglary. So if admission be gained under pretence of business; or if one take lodgings with a like felonious intent, and afterwards rob the landlord; or get possession of a dwelling-house by false affidavits without any colour of title; and then rifle the house; such entrance being gained by fraud, will be burglarious.[h] The entry in such case, however, must be immediate.[i]

8th. Conspiracy with servant.

§ 1540. If a servant conspire with a robber, and let him into the house by night, this is burglary in both;[j] for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather

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[z] State *v.* Wilson, Coxe, 437.
[a] 1 Hale, 552; and see Pugh *v.* Griffiths, 7 A. & El. 836; R *v.* Widan, 7 C. & P. 432; R. *v.* Wheelden, 8 C. & P. 247; R. *v.* Hayms, 7 C. & P. 441.
[b] 2 East P. C. 487. [c] R. *v.* Smith, R. & R. 417. [d] R. *v.* Bird, 9 C. & P. 442.
[e] R. *v.* Robinson, R. & M. 327–8; R. *v.* Bird, 9 C. & P. 442.
[f] Gray's case, 2 East, P. C. 488, 1 Str. 481. [g] 2 East, P. C. 486.
[h] 2 East's P. C. 485. [i] State *v.* Henry, 9 Iredell, 463.
[j] 1 Hale, 553; 1 Hawk. c. 38, s. 14; R. *v.* Cornwall, 2 Str. 881.

aggravates than extenuates the guilt. But if a servant, pretending to ageee with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open.[j]

9th. Breaking by pulling, pushing or lifting.

§ 1541. Where an entry was effected, first into an outer cellar, by lifting up a heavy iron grating that led into it, and then into the house by a window: and it appeared that the window, which opened by hinges, had been fastened by means of two nails as wedges, but could notwithstanding be easily opened by pushing; the judges held that opening the window so secured was a breaking sufficient to constitute burglary.[k] When a window, however, or a door opening on hinges, is not fastened at all, it was once thought its opening would not be a breaking, within the definition of burglary. It is now ruled, however, that while there must be a breaking, removing or putting aside something material, which constitutes a part of the dwelling-house, and is relied on as a security against intrusion, yet if the door or window be shut, being kept in its place only by the pully weight,[l] it is not necessary to resort to locks, bolts or nails, a latch to the door or weight of the window is sufficient.[m]

§ 1542. At one time the English judges were divided on the question whether when the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened, it was burglary; the door having bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time.[n] Formerly the case was held within the definition of the offence.[o] Perhaps, however, there was a difference between these two cases in this, that in the latter case there were no inferior fastenings, but in the former there were, though not used. In a later case it has been held, that the lifting up of a trap door covering a cellar which was merely held in its place by its own weight, and which had no fastenings, because it being a new trap door, they had not been put on, is not a sufficient breaking to constitute a burglary.[p]

As has been seen, lifting a window already partially raised, is no burglary.[q] The present opinion, however, seems to be that a lifting of a closed window is a breaking sufficient to constitute burglary.[r]

10th. Entrance by chimney.

§ 1543. Entrance by a thief through the chimney is a breaking; for that is as much closed as the nature of things will permit.[s] And it would be a

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[j] R. *v.* Johnson, 1 Car. & Mar. 218.
[k] R. *v.* Hall, R. & R. 355.
[l] R. *v.* Haines, R. & R. 450.
[m] State *v.* Boon, 13 Iredell, 244; 1 Russell, by Greaves, 787.
[n] R. *v.* Cullen, R. & R. 157.
[o] Brown's case, 2 East's P. C. 487.
[p] R. *v.* Lawrence, 4 C. & P. 231; though see R. *v.* Russell, R. & M. 377.
[q] R. *v.* Smith, 1 Moody C. C. 178; R. *v.* Hyam, 1 Russ. by Greaves, 787; 7 C. & P. 441; ante, § 1532.
[r] R. *v.* Russell, R. & M. 377,
[s] 1 Hawk. c. 33, s. 4; 4 Bla. Com. 226.

burglarious breaking to constitute burglary, though the party does not enter any of the rooms of the house. Where the prisoner got in at a chimney, and lowered himself a little way down, just above the mantel-piece of a room on the ground floor, the majority of the judges held, that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself was an entry therein.[t]

11th. Where there is an aperture already open.

§ 1544. If the window of a house be left open,[u] or where there is an aperture in the wall, roof, or cellar, to admit light or air, through which the entry is made, this is no breaking.[v] The opening of a folding or trap door, however, covering such aperture by its own weight, though itself unlatched, is burglary.[w]

12th. Entering by the master's connivance.

§ 1545. If a servant, with his master's assent, pretend to agree with a robber, and opens the door and lets the latter in, this is no burglary.[x]

13th. Breaking out of a house.

§ 1546. Doubts having been entertained whether when a thief got in a house without breaking, it was burglary to break out, the Stat. 12 Anne, c. 1, § 7, make such a breaking out burglary. Under this statute it has been held burglary to break open a door, window or skylight in the attempt to escape, though the prisoner only get his head through;[y] and even for a lodger, who enters lawfully, to break out after committing a felony.[z]

14th. Evidence of breaking.

§ 1547. How far circumstantial evidence is admissible to prove the breaking has been already considered.[uu]

15th. Terror without breaking, producing surrender of goods.

§ 1548. Where the owner either from apprehension of the force, or with the view more effectually to repel it, opens the door, through which the robber enters, this is burglary.[vv] But if on a mere assault the owner throws out money, this, it seems, is not burglary.[ww]

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[t] R. v. Brice, R. & R. 450.
[u] R, v. Smith, 1 Moody C. C. 178.
[v] R. v. Lewis, 2 C. & P. 628; R. v. Spriggs, 1 M. & R. 357; State v. Boon, 13 Iredell, 244; ante, § 1532.
[w] R. v. Brown, 2 East, P. C. 488; R. v. Callan, R. & R. 157; R. v. Russell, R. & M. 377.
[x] R. v Johnson, Car. & M. 218; Roscoe's Cr. Ev. 345.
[y] R. v. McKearney, Jebb's C. C. 99; R. v. Lawrence, 4 C. & P. 231; R. v. Compton, 7 C. & P. 231.
[z] R. v. Wheeldon, 8 C. & P. 7 7.
[uu] Ante, § 732, 854–5.
[vv] 2 East, P. C. 486; Hawkins, ch. 38, s. 4; R. v. Swallow, 1 Rus. on Cr. 792.
[ww] 2 East, P. C. 486; see 1 Bennet & H. Lead. Cas. 539.

II. Entry.

§ 1549. The entry is essential to the constitution of the offence. When both entry and breaking take place in the night, it is not necessary that both should be at the same time; therefore if thieves break a hole in the house one night with intent to enter another night, and commit felony, which they execute accordingly, it is burglary.[xx] When the thief breaketh the house, and his body or any part thereof, as his foot or his arm, is within any part of the house, it is deemed an entry, or when he putteth a gun into a window which he hath broken, (though the hand be not in) or into a hole of the house which he hath made, with intent to murder or kill; this is an entry and breaking of the house; but if he doth barely break the house, without any such entry at all, this is no burglary.[yy]

§ 1550. Where the prisoner introduced his hand through a pane of glass, which he had broken, between an outer window and an inner shutter, for the purpose of undoing the window-latch, it was considered a sufficient entry.[zz] The same is the case of the mere introduction of the offender's finger.[a] On the trial of George Gibbon, Old Bailey, June, 1752,[b] who was indicted for burglary in the dwelling-house of John Allen, it appeared in evidence that the prisoner in the night-time cut a hole in the window-shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole took out watches and other things, which hung in the shop, within his reach, but no entry was proved, otherwise than by putting his hand through the hole; this was held to be burglary, and the prisoner was convicted. In another case, thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold. This was deemed burglary by high authority.[c]

It has been said that discharging a loaded gun into a house is a sufficient entry.[d]

An entry down a chimney is a sufficient entry into a house, for the chimney is a part of the house.[e] An entry, however, through a hole in the roof left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening, and needs protection; whereas if a man choose to leave a hole in the wall or roof of his house instead of a fastened window, he must take the consequences.[f]

§ 1551. Where a hole was bored through the door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house, yet as the instrument was not introduced for the purpose of taking the pro-

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[xx] 1 Hale, 551.
[yy] 3 Inst. 54; 2 East's P. C. 490.
[zz] R. *v.* Bailey, R. & R. 341.
[a] R. *v.* Davis, R. & R. 499; and see 1 Hale, 533.
[b] Fost. 107; 2 East's P. C, 490.
[c] 2 East's P. C. 490.
[d] 1 Hawk. c. 38, s 11; 1 Hale, 355; 4 Camp. 220; Pickering *v.* Rudd, 1 Stark. 48.
[e] R. *v.* Brice, R. & R. 450.
[f] R. *v.* Sprigggs, 1 Moo. & Rob. 347.

perty, or committing any other felony, it was decided that this was not sufficient to constitute burglary.[g]

§ 1552. In a case where the house was broken and not entered, and the owner for fear threw out his money, it was holden to be no burglary; though clearly robbery, if taken in the presence of the owner.[h]

If the instrument with which the house is broken happen to enter the house, but without any intention on the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute burglary.[i]

§ 1553. In a case where the prisoner raised a window which was not bolted, and thrust a crow-bar under the bottom of the shutter, (which was about half a foot within the window,) so as to make an indent on the inside of the shutter, but from the length of the bar his hand was not inside the house, there was held not to be a sufficient entry to constitute burglary. And so, *a fortiori*, where he merely broke open the outer shutter, but did not get his hand through the glass pane.[k]

§ 1554. Where it appeared that the prisoner was a guest at an inn, and that in the night he left his own room and entered the bar-room and stole some money therefrom, it was held that as the guest had a legal right to enter the inn and the bar-room, his subsequent larceny did not relate back, and give a character to his entry, so as to make it illegal, and subject him to punishment for entering with a felonious intent, and that the conviction could not be sustained.[l]

III. Dwelling-house.

§ 1555. The breaking and entering, to constitute a burglary, must be into the dwelling-house of another, that is to say, a house in which the occupier and his family usually *reside*, or in other words dwell and lie in.[m]

§ 1556. It is now the better opinion that a church may be the subject of burglary;[n] though this was once doubted.[o]

§ 1557. Burglary may be committed in a house or shop standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be enclosed or open.[p] And a building used with a dwelling-house, and opening into an enclosed yard belonging thereto, was deemed parcel of the dwelling-house, though it also opened into an adjoining street, and though it had no internal commu-

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[g] R. *v.* Hughes, 5 East's P. C. 491. [h] 2 East's P. C. 490.

[i] C. *v.* Rust and Ford, R. & M. 184; Car. C. L. 293, S. C.; R. *v.* Roberts, 2 East's P. C. 487.

[j] R. *v.* Rust & Ford, R. & M., 184; Car. C. L. 293, S. C., by the name of R. *v.* Roberts.

[k] State *v.* McCalf, 4 Ala. 643.

[l] State *v.* Moore, 12 N. Hamp. 42. [m] See 2 Russ. on Cr. 6 Am. ed. 797.

[n] 3 Inst. 64; 1 Hale, 556; R. *v.* Baker, 3 Coxe C. C. 581, see 2 Bennett & Heard's Lead. Cas. 54, 1 Russell, by Greaves, 826.

[o] 1 Hawk. c. 38, s. 17.

[p] See State *v.* Langford, 1 Devereux, 253; State *v.* Wilson, 1 Hayw. 242; State *v.* Twitty, 1 Hayw. 102; 1 Leach, 357. People *v.* Snyder, 7 Parker, C. R. 23.

nication with the dwelling-house.[q] In a case where the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined, all which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c., making altogether an enclosed yard; the work-shop had no internal communication with the house, and it had a door opening into the street; its roof was higher than that of the dwelling-house; the street door of the work-shop was broken open in the night, and the offender being indicted for burglary and convicted, the judges held this work-shop was parcel of the dwelling, and that the conviction was right.[r]

§ 1558. On the trial of an indictment for a burglary, it appeared that adjoining to the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house; and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roofs of the dwelling-house, kiln, and dairy were of different heights. It was held, that the dairy was not a part of the dwelling-house, and that a burglary could not be committed by breaking into it.[s] A store-house, two hundred and fifty yards distant from the dwelling, (in which last the owner usually slept,) which was on the opposite side of the road—to which there was no chimney—in which there was no bed or bedstead, but in which the owner sometimes slept twice a week, and at other times not once in two weeks, was held not to be a dwelling-house, in any sense of the word, and, therefore, that burglary could not be committed by breaking into it.[ss] A smoke-house, opening into the yard of a dwelling-house, and used for its common and ordinary purposes, is, in law, a part of the dwelling-house, and in the breaking and entering of which a burglary may be committed.[t]

§ 1559. The cabin of a vessel is a "shop," and a barn not connected with the mansion house is an "out-house," within the meaning of the Connecticut statute for the punishment of burglary.[tt]

§ 1560. In a case where the prisoner broke into a goose-house opening into the prosecutor's yard, into which his house also opened, and the yard was surrounded partly by other buildings of the homestead and partly by a wall; some of the buildings had doors opening backward, and there was a gate in one part of the wall opening upon a road; the goose-house was held to be a part of the dwelling-house.[u]

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[q] R. *v.* Lithgo, R. & R. 357.
[r] R. *v.* Chalking, R. & R. 334.
[s] Regina *v.* Higgs, 2 Car. & Kir. 321.
[ss] State *v.* Jenkins, 5 Jones' Laws, (N. C.) 430.
[t] State *v.* White, 4 Jones' Laws, (N. C.) 349.
[tt] State *v.* Carrier, 5 Day, 131; State *v.* Brooks, 4 Conn. 466; see also, R. *v.* Hump 1 Root, 63; Aliter, of a district school-house, State *v.* Bailey, 10 Conn. 144.
[u] R. *v* Clayburn and another, R. & R. 660.

§ 1561. The general rule is, that if an out-house be so near the dwelling-house that it is used with the dwelling-house as appurtenant to it, though not within the same enclosure, burglary may be committed in it.[v] But if there be no common entrance, and the building be distinct, the offence does not exist.[w] The breaking into a store, in the night-time, when there was no fence enclosing the dwelling-house and the store, so as to bring them under one enclosure, and when the two were twenty feet apart, was held to be no burglary.[x] But where it is the practice of the owner and his servants occasionally to sleep in such store, the case is different.[y]

§ 1562. It has been holden that burglary might take place in respect of a building eight or nine yards distant from a dwelling-house, and with only a paling between them,[z] and an out-house in the yard of a dwelling-house was considered parcel of the dwelling-house if the yard was enclosed, though the occupier had another dwelling-house opening into the yard, and he let such dwelling-house with certain easements in the yard.[a] But then it was laid down, that if the out-house was at a considerable distance, as if it stood a bowshot from it, so as not to be reasonably esteemed parcel of the principal dwelling, nor within the curtilage, it would not answer to this description.[b] The present current of opinion seems to be that an out-house several feet from the mansion, and unconnected by any common enclosure, is not a place in which burglary can be committed.[c] A building separated from a dwelling-house by a public road, however narrow, was held not to be a parcel of the dwelling-house, if there was no common fence or roof to connect them, though it were held by the same tenure, and though some of the offices necessary to the dwelling-house adjoined it, and though there was an awning extending from it to the dwelling-house. But if it be made a sleeping-place for any of the servants of the dwelling-house, it may be deemed a distinct dwelling-house.[d]

§ 1563. A door which opens into no building, but into the yard only, and forms part of the outward fence of the curtilage, was not such a part of the dwelling-house as that the breaking thereof would constitute burglary.[e] An area gate, opening into the area only, was not deemed part of the dwelling-house, so as to make the breaking thereof burglary, if there was any door or fastening to prevent persons in the area from entering the house, although such door or fastening might not be secured at the time.[f] But in a case where a centre building was allotted to a variety of trades and there were two wings annexed to it, both of which were used as dwelling-houses, and were occupied by different persons, but had no internal

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[v] State *v.* Twitty, 1 Hayw. 102; Ammon *v.* State, 3 Humphreys, 379.
[w] State *v.* Langford, 1 Devereux, 253; State *v.* Gervis 1 N. & McCord, 583.
[x] People *v.* Parker, 4 Johns. 423; State *v.* Gervis, 1 N. & McCord, 583.
[y] State *v.* Wilson, 1 Hayw. 242. [z] 1 Hale, 558.
[a] Ry. & Mo. C. C. 13; and see Brown's case 2 East's P. C. 493.
[b] 1 Hale, 144. [c] Garland's case, 2 East's P. C. 493; 1 Leach, 144.
[d] Ammon *v.* State, 3 Humphrey, 379; R. *v.* Westwood, R. & R. 495.
[e] R. *v.* Bennet, R. & R. 239. [f] R. *v.* Davis, R. & R. 322.

communication with the building, though the roofs of all were connected, and the entrances of all were out of the same common enclosure, the case was considered otherwise, and it was holden not a dwelling-house for the purpose, being evidently a distinct tenement, and occupied jointly, the adjoining houses being the respective abodes of individuals.[g]

§ 1564. In Tennessee a house in which no member of the family slept, used for the sale of goods, was held not to be a part and parcel of the mansion house, though within thirty feet of it, and within a common enclosure.[h]

A two storied house of which the front room on the first floor was used as a store-house, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a sleeping room by the owner, while the clerks, who were unmarried men, and took their meals at a hotel, slept in the rooms on the second floor, is a dwelling-house, both within the common law definition of burglary, and under §§ 3308–9 of the Alabama code.[hh]

§ 1565. A building or house intended for and constructed as a dwelling-house, under repair, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed; for it cannot be deemed his dwelling-house, until he has taken possession, and begun to inhabit it.[i] If one of the workmen engaged in the repairs sleep there in order to protect it, it will not make any difference;[j] nor though the house is ready for the reception of the owner, and he has sent his property into it preparatory to his own removal, does it become in this aspect his mansion.[k] So in a case where the landlord of a house purchased the furniture of his out-going tenant, and procured a servant to sleep there in order to guard it, but without any intention of making it his own residence, a breaking into the house was considered not to be a burglary.[l]

§ 1566. The mere casual use of a tenement will not suffice.[m] Where neither the owner nor any of his family have slept in the house, it is not his dwelling-house, though he had used it for his meals and all the purposes of his business, and so a breaking into it is not a burglary.[n]

§ 1567. If a man die in his leasehold house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking it, and it may be laid to be the executor's property.[o]

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[g] Eggington's case, 3 East's P. C. 424; 2 B. & P. 508; 2 Leach, 915, S. C.

[h] Armour *v.* State, 3 Humph. 379.

[hh] Ex parte Vincent, 26 Ala. 145.

[i] 1 Leach, 185; Fuller's case, 2 East's P. C. 498; 1 Leach, 196; Elsmore *v.* St. Braivells, 2 M. & R. 514; 8 B. & Cress. 461, S. C.

[j] 1 Leach, 186.

[k] R. *v.* Hallard, 2 East's P. C. 498; R. *v.* Thompson, 2 East's P. C. 498; 2 Leach. 771.

[l] R. *v.* Davis, 2 Leach, 876; R. *v.* Smith, 2 East's P. C. 497; R. *v.* Fuller, 2 East's P. C. 498; 1 Leach 196.

[m] 1 Hale, 557.

[n] R. *v.* Martin, R. & R. 108.

[o] 2 East's P. C. 499.

§ 1568. A dwelling-house is deemed any permanent building in which a party may dwell and lie, and as such, burglary may be committed in it. A set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose.[p] So even a loft over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken.[q]

§ 1569 Burglary may be also committed in a lodging-room;[r] or in a garret used for a work-shop, and rented together with an apartment for sleeping, and if the landlord does not sleep under the same roof, the place may be laid as the mansion of the lodger.[s]

§ 1570. The offence cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it;[t] because it is not a permanent but a temporary edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house.[u] The occupation of a servant in that capacity, and not as a tenant, is in many cases the occupation of the master, and will be a sufficient residence to render it the dwelling-house of the master.[v] On the trial of an indictment for burglary, where the prisoner was charged with breaking into the dwelling-house of J. B., it appeared that J. B. worked for one W., who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some adjoining mills. J. B. received no more wages after than before he went to live in the house. It was held not rightly laid.[w]

§ 1571. If a servant live in a house of his master's at a yearly rent, the house cannot be described as the master's house, though it be on the premises.

§ 1572. To make it burglary it is not absolutely necessary that any person should be actually within the house at the time the offence is committed. For if the owner leaves it *animo revertendi*, though no person reside in it in his absence, it will still be his mansion.[y]

§ 1573. Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town, though neither the prosecutor nor his family had ever lodged in the house in which the crime is charged to have been committed, but merely visited it occasionally.[z]

§ 1574. Though a man leave his house and never mean to live in it again, yet if he use part of it as a shop, and let his servant and his family live and sleep in another part of it, for fear the place should be robbed, and

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[p] 1 Hale, 556; 1 Hawk. c. 38, s. 11.
[q] R. *v.* Turner, 1 Leach, 305.
[r] 1 Leach, 89.
[s] 1 Leach, 237.
[t] 1 Hawk. c. 38, s. 35; 1 Hale, 557.
[u] R. *v.* Smith, 1 M. & Rob. 256.
[v] R. *v.* Stock, R. & R. 185; R. *v.* Wilson, R. & R. 115.
[w] R. *v.* Rawlings, 7 Car. & P. 150.
[y] 1 Hawk. c. 37, s. 11.
[z] Com. *v.* Brown, 3 Rawle, 207; Foster, 77; 2 East's P. C. 496; R. *v.* Murray, 2 East's P. C. 496.

lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling house.[a] But in a case where the prosecutor, an upholsterer, left the house in which he resided with his family, without any intent of returning to live in it, and took a dwelling-house elsewhere, but still retained the former house as a ware-house and work-shop; two women, employed by him as workwomen in his business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house; the judges held that this was not properly described as the dwelling-house of the prosecutor.[b]

§ 1575. Where the prosecutor's house consisted of two rooms for residing in, another room used as a cellar, and a wash-house on the ground floor, and of three bed-rooms up stairs, one of them over the wash-house, and the bed-room over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house, and any of the rooms of the house, but the whole were under the same roof, and the defendant broke into the wash-house, and was breaking through the partition wall between the wash-house and the house-place; it was holden in this case that the defendant was properly convicted of burglary in breaking the house.[c]

§ 1576. A count may be inserted for breaking and entering a building within the curtilage, if there be any doubt as to the nature of the building broken and entered.[d] Within the meaning in the definition of burglary, a dwelling-house may be so divided as to form two or more dwelling-houses. The words mansion house sufficiently describes a dwelling-house.[e]

IV. Ownership.[f]

§ 1577. "If the rule," remarks Mr. East,[g] "by which to ascertain the ownership may be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person, there, if he inhabit it either by himself, his family, or servants, or even by his guests, the indictment must lay the offence to be committed against his mansion. And so it is if he let out apartments to inmates who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicil there, without any interference on the part of the proper owner, or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance, then the offence of breaking, &c., their separate

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[a] R. v. Gibbons, R. & R. 442.
[b] R. v. Flannagan, R. & R. 187.
[c] R. v. Burrows, R. & M. 274.
[d] Jervis's Arch. 9th ed. 306.
[e] Com. v. Pennock, 3 Serg. & Rawle, 199.
[f] As to the manner of averring the names of owners, &c., see ante, § 233–49, 595–8.
[g] 2 East's P. C. 499, 500.

apartments, must be laid to be done against the mansion house of such occupiers respectively."

§ 1578. Where it appeared that a servant lived in the house of his master at a yearly rent, it was ruled the house could not be described as the master's house, though it be on the premises where the master's business is carried on, and although the servant has it because of his service.[h]

§ 1579. Where a workman was employed at 15s a week wages, and a cottage free of rent and taxes, for himself and family to reside in, upon an indictment for burglary, the judge at the trial held, that as the workman did not occupy the cottage for the benefit or use of his master, but for his own benefit, it was well described as the dwelling-house of the workman: upon reference to the judges they were of the same opinion.[i]

§ 1580. Where a toll-gate house, erected by the trustees of a turnpike as and for the dwelling-house of the person who might be employed to collect the tolls at a particular gate, was broken and entered in the night-time; and upon an indictment for burglary, it appeared that the trustees had let the tolls to Ward, and Ward had employed Ellis (at weekly wages, with the liberty of living in the toll-house in question) to collect them, and that Ellis dwelt in the house for that purpose; the indictment having described this as the dwelling-house of Ellis, the judges held the description to be correct, for Ellis had the exclusive possession; it was unconnected with any premises of Ward's, and Ward did not appear to have any interest whatsoever in it.[j] And in a case where a servant lived rent free in a house belonging to his master, and his master, paid the taxes, and his master's business was carried on in the house; but the servant and his family were the only persons who slept in the house; and that part of the house in which his master's business was carried on, was at all times open to those parts in which the servant lived: upon an indictment for breaking and entering that part of the house in which the master's business was carried on, it was held that it might be described as the servant's house, though it was not decided that it might not also be described as the house of the master.[k]

§ 1581. Where the servant of three partners in trade had weekly wages, and particular rooms assigned to him, as lodging for himself and family, over the bank and brewery office of his employers, with which his lodging communicated by a trap-door and a ladder, it was holden by the twelve judges that a burglary committed in the banking room was well laid as in the dwelling-house of the three partners.[l] A gardener lived in a house of his master, quite separate from the dwelling-house of his master, and had the entire control of the house he lived in and kept the key; it was held

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[h] R. *v.* Jarvis, R. & M. 7; and see R. *v.* Smythe, 5 C. & P. 202.

[i] R. *v.* Jobling, R. & R. 525; and see R. *v.* Smythe, 5 C. & P. 202; R. *v.* Jarvis, R. & M. 7; post, § 1610.

[j] R. *v.* Camfield, R. & M. 42.

[k] R. *v.* Witt, R. & M. 248.

[l] R. *v.* Stockton, 2 Taunt. 339; 2 Leach, 1015; R. & R. 185, S. C.

that, on an indictment for burglary, the house might be laid either as his or his master's.[m]

§ 1582. If a house be tenanted by a married woman, it must in all cases be deemed the house of her husband and not of herself, even although she live separate from her husband.[o] If a married woman live apart from her husband, upon an income arising from property vested in trustees for her separate use, a house that she has hired to live in is properly described as the dwelling-house of her husband, though he has never been in it, and she paid the rent out of her separate property.[o] And if a wife be living apart from her husband, in a house built by him, though she be living in adultery with another man, who paid the house-keeping expenses, it may be laid as the dwelling house of the husband; even if the husband expected the criminal intercourse when he placed her to live in the house.[p]

§ 1583 A house, in part of which a man lives, and other parts of which he lets to lodgers, may be considered and described as his house, though he has taken the benefit of the insolvent debtors' act and executed an assignment including the house, if the assignee has not taken possession; at least, no objection can be made if in other counts it be stated as the house of the assignee, and in others of the lodger in whose room the burglary was committed.[q] On the trial it appeared that B. owned the building, that there were several apartments in the house, each occupied by a family, that the street-door was used in common by all, that A. occupied with his family one of these apartments, and that his was the room broken open. It was held, that it was properly laid as his dwelling-house.[qq]

§ 1584. A city hall may be described as the residence of the clerk of the company to whom it belongs, the punishment of burglary being intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose; it being absurd to suppose that the terror, which is of the essence of the crime, could from a breaking and entering in one place produce an effect in another.[r] The indictment alleged that the principal broke and entered "a building called a bank, being the bank of the New Hampshire Savings Bank in Concord." On the trial it appeared that the Merrimack County Bank owned the building in which the Savings Bank had their banking-rooms; that the owners occupied a distinct part of the building, entered by a separate outer door; that the Savings Bank had the exclusive occupation of their rooms, as tenants to the owners, and entered by another outer door, which also led to the other rooms in the building occupied by tenants. No part of the building

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[m] R. *v.* Rees, 7 C. & P. 568.

[o] Fars' case, Kel. 43; 2 East's P. C. 504; and see Bogett *v.* Frier, 1 East, 301; R. *v.* Smythe, 4 Car. & P. 202.

[o] R. *v.* French, R. & R. C. C. 491.

[p] R. *v.* Wilford, R. & R. 517.

[q] R. *v.* Ball, R. & M. C. C. 30.

[qq] People *v.* Bush, 3 Parker, C. R. (N. Y.) 552.

[r] 2 Leach, 931; 2 East's P. C. 501.

was occupied as a dwelling-house. It was held, that the rooms occupied by the Savings bank were properly described as their bank.[rr]

§ 1585. Where the chamber of a guest at an inn is forced open and his goods stolen, the burglary must be laid in the dwelling-house of the landlord.[s]

In all other cases where the occupier has the use merely and no interest in the apartments he occupies, it is the same.[t]

§ 1586. Where divers persons have several rooms in a house of which they keep the keys, and inhabit them severally with their families, yet if they enter at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. But if the owner inhabit no part of the house, or even if he occupy a shop or cellar in it, but do not sleep therein, the apartments of such inmates shall be considered as their respective dwelling-houses.[u]

§ 1587. If all internal communication be cut off by an actual severance, the apartments become distinct houses, so that if one house be divided to accommodate the families of two partners, though the rent and taxes of the whole be paid out of the common fund, each part will be regarded as a mansion.[v] But a house, the joint property of partners in trade in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of the partners resides in it.[w]

§ 1588. Where the owner lets out apartments in his house to other persons, and sleeps under the same roof, having but one outer-door common to him and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the one dwelling-house of the owner.[x] But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer-doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year.[y]

§ 1589. Where the prosecutor's servant dwelt in a part of the house, and the rest, (excepting the shop,) was let off to lodgers, the judges held that the shop which was in the prosecutor's occupation was properly described as the dwelling-house of the prosecutor.[z] In a case where the prosecutor, having a dwelling-house with a shop adjoining, with separate entrances from the street, but the shop having a back door into a passage in the house, let the shop to his son, who used it as a place of business only, and did not reside there, a burglary having been committed in the shop, the judges held that it was properly described in the indictment as

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[rr] State *v.* Rand, 33 N. H. 216.

[s] 1 Hale, 557; R. *v.* Prosser, 2 East's P. C. 502. [t] 1 Hawk. c. 38, s. 26.

[u] Carroll's case, 1 Leach, 237; Trapshaw's case, 1 Leach, 427; and see 1 Hawk. c. 38, s. 26.

[v] R *v.* Jones, 1 Leach, 537; 2 East's P. C. 504; Tracy *v.* Talbot, Salk. 532.

[w] R. *v.* Athea, R. & M. 329.

[x] Kel. 84. [y] 2 East's P. C. 505. [z] R. *v.* Gibbons, R. & R. 442.

the dwelling-house of the father.[a] If the owner let off a part, but do not dwell in the part he reserves for himself, then the part let off is deemed in law the dwelling-house of the party who dwells in it, whether it communicates internally with the other part or not; but the part he has reserved for himself is not the subject of burglary; it is not his dwelling-house, for he does not dwell in it; nor can it be deemed the dwelling-house of the tenant, for it forms no part of his lodging.[b] Where a coachman rented the loft over a coach-house and stables, and he and his family resided in it, a burglary committed in it was holden to be well laid to have been committed in the dwelling-house of the coachman.[c] The governor of the workhouse at Birmingham, under a contract for seven years with the guardians and overseers of the poor of that place, occupied and dwelt in the governor's house with the exception of one room, which the guardians and overseers reserved for themselves as an office, and three other rooms as store rooms; the clerk of the guardians and overseers keeping one key of the office, the governor another, for the purpose of securing the effects in case of fire, and the room was cleaned and taken care of by the governor's servant; this office being broken and entered in the night-time, ten of the judges held that it could not be described as the dwelling-house of the governor.[d] So where the owner of a dwelling-house, ware-house, and counting-house, within the same curtilage, let the dwelling-house to his ware-houseman at a yearly rent, the counting-house and ware-house being broken and entered in the night-time, the judges held this was not burglary; that the counting-house and ware-house could not be described as the dwelling-house of the master, because the dwelling-house was occupied by the ware-houseman as tenant, and not as servant; nor could they be described as the dwelling-house of the tenant, for they formed no part of his holding.[e] But, on the other hand, if the owner let the whole of a dwelling-house, retaining no part of it for his or his family's dwelling, the part occupied and dwelt in by each tenant is deemed in law to be the dwelling-house of such tenant, whether the parts holden by the respective tenants communicate with such other internally or not.[f]

§ 1590. In a case where a lodger occupied a sleeping-room on the first floor, and a work-shop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the work-shop was holden by the judges to be well laid to have been committed in the dwelling-house of the lodger who rented it.[g]

§ 1591. A man cannot be indicted for burglary in his own house. Therefore, if the owner of a house break and enter into the room of his lodger and steal his goods, he can only be convicted of larceny.[h]

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[a] R. *v.* Sefton, R. & R. 202.
[b] 1 Leach, 89, 237, 437.
[c] R. *v.* Turner, 1 Leach, 305.
[d] R. *v.* Wilson, R. & Ry. 115.
[e] R. *v.* Jervis, R. & M. 7; see R. *v.* Smythe, 5 Car. & P. 202.
[f] R. *v.* Bailey, R. & M. 23; R. *v.* Jenkins, R. & M. 23.
[g] R. *v.* Carrell, 1 Leach, 237; see also People *v.* Smith, 1 Harris, c. 329.
[h] Kel. 84; 2 East's P. C. 502, 506.

When the defendant is in possession under contract to purchase, an indictment laying the house as the property of another is bad.[hh]

V. Time.[i]

§ 1592. The breaking and entering must be in the night, though they need not be both in the same night, for if the defendants break a hole in the house one night, with the intent to enter another night, and commit felony, and they accordingly do so through the hole they so made the night before, this seems to be burglary, for the breaking and entering were both in the night; and, says Lord Hale, it shall be supposed that *they broke and entered in the night when they entered,* for the breaking makes not the burglary till the entry.[j]

§ 1593. The night-time extends from the termination of day-light, beginning at the time when the countenance ceases to be reasonably discerned to the earliest dawn of the next morning.[k]

It has been said in Vermont that the hour of the night must be averred, though the general opinion is to the contrary.[m]

§ 1594. If there be day-light or twilight enough, begun or left, whereby the countenance of a person may be reasonably discerned, a breaking and entering is not burglary by the common law.[n] An indictment alleging the crime to have been committed between the hours of twelve at night and nine of the evening succeeding, will be quashed for want of a *noctanter*.[o]

§ 1595. Circumstantial evidence is enough to prove the offence was committed in the night,[p] though no presumption of law will suffice for this purpose.[pp]

§ 1596. Where the prisoner took the glass out of a door on Friday night, with intent thereby to enter the house, and afterwards on the Sunday night, and before the glass was replaced, he entered by the aperture he had thus made, the judges held that the breaking being originally with the intent to enter, and the breaking and entering being both in the night-time, the offence amounted to burglary, notwithstanding the time that had elapsed between the breaking and the entry.[q]

§ 1597. In New Hampshire an indictment for burglary may be sustained by circumstantial evidence, and it is not necessary to show that the

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[hh] State *v.* Fish, 3 Dutch. 117.

[i] As to the pleading and proof of time, see ante, § 270–5, 600.

[j] In Massachusetts, "whenever, in any criminal prosecution, an offence is alleged to have been committed in the night-time, the time called night-time shall be deemed and be considered to be the time which existed between one hour after the sun-setting on one day, and one hour before sun-rising on the next day; and in all cases the time of sun-setting and sun-rising shall be ascertained according to mean time, in the place where the offence was committed. (Gen. Laws Mass. Sess. 1847, chap. 13.)

[k] State *v.* Bancroft, 10 Mass. 105.

[l] State *v.* G. S., 1 Tyler, 295; Conner *v.* State, 14 Mis. 561; see ante, § 270; post, § 1612.

[m] Ante, § 270.

[n] Com. *v.* Chevalier, 7 Dana's Ab. 134; though see Thomas *v.* State, 5 Howard's Miss. 20.

[o] State *v.* Mather, Chip. 32.

[p] State *v.* Bancroft, 10 New Hamp. 105.

[pp] State *v.* White, 4 Jones' Laws, (N. C.) 349.

[q] R. *v.* Smith, R. & R. 417.

entry could not have been made in the day-time.[r] It is not material to the crime of burglary in Mississippi, that it would not, when committed, be light enough to distinguish a man's face.[s]

VI. Intention.

§ 1598. The indictment should charge the breaking to be with an intent to commit a felony. Though the express averment of such intent may be supplied when a felony is distinctly laid to have been committed,[t] yet it is always safer to particularly aver the felonious intent.[u]

§ 1599. An intention to commit a rape, or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law, because wherever a statute makes any offence felony, it incidentally gives it all the properties of felony at common law.[v]

If the breaking and entering be at different times, both must appear to have been done with the same felonious intent.[w]

§ 1600. The intent may be inferred from the facts.[x] Thus where a man was found in the night-time in the chimney of a shop, just above the mantel-piece, and before he had entered the shop, the jury found him guilty of burglary with the intent to steal, upon this evidence only, and the judges confirmed the conviction.[y] If the prisoner actually committed a felony, after he had entered the house, this is satisfactory evidence, and almost conclusive, that the intent with which he broke the house was to commit that felony. The very fact of a man's breaking and entering a dwelling-house in the night-time, is strong presumptive evidence that he did so with intent to steal, and the jury will be warranted in finding him guilty, unless the contrary be proved.[z]

The intent with which one charged with burglary entered one store, may be shown by proof tending to show a felony committed by him at the same time in an adjoining store.[zz]

Whether the felonious intent be executed or not, is immaterial; they are burglars who break into any house or church in the night with a felonious intent, although they take nothing away. It is in this point that burglary differs from robbery, which requires that something be taken, though it be not material of what value.[a]

§ 1601. A breaking and entering with intent to cut off an ear of a person in the house, is not felony by the common law, nor by the Massachusetts statute of 1804, c. 123.[b]

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[r] State *v.* Bancroft, 10 New Hamp. 105. [s] Thomas *v.* State, 5 How. Miss. 20.
[t] Com. *v.* Brown, 3 Rawle, 207; post, § 1613.
[u] 1 Hawk. c. 38, s. 18; 3 Inst. 65; 1 Hale, 561; R. *v.* Furnival, R. & R. C. C. 445; Jones *v.* State, 11 New Hamp. 269; State *v.* Ayer, 3 Frost, 301, 318; State *v.* Eaton, 3 Harrington, 554. [v] 1 Hawk. c. 38, s. 18. [w] R. *v.* Smith, R. & R. 417.
[x] See ante, § 631–5, 639, 647–51, 725–31, 853.
[y] R. *v.* Brice, R. & R. 450. [z] Arch. Peel's Acts, 40.
[zz] Osborne *v.* People, 2 Parker, C. R. (N. Y.) 1583.
[a] 2 East's P. C. 513; 1 Hale, 561. [b] Com. *v.* Newell, 7 Mass. 247.

§ 1602. It would seem in Pennsylvania that the violent breaking into the dwelliug-house of another, *with intent to disturb the peace*, is indictable at common law as malicious mischief;[c] and an attempt to commit a burglary is undoubtedly an offence at common law.[d]

§ 1603. Where a man burglariously entered a room where a young lady was sleeping, and grasped her ankle without any attempt at explanation, when she screamed, this is evidence of an attempt to commit a rape, and must be submitted by the court to the jury.[e]

§ 1604. Under the Ohio statute, which prescribes the punishment for breaking and entering in the night a mansion-house in which any person shall reside or dwell, and committing or attempting to commit any personal violence or abuse, the intent with which the party enters forms no part of the offence.[f]

The defendant cannot protect himself on such indictment by showing the permission of the wife of the occupant of the house that he might enter it for an unlawful purpose.[g]

§ 1605. Where a burglary is connected with a larceny, mere possession of the stolen goods, without any other evidence of guilt, is not to be regarded as prima facie or presumptive evidence of the burglary. But where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual and exclusive possession of a person, who gives a false account, or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained.[h]

§ 1606. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of the larceny. Ibid.

VII. Indictment.[i]

§ 1607. The offence must not only be laid to be done feloniously, but also *burglariously;* which is a term of art, and cannot be expressed by

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[c] Com. *v.* Taylor, 5 Binney, 281.
[d] Hackett *v.* Com., 3 Harris, 95.
[e] State *v.* Boon, 13 Iredell, 244.
[f] Forsythe *v.* State, 6 Ham. 22.
[g] Ibid.
[h] Davis *v.* People, 1 Harris, C. C. 447; see, as to the presumption generally arising from the possession of stolen goods, ante, § 728–9–30.
[i] For forms of indictment, see Wh. C. L. as follows:
(367) General frame of indictment for burglary, and larceny, at common law.
(368) Burglary and larceny at common law. Another form.
(369) Second count. Receiving stolen goods.
(370) Burglary at common law with no larceny.
(371) Breaking into dwelling-house, not being armed, with intent to commit larceny under Massachusetts statute.
(372) General frame of indictment in New York.
(373) Burglary, by breaking out of a house.
(374) Burglary and larceny and assault, with intent to murder.
(375) Burglary, with violence.
(376) Burglary and rape.

any other word or circumlocution.[j] It must be stated also, that the offender broke and entered the house; a breaking without an entry, or *vice versa*, is insufficient.[k]

§ 1608. It must be laid to be done in a mansion or dwelling-house; and, therefore, if it be only said to be in the house of such a one, it is not sufficient.[l] The words mansion-house, sufficiently describe a dwelling-house.[m]

Upon an indictment in New Hampshire, charging the prisoner with breaking and entering the house in the night-time, with intent to steal and actually stealing therefrom, the jury found the prisoner guilty of entering in the night-time and stealing; it was held, that upon this indictment and finding, the prisoner might be sentenced under the statute for entering a dwelling-house in the night-time, with intent to steal.[n]

§ 1609 The indictment must allege or imply that some person resided or dwelt in the house[o].

Where the burglary is in any out-house, which by law is considered part of the dwelling-house, it must still be laid to be done in the dwelling-house.[p]

§ 1610. It is necessary to ascertain to whom the mansion belongs, and to state that with accuracy in the indictment;[q] and, therefore, where the prisoner was indicted for burglary in the dwelling-house of John Snoxall, and stealing therein goods, the property of Ann Lock; and it appeared that it was not the dwelling-house of J. S., Buller and Grose, Justices, held that the prisoner could not be found guilty either of the burglary, or stealing to the

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(377) Burglary, with intent to ravish: with a count for burglary with violence under st. 7 Wm. 4, and 1 Vic. ch. 86, § 2.
(378) Burglary and Larceny, at common law, by breaking into a church.
(379) Burglary and larceny. Breaking and entering a store and stealing goods, under Ohio statute.
(380) Burglary and larceny. Breaking and entering a meeting-house, and stealing a communion cup and chalice, under Ohio statute.
(381) Burglary. Breaking and entering a storehouse with intent to steal, under Ohio statute.
(382) Burglary. Breaking and entering a shop with intent to steal, under Ohio statute.
(383) Burglary. Breaking and entering a dwelling-house with intent to steal, under Ohio statute.
(384) Breaking and entering a mansion-house in the day-time, and attempting to commit personal violence, under Ohio statute.
(385) Breaking and entering a mansion-house in the night season, and committing personal violence, under Ohio statute.
(386) Against a person for attempting to break and enter a dwelling-house at night, at common law.
(387) Breaking a storehouse with intent to enter and steal, at common law.
(388) Being found by night armed, with intent to break into a dwelling-house, and commit a felony therein.

[j] 1 Hale, 550; 4 Co. 39 b; 5 Co. 121 b; see ante, § 401.
[k] 1 Hale, 550. R. *v.* Compton, 7 C. & P. 139. In Massachusetts, under the Rev. Stats., the term is no longer necessary; Tully *v.* Com., 4 Metc. 357; see Th. & H. Prec. 67.
[l] 1 Hale, 550, 566; 1 Hawk. c. 38, s. 10; 4 Blac. Com. 224, 225.
[m] Com. *v.* Pennock, 5 Serg. & R. 199.
[n] State *v.* Moore, 12 N. Hamp. 22.
[o] Forsyth *v.* State, 6 Ham. 22.
[p] 2 East's P. C. 512.
[q] See more fully, as to the laws of ownership, post, § 1672.

amount of 40s. in the dwelling-house; for it is essential, in both cases, to state in the indictment the name of the person in whose house the offence was committed. In Cole's case, it was stated to be the shop of one Richard ———, (leaving a blank for the surname,) on which account it was doubted whether it could be supported, though the reporter says it was holden good.[r]

§ 1611. In an indictment for burning a dwelling-house of another, the particular interest of that person is immaterial. If the house be his dwelling-house, it is sufficient.[s]

§ 1612. The indictment must not only state the fact to have been done in the night of such day; but it was once thought that it should state the particular hour of the night; though it does not seem necessary that the evidence should strictly correspond with the latter allegation.[t] The better opinion now seems to be, that it was enough to aver the offence to have been in the night.[u] It is also enough to say "about the hour of twelve in the night of the same day."[v] It is certainly insufficient to aver the offence to have been committed between the hours of twelve at night and nine the next morning.[w]

An indictment charging that the goods were feloniously and burglariously taken from a dwelling-house, without charging that this was done in the night-time, is not a good indictment for burglary, but is only an indictment for a larceny.[x]

§ 1613. As has been said, it must be alleged and proved, either that a felony was committed in the dwelling-house, or that the party broke and entered with intent to commit some felony within the same.[y] Where the averment of larceny is made, it is not necessary, it is said, to aver the intent to be felonious, the presumption being that it was so.[z] But it is very unsafe to leave out the intent, since if the consummated act be not proved, the defendant must otherwise be acquitted.[a]

§ 1614. The same burglary may be laid to have been committed in several counts, each with a distinct intent.[b]

If an indictment for burglary neglect to specify the felony which the defendant intended to commit, the defect is fatal.[bb]

§ 1615. So, also, the indictment may be so laid as to comprise other offences besides burglary, though connected therewith; so that the prisoner may be acquitted of part, and found guilty of the rest. As if the prisoner be charged that he feloniously and burglariously broke and entered the

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[r] White's case, O. B. Feb. 1783, Leach, 216 (new ed. 286;) Cole's case, Moor, 466; vide 1 Hale, 558; see ante, § 1577, &c.

[s] People *v.* Van Blarcum, 2 Johns. 105.

[t] 2 East's P. C. 515.

[u] Ante, § 270.

[v] State *v.* Seymour, 36 Maine, 225.

[w] State *v.* Mather, Chipman, 32.

[x] Thompson *v.* Com. 4 Leigh, 652.

[y] 2 Hale, 513.

[z] Com. *v.* Brown, 3 Rawle, 207; Jones *v.* State, 11 N. H. 46; ante, § 1598.

[a] R. *v.* Furnivel, R. & R. C. C. 445; Jones *v.* State, 11 New Hamp. 269; State *v.* Ayer, 3 Fost. 301.

[b] 1 Easts' P. C. 515; ante, § 392.

[bb] The State *v.* Lockhart, 24 Ga. 420.

dwelling-house of J. S., and then and there certain goods of J. S. feloniously and burglariously did steal, &c.; the indictment comprises two offences, namely, burglary and larceny; and therefore he may be acquitted of the burglary if the case be so upon the evidence, and found guilty only of the larceny. But in such case, if the prisoner be acquitted of the larceny, it seems he cannot be found guilty of the burglary; because, as it is thus charged, the larceny constitutes part of the burglary.[c]

§ 1616. On a conviction for breaking and entering a store, and stealing therefrom, the prosecuting officer may enter a *nolle prosequi* as to the breaking and entering, and thereby leave the defendant punishable for the simple larceny alone.[d]

§ 1617. In Ohio, in an indictment for burglary, a description of the premises as the "warehouse of W. N., of Scioto county," is sufficient.[e]

It is not necessary to aver what specific goods were intended to be stolen,[f] and, *a fortiori*, what was their value.[g]

§ 1618. In Connecticut an information for burglary alleged that the prisoner "feloniously and burglariously" broke and entered, without alleging that the acts were done in the night season, or stating at what hour they were done; it was held, after a verdict of guilty, and judgment thereon, that the information was fatally defective, and that the defect was not cured by the verdict.[h]

§ 1619. So in Virginia, an indictment charging that goods were feloniously and burglariously taken from a dwelling-house, without charging that this was done in the night-time, is not a good indictment for burglary, but is only an indictment for larceny.[i]

§ 1620. In an indictment under the Statute of Missouri, for setting fire to a dwelling-house, in which there was a human being, it is not necessary to state the name of the person in the house.[j]

CHAPTER III.

ARSON.

A. STATUTES.

UNITED STATES.

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

MASSACHUSETTS.

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

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[c] See ante, § 560–5, 617.
[d] Anonymous, 31 Maine, (1 Red.) 592.
[e] Spencer *v.* State, 13 Ohio, 401.
[f] Ibid.
[g] Spears *v.* State, 2 Ohio St. Rep. (N. S.) 585.
[h] Lewis *v.* State, 16 Conn. 32.
[i] Mark's case, 4 Leigh, 658.
[j] State *v.* Aquillæ, 14 Mis. 130.

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B. ARSON AT COMMON LAW.
I. BURNING, § 1659.
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A.—STATUTES.

UNITED STATES.

§ 1621. *Arson in any fort, dock-yard, &c.*—If any person or persons, within any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to and under the jurisdiction of the United States, or on the site of any light-house or other needful building belonging to the United States, the site whereof is ceded to them, and under their jurisdiction as aforesaid, shall, wilfully and maliciously, burn any dwelling-house or mansion-house, or any store, barn, stable, or other building, parcel of any dwelling or mansion-house, every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, suffer death.—(Act of 3d March, 1825, sect. 1.)

§ 1622. *Burning any armory, arsenal, ship-house, &c., not parcel of dwelling-house, or timber, stores, &c.*—If any person or persons, in any of the places aforesaid, shall wilfully and maliciously set fire to or burn any arsenal, armory, magazine, rope-walk, ship-house, ware-house, blockhouse, or barrack, or any store-house, barn or stable, not parcel of a dwelling-house, or any other building not mentioned in the first section of this act, or any vessel, built or building, or begun to be built, or repairing, or any light-house or beacon, or any timber, cables, rigging, or other materials for building, repairing, or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, naval or victualling stores, arms, or other munitions of war, every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the aggravation of the offence. —(Ibid. sect. 2.)

§ 1623. *Burning any vessel, &c.*—If any person shall wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet, or assist in setting on fire, or burning, or otherwise destroying any vessel of war of the United States, afloat on the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, suffer death: *Provided*, That nothing herein contained shall be construed to take away or impair the right of any court martial to punish any offence which, by the laws of the United States, may be punishable by such court.—(Ibid. sect. 11.)

§ 1624. *Burning any vessel with intent to prejudice underwriters.*—Any person not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death.—(Act of 26th March, 1804, sect. 1.)[a]

§ 1625. If any person shall, on the high seas, wilfully and corruptly cast away, burn or otherwise destroy any vessel of which he is the owner, in part or in whole, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite any policy or policies of insurance thereon, or, if of any merchant or merchants that shall load goods thereon, or, of any other owner or owners of such vessel, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death.[b]—(Ibid. sect. 2.)

MASSACHUSETTS.

§ 1626. *Arson generally.*—Every person who shall wilfully and maliciously[bb] burn, in the night-time, the dwelling-house[c] of another, or shall, in the night-time, wilfully and maliciously set fire to any other building owned by himself or another, by the burning whereof such dwelling-house shall be burnt in the night-time, shall suffer the punishment of death;[cc] but, if the defendant shall prove on the trial, and the jury shall find, that at the time of committing the offence, there was no person lawfully in the dwelling-house so burnt, the punishment, instead of death, shall be imprisonment in the state prison for life.[d]—(Rev. Stat., ch. 126, sect. 1.)

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[a] To destroy a vessel, under the statute, means to make her unfit for service, beyond the hope of recovery by ordinary means. (United States *v.* Johns. I Washington, R. 363; Curtis, Merch. Seamen, 126. See, also, post, § 2907-13.)

[b] This act does not make it an offence, when done with intent to prejudice an underwriter on the cargo. (U. S. *v.* Johns, I Wash. C. C. R. 363; see post, § 2907-8-9, where this act is fully considered.)

[bb] Malice is of the essence of the crime of arson at common law, and the same ingredient must enter into offences of house-burning created by statute. (Jesse *v.* State, 28 Miss. (6 Cush.) 100.)

[c] Burning a house never occupied by the alleged owner as a dwelling-house, is not arson within the meaning of Rev. Sts. c. 126, § 1. (Commonwealth *v.* Barney, 10 Cush. (Mass.) 478.)

[cc] Changed to imprisonment for life. (See Sup. Rev. Stat. p. 854.)

[d] This section does not alter the common law rule, that the crime of arson is committed, when a person wilfully and maliciously burns any part of a dwelling-house, however small. (Com. *v.* Van Shaack, 16 Mass. 105.)

By it the punishment of arson is mitigated, whenever there was no person lawfully within the dwelling-house burned. It applies, it seems, to cases where the inmates

§ 1627. *Burning in day-time, dwelling-house, &c.*—Every person who shall wilfully and maliciously burn, in the day-time, the dwelling-house of another, or any building adjoining such dwelling-house, or shall wilfully and maliciously set fire to any building, owned by himself or another, by the burning whereof, such dwelling-house shall be burnt, in the day-time, or shall, in the day-time, wilfully and maliciously set fire to any building owned by himself or another, by the burning whereof such dwelling-house shall be burnt in the night-time, shall be punished by imprisonment in the state prison for life.[e]—(Ibid. sect. 2.)

§ 1628. *Burning in night-time; meeting-house, court-house, store, mill, &c.*—Every person who shall wilfully and maliciously burn, in the night-time, any meeting-house, church, court-house, town-house, college, academy, jail, or other building erected for public use, or any banking-house, ware-house, store, manufactory or mill of another, (being, with the property therein contained, of the value of one thousand dollars,) or any barn, stable, shop, or office of another, within the curtilage of any dwelling-house, or any other building, by the burning whereof, any building mentioned in this section shall be burnt, in the night-time, shall be punished by imprisonment in the state prison for life.[f]—(Ibid. sect. 3.)

§ 1629. *Same in day-time.*—Every person who shall wilfully and maliciously burn, in the day-time, any building mentioned in the preceding section, the punishment for which if burnt in the night-time, would be imprisonment in the state prison for life, shall be punished by imprisonment in the state prison, not more than ten years.[g]—(Ibid. sect. 4.)

§ 1630. *Burning in day or night banking or ware-houses, stores, stables, &c., of a particular class.*—Every person who shall wilfully and maliciously burn, either in the night-time or in the day-time, any banking-house, ware-house, store, manufactory, mill, barn, stable, shop, out-house, or other building whatsoever, of another, other than is mentioned in the third section, or any bridge, lock, dam, or flume, or any ship, or vessel of another, lying within the body of any county, shall be punished by imprisonment in the state prison, not more than ten years.[h]—(Ibid. sect. 5.)

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had been obliged to quit the house by force, or fear of violence. (Com. *v.* Buzzell, 16 Pick. 153.)

A stranger who had entered at the same time with the offender, to protect property or life, was not lawfully within the house, in the sense of the statute. (Ibid.)

If, at the time of such burning, the occupants had retired to an out-building, not adjoining the dwelling-house, they were not within the house, so as to make the arson capital. (Ibid.)

Where an indictment for arson, under Stat. 1804, ch. 131, charged that the defendant set fire to the building of A., whereby a dwelling-house was burned—the allegation of the ownership of such building, being descriptive, is material; and, if it is not proved as set out, the defendant is entitled to a verdict in his favor. (Com. *v.* Wade, 17 Pick. 395.)

It is no offence by the statute or common law of this commonwealth, for a man to burn his own store. (Bloss *v.* Tobey, 2 Pick. 320.)

A conviction or acquittal, upon an indictment in Rev. Stat., ch. 126, s. 5, for burning a building, which does not aver that the building alleged to have been burnt was "other than is mentioned in sec. 3, of the same chapter," is a bar to a second indictment, on sec. 3, for the same burning. (Com. *v.* Squire, 1 Metc. 258.)

[e] See form, Wh. Prec. 392–3.

[f] See form, Wh. Prec. 394–5, 400.

[g] See form, Wh. Prec. 396.

[h] Under this section, the term vessel does not mean a small, unfinished boat, still in the hands of the builder, and unfit for use. It has been held that a vessel lies "within the body of the county," when it lies in the water which flows within the county, and not upon the high seas. (Com. *v.* Francis, Thacher's C. C. 240.)

Setting fire to an unfinished boat in a shop, with intent to burn the building, is a misdemeanor at common law; but, unless some permanent part of the building be burned, it does not come under the statute of 1804, ch. 131. (Ibid.)

§ 1631. *Burning piles of wood, fence, hay-stack, vegetable product, &c.*—Every person who shall wilfully and maliciously burn or otherwise destroy, or injure any pile or parcel of wood, boards, timber, or other lumber, or any fence, bars or gate, or any stack of grain, hay, or other vegetable product, or any vegetable product severed from the soil, and not stacked, or any standing trees, grain, grass, or other standing product of the soil, or the soil itself of another, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding five hundred dollars, and imprisonment in the county jail, not more than one year.[1] —(Ibid. sect. 6.)

§ 1632. *Married woman responsible burning her husband's property.*—The preceding sections shall severally extend to a married woman, who may commit either of the offences therein described, though the property burnt or set fire to, may belong, partly or wholly to her husband.—(Ibid. sect. 7.)

§ 1633. *Burning with intent to defraud underwriters.*—Every person who shall wilfully burn any building, or any goods, wares, merchandise, or other chattels, which shall be at the time insured against loss or damage by fire, with intent to injure the insurer, whether such person be the owner of the property burnt or not, he or she shall be punished by imprisonment in the state prison, not more than twenty years.[j]—(Ibid. sect. 8.)

NEW YORK.

§ 1634. *Arson, first degree.*—Arson, in the first degree, the punishment of which is prescribed in this title, consists in wilfully setting fire to, or burning, in the night-time, a dwelling-house,[k] in which there shall be, at the time, some human being;[l] and every house, prison, jail, or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein.—(2 Rev. Stat. 657, sect. 9.)

§ 1635. But no ware-house, barn, shed or other out-house, shall be deemed a dwelling-house, or part of a dwelling-house, within the meaning of the last section, unless the same be joined to, immediately connected with, and part of a dwelling-house.[m]—(Ibid. sect. 10.)

A building need not be completely finished to make it the subject of the offence. An indictment is therefore good, which alleges that the defendant set fire to, and burned, "a building erected for a dwelling-house, and not completed or inhabited. (Com. *v.* Squire, 1 Metc. 258.)

An indictment is defective, without an averment that the building alleged to be burnt was other than is mentioned in sec. 3. (Ibid.)

For form of indictment under this section, see Wh. Prec. 397.

[i] The offence of burning hay-stacks, as provided for in Stat. 1804, ch. 131, sec. 4, 5, is not a felony. (Com. *v.* Macomber, 3 Mass. 254.)

See form, Wh. Prec. 399.

[j] See form, Wh. Prec. 398; see, also, post, § 2914, &c., and see Com. *v.* Harnley, 10 Metc. 402.

[k] It was once held that this section does not cover a case where the dwelling-house was the defendant's own. (People *v.* Henderson, 1 Parker, C. C. 560. But see now, Shepherd *v.* People, 5 E. P. Smith, 537.) As to ownership, see post, § 1671.

A house usually occupied by persons lodging therein is a dwelling-house in this sense. (People *v.* Orcutt, 1 Parker, C. C. 252.)

[l] A design to produce death is not necessary under this section. (People *v.* Orcutt, 1 Parker C. C. 252.) Knowledge that the building was occupied is not necessary. (Ibid.)

[m] Setting fire to a dwelling-house, inhabited at the time, by which a part only of the house is consumed, is arson within the first section of the act, (Sess. 86, ch. 29,) and punishable with death. (People *v.* Butler, 16 Johnson, 203.)

In an indictment for arson, the house or building set fire to, or burned, must be

§ 1636. *Arson, second degree.*—Every person who shall wilfully set fire to, or burn any inhabited dwelling-house, in the day-time, which, if committed in the night-time, would be arson in the first degree, shall, on conviction, be adjudged guilty of arson in the second degree.—(2 Rev. Stat. 666, sect. 1.)

Every person who shall wilfully set fire to, or burn, in the night-time, any shop, ware-house, or other building, not being the subject of arson in the first degree, but adjoining to,[mm] or within the curtilage of any inhabited dwelling-house, so that such house shall be endangered by such firing, shall, upon conviction, be adjudged guilty of arson in the second degree.—(Ibid. sect. 2.)

§ 1637. *Arson, third degree.*—Every person who shall wilfully, set fire to, or burn in the day-time, any shop, ware-house, or other building, which, if committed in the night-time, would be arson in the second degree, shall, upon conviction, be adjudged guilty of arson in the third degree.—(Ibid. sect. 3.)

Every person who shall wilfully set fire to, or burn, in the night-time, the house of another, not the subject of arson in the first or second degree, any house of public worship, or any school-house; any public building, belonging to the people of this state, or to any county, town, city, or village, or any building in which shall be deposited the papers of any public officer, or any barn or grist mill, or any building erected for the manufacturing of cotton or woollen goods, or both, or paper, iron, or any other fabric, or any fulling-mill, or any ship or vessel, shall, upon conviction, be adjudged guilty of arson in the third degree.—(Ibid. sect. 4.)

Every person who shall wilfully burn any building, ship or vessel, or any goods, wares, merchandise, or other chattel, which shall be at the time insured against loss or damage by fire, with intent to prejudice such insurer, whether the same be the property of such person or of any other, shall, upon conviction, be adjudged guilty of arson in the third degree.[n]—(Ibid. sect. 5.)

§ 1638. *Arson, fourth degree.*—Every person who shall in the day-time wilfully set fire to or burn, any dwelling-house or building, ship or vessel, which, if committed in the night-time, would be arson in the third degree, shall, on conviction, be adjudged guilty of arson in the fourth degree.—(Ibid. sect. 6.)

Every person who shall in the day or night-time, wilfully set fire to, or burn, any saw-mill, any carding-machine or building containing the same, any stock of grain of any kind, or any stock of hay, not being the property of such person, any toll-bridge, or any other public bridge; shall, upon conviction, be adjudged guilty of arson in the fourth degree.—(Ibid. sect. 7.)

Every person who shall wilfully set fire to or burn, in the day or in the night, any crop of grain growing or standing in the field, or any nursery or orchard of fruit trees belonging to another; or any fence around any cultivated field belonging to another; or the woods in any town not belonging to himself; or any grass or herb-

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described as the house or building of the person in possession; and it was accordingly held, in this case, where the building burned was alleged, in the indictment, as the building of the owner; and the proof was, that at the time of the committing of the offence, it was in the possession of the tenant, that the accused could not be convicted. (People *v.* Gates, 15 Wendell, 159.)

Setting fire to a jail, by a prisoner, merely for the purpose of effecting his escape, is not arson. (People *v.* Cottrell, 13 Johnson, 115.)

It is not a wilful burning of an inhabited dwelling-house, within the meaning of the first section of the statute, declaring the punishment of crimes, (Sess. 36, ch. 20,) though the jail is to be deemed an inhabited dwelling-house. (Ibid.)

[mm] The word "adjoining," means in actual contact with. (Peverelly *v.* People, 3 Parker C. R. (N. Y.) 159.

[n] See People *v.* Henderson, 1 Harris C. C. 560.

age growing on any marshes or other lands, not belonging to himself, shall, on conviction, be adjudged guilty of arson in the fourth degree.—(Ibid. sect. 8.)

§ 1639. *Punishment.*—Every person who shall be convicted of any degree of arson herein specified, shall be punished by imprisonment in a state prison, as follows:—1. Of arson in the second degree, for any term not less than ten years. 2. Of arson in the third degree, for any term not more than ten years, and not less than seven years. 3. Of arson in the fourth degree, for any term not more than seven, and not less than two years; or by imprisonment in a county jail not exceeding one year.—Ibid. sect. 9.)

PENNSYLVANIA.

§ 1640. *Arson.*—If any person shall maliciously and voluntarily burn, or cause to be burned, or set fire to, or cause, or attempt to set fire to, with intent to burn any factory, mill, or dwelling-house of another, or any kitchen, shop, barn stable or other out-house that is parcel of such dwelling, or belonging, or adjoining thereto, or any other building by means whereof a dwelling-house shall be burnt, then, and in every such case, the person so offending shall be adjudged guilty of felonious arson, and on conviction thereof, shall be sentenced to pay a fine not exceeding two thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, at labor, not exceeding twelve years; and in case of the malicious burning or setting fire to any dwelling-house, or building that is parcel of such dwelling or belonging thereto, there is any person in the same, the offender being convicted thereof, shall be sentenced to pay a fine not exceeding four thousand dollars, and to undergo an imprisonment, at separate or solitary confinement, not exceeding twenty years.—(Rev. Act, 1860, Bill I., sect. 137.)

§ 1641. *Burning out houses and setting fire with intent to burn.*—If any person shall wilfully and maliciously burn, or cause to be burned, set fire to, or attempt to set fire to, with intent to burn, or aid, counsel, procure or consent to the burning or setting fire to, of any barn, stable or other building of another, not parcel of the dwelling-house, or any shop, store-house, ware-house, malt-house, mill, or other building of another, or any barrick, rick or stack of grain, hay, fodder or bark, piles of wood, boards or other lumber, or any ship, boat or other vessel of another lying within any county in this state, or any wooden bridge within the same, or state capitol, or adjoining offices, or any church, meeting-house, court-house, jail, or other public building belonging to this commonwealth, or to any city or county thereof, or to any body corporate or religious society whatever, the person offending shall, on conviction, be adjudged guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.—(Ibid. sect. 138.)

§ 1642. *Setting fire with intent to defraud insurers.*—Every person being the owner of any ship, boat or other vessel, or the owner, tenant, or occupant of any house, out-house, office, store, shop, ware-house, mill, distillery, brewery or manufactory, barn or stable, or any other building, who shall wilfully burn or set fire thereto, with intention to burn the same, with an intention thereby to defraud or prejudice any person, or body politic or corporate, that hath underwritten or shall underwrite any policy of insurance thereon, or on any moneys, goods, wares or merchandise therein, or that shall be otherwise interested therein, shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, at labor, not exceeding seven years.—(Ibid. sect. 139.)

§ 1643. *Firing woods.*—If any person shall wilfully set on fire, or cause to be set

on fire, any woods, lands or marshes, within this commonwealth, so as thereby to occasion loss, damage or injury to any other person, he or she shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, and to undergo an imprisonment not exceeding twelve months.—(Ibid. sect. 140.)

§ 1644. *Attempting to blow up building.*—If any person shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, or vessel, any gunpowder or other explosive mixture, with intent to do bodily harm to any person, or to destroy or damage any building, or vessel, or any machinery, working tools, fixtures, goods or chattels, every such offender shall, whether or not injury is effected to any person, or any damage to any building, vessel or machinery, working tools, goods or chattels, be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement, at labor, not exceeding three years.°—(Ibid. sect. 141.)

VIRGINIA.

§ 1649. *Arson, generally.*—If any free person, in the night, maliciously burn the dwelling-house of another, or any jail or prison, or maliciously set fire to any thing, by the burning whereof such dwelling-house, jail or prison, shall be burnt in the night, he shall be punished with death; but if the jury find that, at the time of committing the offence, there was no person in the dwelling-house, jail or prison, the offender shall be confined in the penitentiary not less than five nor more than ten years.—(Code 1849, ch. 192, sect. 1.)

§ 1650. *Burning in day-time.*—If any free person, in the day-time, maliciously burn the dwelling-house of another, or any jail or prison, or maliciously set fire to

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° These sections provide against various kinds of malicious burnings and attempts to burn. The sections are amendments and extensions of the 3d section of act of the 21st of March, 1806, entitled "A supplement to sundry penal laws of this Commonwealth." 4 Smith's Laws, 334. Brightly's Digest, 41; Title, Arson, No. 1; of the 4th section of the act 23d of April, 1829, entitled "A further supplement to an act, entitled 'An Act to reform the penal laws of this Commonwealth.'" 10 Smith's Laws, 435. Brightly's Digest, 51; Title, Arson, No. 2. The 10th section of the act of 16th April, 1849, entitled "An Act relating to lunatics and habitual drunkards, and for the more effectual punishment of arson," &c. Pamphlet Laws, 663. Brightly's Digest, 51; Title, Arson, No. 3; of the 34th section of the act of the 25th of April, 1850, entitled "An Act relating to executrixes," &c. Pamphlet Laws, 575, Brightly's Digest, 51; Title, Arson, No. 4, and the 74th section of the act of 13th of June, 1836, entitled "An Act relating to roads, highways, and bridges." Pamphlet Laws, 556. Brightly's Digest, 51; Title, Arson, No. 5. The 139th section refers to the burning, or attempting to burn a dwelling-house, or any out-house, parcel thereof, or any other building, by means whereof a dwelling-house shall be burnt. Regarding the burning of a dwelling-house as the most heinous of this class of offences, the Commissioners propose its exemplary punishment. The fact of any person being in a dwelling-house set fire to or burnt, renders the offender liable to a much heavier punishment. This distinction the Commissioners think necessary, in order to the protection of human life, which is frequently endangered by the malicious burning of a dwelling-house. Section 138th provides against the malicious burning, or attempting to burn the buildings therein enumerated, not being dwelling-houses, or any barrack, stack of hay, grain, or bark, &c. The punishments provided against these offences, though sufficiently severe, are less than the preceding sections. The 139th section is new, and of manifest necessity. The 140th section is a consolidation and amendment of those of the 1st and 4th sections of the act of the 18th of April, 1794, entitled "An Act to prevent the damages which may happen by the firing of woods." 3 Smith's Laws, 189, and the act of the 27th of March, 1824, entitled "An Act to prevent the destruction of timber," &c. 8 Smith's Laws, 284. Brightly's Digest, 381; Title, Firing Woods, No. 3.—(Revisor's Report.)

any building or other thing, by the burning whereof such dwelling-house, jail or prison, shall be burnt, he shall be confined in the penitentiary not less than three nor more than ten years.—(Ibid. sect. 2.)

§ 1651. *What is dwelling-house.*—No out-house not adjoining a dwelling-house, nor under the same roof, (although within the curtilage thereof,) shall be deemed parcel of such dwelling-house, within the meaning of this chapter, unless some person usually lodge therein at night.—(Ibid. sect. 3.)

§ 1652. *Burning meeting-house, college, banking-house, mill, &c.*—If a free person maliciously burn any meeting-house, court-house, town-house, college, academy or other building erected for public use, (except a jail or prison,) or any banking-house, ware-house, store-house, manufactory, or mill of another person, not usually occupied by persons lodging thereiu at night, or if he maliciously set fire to any thing, by the burning whereof any building mentioned in this section shall be burnt, he shall be confined in the penitentiary, when such building, with the property therein is of the value of one thousand dollars, not less than three nor more than ten years; and when it is of less value, not less than three nor more than five years. —(Ibid. sect. 4.)

§ 1653. *Burning pile of wood, tobacco-house, stock of wheat, &c.*—If a free person maliciously burn any pile or parcel of wood, boards or other lumber, or any barn, stable, cow-house, tobacco-house, stock of wheat or other grain, or of fodder, straw or hay, he shall, if the thing burnt with the property therein be of the value of one hundred dollars, be confined in the penitentiary not less than three nor more than five years; and if it be of less value, he shall be so confined not less than one nor more than three years, or in the discretion of the jury, if the accused be white, or of the court, if he be a negro, in jail not more than one year, and be fined not exceeding five hundred dollars.—(Ibid. sect. 5.)

§ 1654. *Punishment.*—If a free person maliciously burn any building, the burning whereof is not punishable under any other section of this chapter, he shall, if the building with the property therein be of the value of one hundred dollars or more, be confined in the penitentiary not less than three, nor more than ten years; and if it be of less value, be so confined not less than one, nor more than three years, or in the discretion of the jury, if the accused be white, or of the court, if he be a negro, in jail not more than one year, and be fined not exceeding five hundred dollars.—(Ibid. sect. 6.)

§ 1655. *Burning bridge, lock, dam, &c.*—If a free person maliciously burn any bridge, lock, dam, or any ship, boat or other vessel, of the value of one hundred dollars or more, he shall be confined in the penitentiary not less than three nor more than ten years; and if the value be less than one hundred dollars, he shall be confined in the jail not exceeding one year, and fined not exceeding two hundred dollars.—(Ibid. sect. 7.)

§ 1656. *Setting fire to woods, &c.*—If any free person unlawfully or maliciously set fire[q] to any woods, fences, grass, straw, or other thing capable of spreading fire on lands, he shall be fined not exceeding one hundred dollars, and be confined in jail not less than two, nor more than twelve months.—(Ibid. sect. 8.)

If any free person intentionally set any woods on fire, whereby damage is done to the property of another, he shall be amerced at the discretion of a jury.—(Ibid. sect. 9.)

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[q] In an indictment for arson, under the 4th section of the statute, (1 Rev. Code, ch. 160, p. 587,) it is not sufficient to use the words, "set fire to" the house: it is necessary to use the term "burn." (Herod *v.* Com., 5 Gratt. 664.)

§ 1657. *Burning with intent to defraud underwriters.*—If a free person wilfully burn any building, or any goods or chattels, which shall be at the time insured against loss or damage by fire, with intent to injure the insurer, whether such person be the owner of the property or not, he shall be confined in the penitentiary not less than one nor more than ten years.—(Ibid. sect. 10.)

OHIO.

§ 1657(*a*). *Arson, generally.*—That if any person shall wilfully and maliciously burn, or cause to be burned, any dwelling-house, kitchen, smoke-house, shop, barn, stable, store-house, ware-house, malt-house, stillery-house, mill or pottery, the property of any other person; or any other buildings, the property of any other person, of the value of fifty dollars, or containing property of the value of fifty dollars; or any church, meeting-house, court-house, work-house, school-house, jail or other public building; or any ship, boat, or other water-craft, of the value of fifty dollars; or any bridge of the value of fifty dollars, erected across any of the waters within this state; every person so offending shall be deemed guilty of arson, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than twenty years nor less than one year.[r]—(Act of March 7, 1835; Swan's Stat., sect. 12, 270.)

§ 1657(*b*). *Attempt to commit arson.*—That if any person shall wilfully and maliciously set fire to any of the buildings or other property described in the foregoing section, with intent to burn or destroy the same; every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than seven years nor less than one year.[s]—(Ibid. sect. 13.)

§ 1657(*c*). *Definition of arson.*—That every person who shall wilfully and maliciously burn, or cause to be burned, any dwelling-house, kitchen, smoke-house, shop, office, barn, stable, store-house, ware-house, still-house, mill, pottery, or any other building of the value of fifty dollars, or any goods, wares, merchandise, or other chattels, of the value of fifty dollars, which shall be at the same time the property of such person, and insured against loss or damage by fire, with intent to prejudice such insurer, every person so offending shall be deemed guilty of arson, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than twenty years nor less than one year.—(Act of March 20, 1860, sect. 1.)

§ 1657(*d*). *Attempt.*—That if any person shall wilfully and maliciously set fire to any of the buildings, water-craft, or other property described in the foregoing section of this act, and which shall be at the same time the property of such person, and insured against loss or damage by fire, with intent to burn or destroy the same, and with intent to prejudice such insurer, every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than seven years nor less that one year.—(Ibid. sect. 2.)

B.—ARSON AT COMMON LAW.[t]

§ 1658. Arson is the malicious and wilful burning of the house or outhouse of another man.[u]

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[r] See form, Wh. Prec. 401-2.
[s] For form, see Wh. Prec. 404.
[t] See Wharton's Precedents, 3:9-409.
[u] 4 Blac. Com. 220.

I. Burning.

§ 1659. The offence is consummated by the least burning of the house. The charring of the floor to the depth or an inch is certainly sufficient,[v] and makes no matter how soon the fire be extinguished.[w]

§ 1660. "The burning necessary to constitute arson of a house at common law," says Sir Wm. Russell,[x] "must be an *actual burning* of the whole or some part of the house. Neither a bare intention, nor even an actual attempt to burn a house by putting fire into or towards it, will amount to the offence, if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete, though the fire should be put out, or go out of itself."[y]

The *corpus delicti* in a case of arson is the burning of the house; and if that fact be established by other evidence, the confessions of the accused are competent to show that the burning was felonious, and that he was the criminal agent.[yy]

§ 1661. On the trial of an indictment for the malicious burning of a building, a board from the building in question being produced in evidence, and exhibited to the jury as the only part of the building burnt, it was held, that whether the same had been so affected by fire as to constitute a burning within the legal meaning of the term, was a question of fact to be determined by the jury, upon the evidence before them, as in ordinary cases.[z]

§ 1662. Upon an indictment for maliciously setting fire to a house, it appeared that a small fagot was found lighted and burning on the boarded floor of the kitchen, and a part of the boards of the kitchen floor was scorched black, but not burnt; the fagot was nearly consumed, but no part of the wood of the floor was consumed; and Cresswell, J., after conferring with Patteson, J., held that as the wood of the floor was scorched, but no part of it consumed, the indictment could not be supported. But the learned judges were of opinion, that it was not essential that the wood should be in a blaze, because some species of wood would burn and entirely consume without blazing at all.[a]

To constitute a setting on fire, it is not necessary that any flame should be visible.[b]

§ 1663. The burning must be malicious[c] and voluntary, otherwise it is

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State *v.* Sandy, (a slave,) 3 Iredell, 570.

[w] 1 Hawk. c. 39, s. 17; 3 Inst. 66; 1 Hale, 569; Dalt. 606; 2 Russ. on Cr. 558; Hester *v.* State. 17 Geo. 130.

[x] 2 Russ. on Cr. 548.

[y] 3 Inst. 66; Dalt. 506; 1 Hale, 568, 569; 1 Hawk. P. C. c. 39, s. 16, 17; 2 East, P. C. c. 21, s. 4, p. 1020; Com. *v.* Van Shaack, 16 Mass. R. 105.

[yy] Sam *v.* State, 33 Miss. 347.

[z] Com *v.* Betton, 5 Cush. 427.

[a] R. *v.* Russell, 1 C. & Mars. 541. [b] R. *v.* Stallion, R. & M. C. C. R. 393.

[c] 2 East P. C. 1033; Jesse *v.* State, 28 Mississippi, 100.

not felony, but only a trespass, and therefore no negligence or mischance amounts to it. Thus, in England, if a person not properly qualified, by shooting at game, happen to set fire to the thatch of a house, or if a man shooting at the poultry of another do the same, the offence is not arson. In such case, however, if the defendant intended to steal the poultry, and not merely to commit a trespass, the first intent being felonious, he must abide all the consequences.[d] It was held, also, in New York, that the setting fire by a prisoner to his cell was not arson, if the intent were merely to effect his own escape.[e] But if a man, intending to commit a felony, by accident set fire to another's house, this, it should seem, would be arson at common law, and also within the statute.[f] If, intending to set fire to the house of A., he accidentally set fire to that of B., it is felony.[g] The weight of authority in England is, that if a man, by wilfully setting fire to his own house, burn also the house of one of his neighbors, it will be felony,[h] for the law, in such a case, implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was, that the fire would communicate to the houses in its neighborhood.

§ 1664. It is without doubt a high misdemeanor to set fire to one's own house in a populous city, where the danger of the communication of the fire is necessarily great,[i] even though no such communication actually takes place.[j] In Massachusetts, it is true, in an action of slander, where the defendant was charged with having said of the plaintiff that he had set fire to his own house, it was held that such an offence was not *per se* indictable,[k] but it is clear that the court meant to go no farther than to say that a charge of such burning, unless alleged to have been accompanied with wantonness or malice, was not sufficient to support a declaration in slander without a proper *inuendo* or *colloquium*.

§ 1665. It is no felony, at common law, however, for a lessee to burn the premises in his possession under the lease,[l] nor for a mortgagor in possession to burn his own house,[m] though in both cases the offence would undoubtedly be indictable as a misdemeanor.

§ 1666. Under the English statute, as well as at common law, it seems there must be an actual burning of some part of the house; a bare intent, or attempt to do it, is not sufficient. Where, upon an indictment on the repealed statute 9 G. 1, c. 22, for setting fire to a paper-mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt, the judges held that it

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[d] 1 Hale, 567, 569; 3 Inst. 67.
[e] People *v.* Cottrell, 18 Johns. 115.
[f] See Foster, 258, 259.
[g] 1 Hale, 569.
[h] See R. *v.* Probert, 2 East's P. C. 1031; R. *v.* Isaac, Ibid.
[i] Ball's case, 3 City Hall Rec. 85.
[j] 1 Hawk. c. 39, sec. 1; Hale, 568, 569; Holmes' case, Cro. Car. 377; 4 Black. Com. 321.
[k] Bloss *v.* Tobey, 2 Pick. 320.
[l] 2 East's P. C. 1029.
[m] Ibid. 1025.

did not amount to an offence within the act.[n] And where the defendant set fire to a parcel of unthreshed wheat, it was holden not to be arson.[o]

II. Property burned.

§ 1667. At common law the offence was considered to reach not only to the very dwelling-house, but to all out-houses which are parcel thereof, though not adjoining thereto, nor under the same roof.[p] But the indictment, however, need not charge the burning to be of a mansion house, but only of a house.[q]

§ 1668. The burning of the barn, though no part of the mansion, if it have corn or hay in it, is felony at common law. And it is said by Mr. East,[r] that at common law arson extended to the burning of a stack of corn; but since the passing of the several statutes above referred to, it became unnecessary to discuss this and other doubtful questions of the like nature.

If a building be set on fire which is so near a dwelling-house as to endanger the burning of it, it is arson.[s]

§ 1669. A barn standing eighty feet from a dwelling-house, in a yard or lane with which there was a communication by a pair of bars, is within the curtilage of the house.[t]

A building designed for a dwelling-house, constructed in the usual manner, not entirely painted or glazed, and not yet occupied, is not a "house" to be the subject of arson at common law.[u]

§ 1670. On an indictment under the Maine Rev. Stat. c. 155, § 3, for setting on fire and burning the barn of one A., being within the curtilage of his dwelling-house, "by which said firing the said dwelling-house was endangered," the jury were instructed that the size of the lot and the distance of the fences surrounding the same, and including the buildings, from the buildings, would not preclude them from considering the barn within the curtilage of the dwelling-house; and it was held that this instruction was unobjectionable, and that the curtilage of a dwelling-house is a space necessary and convenient, and habitually used for the family purposes, the carrying on of domestic employments; that it included the garden, if there be one, and need not be separated from other lands by a fence."[v] It was further held, that the judge was not bound to define the term curtilage to the jury, without any request.[w]

A building, which was built for a dwelling-house, and had been occupied as such, but not within ten months previous to its being burned, nor was

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[n] R. *v.* Taylor, 1 Leach, 49.
[o] R. *v.* Judd, 2 T. R. 255.
[p] 1 Hale, 567, 570; Sum. 86; 3 Inst. 67, 69; 1 Hawk. c. 39, s. 1, 2; 4 Black. Com. 221. As to what is the correct distinction between the *domus* of arson, and the *domus mansionalis* of burglary, see a very curious article in 13 Boston Law Rep. 157.
[q] In what sense the term of out-house is to be considered, see ante, § 1555–70.
[r] 1 East's P. C. 1020.
[s] Gage *v.* Sheldon, 3 Rich. 242.
[t] The People *v.* Taylor, 2 Mich. (Gibbs,) 250.
[u] State *v.* M'Gowen, 20 Conn. 245.
[v] State *v.* Shaw, 31 Maine (1 Red.) 523.
[w] Ibid.

so occupied at that time, is not a dwelling-house, the burning of which constitutes the crime of arson.[ww]

§ 1671. At common law it is essential to prove who was the actual owner.[x] In New York, after an elaborate examination of the authorities, the common law rule was recognized, but it was held that under the revised statutes, the house or building set fire to or burned must be described as the barn or building of the *person in possession*, and it was accordingly decided, when the building burned was alleged in the indictment as the building of the owner, and the proof was that, at the time of the offence, it was in the possession of a tenant, that the accused could not be convicted.[y] The same modification of the common law exists in England by statute 7 Wm. IV, and 1 Vict. c. 89, s. 3, by which it is immaterial whether the house be that of a third person or the defendant himself, for that statute applies, whether the house, &c., be in the possession of the offender, or in the possession of any other person. Under these statutes it has been held that a house, in part of which a man lives, but lets other parts to lodgers, may be described as his house, even though he be an insolvent debtor, and have assigned the house to his assignee, if the assignee have not taken possession; at all events the room in which he lives may be described as his house.[z] So, if the possession of a house be obtained wrongfully, it may be described as the house of the wrongful occupier.[a]

§ 1672. At common law great nicety is required in many instances to distinguish the person who may be said to occupy *suo jure*, and against whom the offence must be laid to have been committed. In Glandfield's case it appeared that the out-houses burned were the property of Blanche Silk, widow, but were only made use of by John Silk, her son, who lived with her after his father's death in the dwelling-house adjoining the out-houses, and took upon him the sole management of the farm with which these out-houses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother; that he paid all the servants, and purchased all the stock; but that the legal property, both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house and the out-houses in question. Heath, J., held, that, as to the stable, pound, and hog-sties, which the son alone used, the indictment must lay them to be in his occupation; and as to the brew-house, (another of the out-houses burned,) the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expenses of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid in their joint occupation. The prisoner was afterwards convicted on a second indictment,[b] drawn agreeably

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[ww] Hooker *v.* Com. 13 Gratt (Va.) 763.

[x] See Glandfield, 2 East, P. C. 1034; Com. *v.* Wade, 17 Pick. 395. For the law under this head, see ante, § 1609–16, post, § 1676–7.

[y] People *v.* Gates, 15 Wendell, 159.

[z] R. *v.* Ball, 1 Mood. C. C. 30.

[a] R. *v.* Wallis, 1 Mood. C. C. 344.

[b] 2 East, P. C. 1034.

to this opinion, the first having improperly laid the whole premises as in the sole occupation of the mother; and he was executed.

Where a parish pauper set fire to a house in which he was put to reside by the overseers, and it was not known who the trustees were in whom the legal ownership was vested, it was holden that it might be described as the house of the overseers, or of persons unknown.[c]

Where a part of the house is occupied by a tenant habitually lodging therein at night, and the residue by the owner, the building is well described in the indictment as the dwelling-house of such tenant.[cc]

III. Indictment.[d]

§ 1673. The indictment for arson at common law must lay the offence to have been done wilfully, (or voluntarily,) and maliciously,[dd] as well as feloniously. The word wilfully may be implied from other fit epithets; thus in Cox's case, where the indictment, which was for perjury at common law, charged the offence to have been committed "falsely, maliciously, wickedly, and corruptly," all the judges held that those words implied that it was done wilfully.[e]

§ 1674. Laying the burning to be of a house is sufficient even at common law, without saying a dwelling-house. In Glandfield's case the indictment, which was framed on the stat. 9 Geo. 1, stated the burning to be of out-houses generally, which was ruled by Heath, J., to be sufficient,

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[c] R. *v.* Rickman, 2 East, P. C. 1034.

[cc] Shepherd *v.* People, 5 E. P. Smith, (N. Y.) 537.

[d] For forms of indictment, see Wh. Prec., as follows:

(389) General frame of an indictment for arson at common law.
(390) Burning unfinished dwelling-house, under Mass. Rev. stats., ch. 126, § 5.
(391) Setting fire to a building, whereby a dwelling-house was burnt in the night time. Mass. st., 1852, ch. 258, § 3.
(392) Burning a dwelling-house in the day time. Rev. sts. of Mass., ch. 126, § 2.
(393) Setting fire to a building adjoining a dwelling-house in the day time, whereby a dwelling-house was burnt in the day time. Rev. sts. of Mass., ch. 126, § 2.
(394) Burning a stable within the curtilage of a dwelling-house. Rev. sts. of Mass., ch. 126, § 3.
(395) Burning a city hall in the night time. Rev. sts. of Mass., ch. 126, § 3.
(396) Burning a meeting-house in the day time. Rev. sts. of Mass., ch. 126, § 4.
(397) Burning a vessel lying within the body of the country. Rev. sts. of Mass., ch. 125, § 5.
(398) Burning a dwelling-house with intent to injure an insurance company. Rev. sts. of Mass., ch. 126, § 8.
(399) Setting fire to stacks of hay. Rev. sts. of Mass., ch. 126, § 6.
(400) Burning a dwelling-house in the night time. Mass. st., 1852, ch. 259, § 3.
(401) Burning a flouring mill, under Ohio statute.
(402) Burning a dwelling-house, under Ohio statute.
(403) Burning a boat, under Ohio statute.
(404) Attempt to commit arson. Setting fire to store, under Ohio statute.
(405) Burning a stack of hay, under Ohio statute.
(406) Burning a meeting-house, under the Vermont statute.
(407) For burning one's own house, with intent to defraud the insurers.
(408) Burning a barrack of hay, under Pennsylvania statute.
(409) Burning stable, under same.

[dd] Kellenbeck *v.* State, 10 Md. 431,

[e] 1 Hawk. c. 89, s. 5; 2 East, P. C. 1036; see ante, § 402.

without stating of what denomination of out-houses, such being the description in the statute 9 Geo. 1.[f]

The house must be laid to be the house of another.[g] Ownership must be laid, and proved as laid.[gg]

§ 1675. 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.[h]

A. was indicted with eight others, for burning the dwelling-house of B. on the 11th of February, 1850; the jury found a verdict that he was guilty of arson in the day-time on that day. It was held, that the indictment charged sufficiently the statutory offence of burning a dwelling-house in the day-time, and the verdict responded to the charge in the indictment.[i]

An indictment, charging that the defendant "did set to, and the same house then and there, by the spreading of such fire, did feloniously, &c., burn," is sufficient.[j] At common law the term "burn" is essential.[k]

§ 1676. Where the indictment for setting fire to a barn in the night-time, whereby a dwelling-house was burned, charged 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 from 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 occupant of this part of the barn, and that the allegation of the indictment that the property was N's. and not G's. was not supported by the proof.[l]

In Vermont, on an indictment for burning a public meeting-house, under a statute, it is not necessary to aver who are its owners.[m]

§ 1677. If a person be indicted for burning the dwelling-house of another, if in fact it be the dwelling-house of such person, the court will not inquire into the tenure or interest of the occupant.[n]

An indictment for arson should allege the value of the property destroyed.[o] It should also allege that the property burned or set on fire belonged to the person in actual possession in his own right.[p]

How ownership is to be averred, has already been considered.[q]

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[f] Ibid. see Hester *v.* State, 17 Geo. 130.
[g] (2 East, P. C. 1034); Martha *v.* State, 2 Alab. 72.
[gg] Ante, § 250, 1577.
[h] State *v.* Sand, (a slave,) 3 Iredell, 570.
[i] Curran's case, 7 Gratt, 619. [j] Poulsten *v.* State, 14 Mis. 463; see as to Georgia, Hester *v.* State, 17 Geo. 130.
[k] Cochran *v.* State, 6 Gill. 400. [l] Com. *v.* Wade, 17 Pick. 395.
[m] State *v.* Roe, 12 Ver. R. 93. [n] People *v.* Van Blarcum, 2 John. 105.
[o] See ante, § 383. [p] Ritchey *v.* State, 7 Blackf. 168. [q] Ante, § 1609–72.

CHAPTER IV.

ROBBERY.

A. STATUTES.

UNITED STATES.

MASSACHUSETTS.
Robbery with larceny, the robber being armed, &c., and striking the person robbed, § 1678.
Robbery not being armed, &c., 1679.
Attempt to extort, by threats, &c., § 1680.

NEW YORK.
Robbery in the first degree, § 1681.
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Punishment, § 1783.
Attempt to extort by threats, &c., § 1684.

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

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

OHIO.
Robbery, § 1624.

B. ROBBERY AT COMMON LAW, § 1695.

A.—STATUTES.

UNITED STATES.—[*See "Offences against Post Office," and "Offences on the High Seas."*]

MASSACHUSETTS.

§ 1678. *Robbery with larceny, the robber being armed, &c., and striking the person robbed.*—If any person shall assault another, and shall feloniously rob, steal, and take from his person any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed, or if being so armed shall wound or strike the person robbed, he shall suffer the punishment of death for the same.—Rev. Stat,, ch. 125, sect. 13.)

[By the statute of April 8, 1839, (Supplement, &c., 127,) the punishment of death is changed to imprisonment for life.]

If any person, being armed with a dangerous weapon, shall assault another, with intent to rob or to murder, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the state prison, not more than twenty years.—(Ibid. sect. 14.)

§ 1679. *Robbery, not being armed, &c.*—If any person shall, by force and violence, or by assault and putting in fear, feloniously rob, steal, and take away from the person of another any money or other property, which may be the subject of larceny, (such robber not being armed with a dangerous weapon,) he shall be pun-

ished by imprisonment in the state prison for life, or for any term of years.—(Ibid. sect. 15.)[a]

§ 1680. *Attempt to extort by threats, &c.*—If any person shall, either verbally or by any written or printed communication, maliciously threaten to accuse another of any crime or offence, or shall, by any written or printed communication, maliciously threaten any injury to the person or property of another, with intent thereby to extort money, or any pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the state prison, or in the county jail, not more than two years, or by fine not exceeding five hundred dollars.[b]—(Ibid. sect. 17.)

NEW YORK.

§ 1681 *Robbery, in the first degree.*—Every person who shall be convicted of feloniously taking the personal property of another from his person, or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree.—(Rev. Stat. Part iv., chap. 1, title 3, art. 5, sect. 55.)

§ 1682. *Robbery, in the second degree.*—Every person who shall be convicted of feloniously taking the personal property of another in his presence, or from his person, which shall have been delivered or suffered to be taken, through fear of some injury to his person or property, or to the person of any relative or member of his family, threatened to be inflicted at some different time, which fear shall have been produced by the threats of the person so receiving or taking such property, shall be adjudged guilty of robbery in the second degree.—(Ibid. sect. 56.)

§ 1683. *Punishment.*—Every person convicted of robbery in the first degree shall be punished by imprisonment in a state prison for a term not less than ten years; and every person convicted of robbery in the second degree, shall be punished by a like imprisonment for a term not exceeding ten years.—(Ibid. sect. 57.)

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[a] Under this section, the articles stolen, must be *carried away* by the robber, and must be the property of the person robbed, or of some third person; and these facts must be alleged in the indictment on the section, in the same manner as in an indictment for robbery, at common law. (*Com. v.* Clifford, 8 Cush. 636.)

In a case determined by the Supreme Court, before the enactment of the Revised Statutes, but on a statute almost precisely the same as that just given, it was said, that to make robbery a capital offence within the statute, it is sufficient if the party be armed with a dangerous weapon, with intent to kill or maim the person assaulted, in case such killing or maiming be necessary to his purpose of robbing, and that he have the power of executing such intent. The prisoner was indicted for the robbery of John Bray, "being then and there, at the time of committing the assault aforesaid, in manner and form aforesaid, armed with a certain dangerous weapon called a pistol, with intent him, the said John Bray, then and there to kill and maim." The defence set up was, that to constitute the crime of robbery a capital offence within the statute, it must be proved that there was an absolute intent to kill or maim the party robbed, at all events, whether the robbery could be accomplished without killing or maiming, or not; and that in the present case, the fact of the prisoner having left the party robbed, without killing or maiming him, or making an actual attempt to do it, proved that there was no such intent, as was by the statute constituted an essential ingredient in the capital offence. This construction of the statute was not adopted by the court, but they instructed the jury, that if they were satisfied, from the evidence, that the prisoner armed himself with a loaded pistol with intent to kill and maim the party whom he should rob—if such killing or maiming was necessary for his purpose of robbing—and that when he assaulted and robbed the prosecutor, he had the power of executing such intent, and meant to do it, if he could not otherwise rob him, the offence was capital according to the statute; and the prisoner was accordingly found guilty. (*Com. v.* Marten, 17 Mass. 739.)

See for form, Wh. Prec. 411–12.

[b] See for form, Wh. Prec. 414.

§ 1684. *Attempt to extort by threats, &c.*—Every person who shall knowingly send or deliver, or shall make, and for the purpose of being delivered or sent, shall part with the possession of, any letter or writing, with or without a name prescribed thereto, or signed with a fictitious name, or with any letter, mark or designation, threatening therein to accuse any person of any crime, or to do any injury to the person or property of any one with a view or intent to extort or gain any money or property of any description belonging to another, shall, upon conviction, be adjudged guilty of an attempt to rob, and shall be punished by imprisonment in a state prison not exceeding five years.—(Ibid. sect. 58.)

PENNSYLVANIA.

§ 1685. *Robbery, when armed, &c.*—If any person, being armed with an offensive weapon or instrument, shall rob or assault, with intent to rob another, or shall, together with one or more person or persons, rob or assault, with intent to rob, or shall rob any person, and at the same time, or immediately before or immediately after such robbery, beat, strike, or ill-use any person, or do violence to such person, the person so offending shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate and solitary confinement, at labor, not exceeding ten years.—(Revised Act, Bill I., sect. 100.)

§ 1686. *Robbery, by threat.*—If any one shall accuse any person of the abominable crime of sodomy or buggery, committed either with man or beast, or of any assault, with intent to commit such abominable crime, or any attempt or endeavor to commit the same, or of making or offering any solicitation, persuasion, promise, or threat to any person, whereby to move or induce such person to commit, or permit such abominable crime, with a view and intent, in any of the cases aforesaid, to extort or gain from such person, and shall, by intimidating such person by such accusation or threat, extort or gain from such person any money or property, the person so offending shall be deemed guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment by separate or solitary confinement at labor, not exceeding ten years.—(Ibid. sect. 102.)

§ 1687. *Robbery or larceny from person, &c.*—If any person shall rob another, or shall steal any property from the person of another, or shall assault any person with intent to rob him, or shall, by menaces or by force, demand any property of another, with intent to steal the same, such person shall be guilty of felony, and being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, not exceeding five years.—(Ibid. sect. 103.)[c]

[c] "These sections are partially new. The existing legislation against the crime of robbery will be found in the 7th section of the act of the 31st of May, 1718, entitled 'An Act for the advancement of justice, and the more certain administration of the law.' 1 Smith's Laws, 105. Brightly's Digest, 730, No. 1. The 2d section of the act of the 8th March, 1780, entitled 'An Act for the amendment of the laws relative to the punishment of treason, robberies, misprisions of treason, and other offences.' 1 Smith's Laws, 498. Brightly's Digest, 730, No. 2. The 2d section of the act of 5th April, 1790, entitled 'An Act to reform the penal laws of this State.' 2 Smith's Laws, 531, Brightly's Digest, 730, No. 3. The 9th section of the act of the 23d September, 1791, entitled 'A supplement to the penal laws of this State.' 3 Smith's Laws, 37. Brightly's Digest, 730, No. 4; and the 4th section of the act of the 23d April, 1829, entitled 'A further supplement to an act, entitled "An Act to reform the penal laws of this Commonwealth."' Pamphlet Laws, 341. Brightly's Digest, 731, No. 5. There are other laws providing for restitution to be made by persons convicted of robbery, which will be found in the act relating to criminal procedure. The 101st

VIRGINIA.

§ 1691. *Robbery with dangerous weapon.*—If any free person commit robbery, being armed with a dangerous weapon, he shall be confined in the penitentiary not less than five nor more than ten years; if not so armed, he shall be confined therein not less than three nor more than ten years.—(Code 1849, chap. 191, sect. 12.)

§ 1692. *Extortion by threats.*—If any free person threaten injury to the character, person or property of another person, or accuse him of any offence, and thereby extort money or pecuniary benefit, he shall be confined in the penitentiary not less than one nor more than five years.—(Ibid. sect. 13.)

§ 1693. *Secreting child, &c., with intent to extort, &c.*—If any free person seize, take or secrete a child from the person having lawful charge of such child, with intent to extort money or pecuniary benefit, he shall be confined in the penitentiary not less than one nor more than five years.—(Ibid. sect. 14.)

OHIO.

§ 1694. *Robbery.*—That if any person shall forcibly and by violence, or by putting in fear, take from the person of another, any money, or personal property, of any value whatever, with intent to rob or steal;[cc] every person so offending shall be deemed guilty of robbery, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than fifteen, nor less than three years.[d]—(Act of March 7, 1835, Swan's Stat., sect. 15–271.)

B.—ROBBERY AT COMMON LAW.

§ 1695. Robbery is the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear.

§ 1696. The taking must be from the person or in the presence of the prosecutor.[dd] Where it appeared that the prosecutor was with a third person, who had the prosecutor's bundle, and who, when the prosecutor was forcibly attacked by the defendant, dropped the bundle, and ran to assist the prosecutor, when the prisoner took up the bundle and ran off, a

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section of the present act, prescribes against robberies committed by a party armed with an offensive weapon, or accompanied with personal injury to the party robbed. The 102d section prescribes against robberies by the means of intimidation mentioned in the section. The 103d section prescribes against robberies committed under less aggravated circumstances. To each of these degrees of robbery, punishments are assigned according to its relative danger and atrocity." (Revisor's Report.)

[cc] A count in an indictment for robbery which has no averment that the property was taken with intent to rob or steal, is fatally defective. (Mathews *v.* State, 4 Ohio (N. S.) 539.

[d] It is enough if the property was in the presence and under the immediate control of the prosecutor, and that while he was laboring under fear, the property was taken by the accused. As where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or cattle before his face; or where his money, or bank bills, or other property, are in his presence, and under his immediate control, and he laboring under such fear, the property is taken by the defendant. In this respect the common law rule prevails in Ohio. (Turner *v.* State, 1 Ohio St. R. 425.)

Where an indictment for robbery avers an actual stealing of bank notes, the intent to steal named in the statute, is necessarily included; as well, also, as the knowledge that they were such. (Turner *v.* State, 1 Ohio St. R. 422.)

[dd] U. S. *v.* Jones, 3 Wash. C. C. R. 209; Com. *v.* Snelling, 4 Binney, 379; R. *v.* Grey, 2 East, P. C. 708; R. *v.* Hamilton, 8 C. & P. 49.

learned judge is said to have doubted whether the offence was robbery.[e] But when a thief puts a man in fear, and then in his presence drives away his cattle, the robbery is complete.[f] So, where a man flying from a robber, drops his hat, which the robber steals.[g]

§ 1697. It is essential that the property should be taken against the will of the party robbed.[h] The goods also must appear to have been taken *animo furandi*, as in cases of larceny.[i] And if a man, by force or threats, compel another to give him goods he has to sell, and give him in return money to the amount of the value of the goods, it is doubted very much if this be robbery,[j] although it is said by Mr. Archbold that it would be if the goods were of greater value than the money given for them.[k] If one, under a *bona fide* impression that the property is his own, obtain it by menaces, that is a trespass, but no robbery.[l]

There must be an actual taking and carrying away. If a robber cut a man's girdle, in order to get his purse, and the purse thereby fall to the ground, and the robber run off, or be apprehended before he can take it up, this would not be robbery, because the purse was never in the possession of the robber.[m] But it is immaterial whether the taking were by force or upon delivery; and if by delivery, it is also immaterial whether the robber compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colorable pretence. A carrying away must also be proved; and where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him; and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended, the judges held that the robbery was not complete.[o] But where the defendant snatched out a lady's ear-ring, and succeeded in separating it from the ear, and it was afterwards found among the curls of her hair, the court held this a sufficient proof of asportation to support the indictment.[p]

§ 1698. While to constitute a robbery, there must be a felonious taking of property from the person of another, either by force, either actual or constructive, by threatening words or gestures; yet, if force be used, fear is not an essential ingredient.[q] This disjunctive way of stating the offence has been incorporated in the statutes of several of the states, among which may be mentioned Mississippi, where it is provided that if the goods be taken either in violence or by putting the owner in fear, it is sufficient.[qq]

Where a man knocked another down, and took from him his property while he was insensible, it was held robbery.[r] Where the defendant seized

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[e] R. *v.* Fellows, 5 C. & P. 501. [f] 1 Hale, 583; post, § 1699 [g] Ibid.
[h] R. *v.* M'Daniel, Foster, 121, 128; Long *v.* State, 12 Georg. 293.
[i] Long *v.* State, 12 Georg. 293. [j] 1 Hawk. P. C. c. 34, s. 14.
[k] Archbold's C. P. 245. [l] R. *v.* Hall, 3 C. & P. 409.
[m] 1 Hale, 533. [o] R. *v* Farrell, 1 Leach, 362. [p] R. *v.* Lapier, 1 Leach, 320.
[q] Com. *v.* Snelling, 4 Binney, 379. [qq] M'Daniel *v.* State, 8 S. & M. 401.
[r] Foster, 128; R. *v.* Lapier, 1 Leach, 320.

the seals and chain of the prosecutor's watch, and pulled the watch out of its fob, but the watch being secured round the neck by a chain, he could not take it until by pulling two or three jerks he broke the chain and ran off with the watch, the robbery was held complete.[s]

The prisoner, when walking on the public street by night with a stranger, seized the latter's watch with violence enough to break a silk guard, and exclaimed, "Damn you, I will have your watch," and fled with it. This was held to be highway robbery, though the prosecutor could not swear that he feared anything except the loss of his watch.[ss]

It appeared that while the prosecutor and prisoner examined a bank note, which the latter had produced, the prosecutor felt the prisoner's hand in his pocket on his pocket-book, and immediately seized his arm, the prisoner at the same time snatching the bill; a scuffle ensued, in which the prosecutor was thrown down, and the prisoner escaped with the pocket-book and bank note. This was held not to be robbery, but only a case of larceny.[t]

§ 1699. Any threat calculated to produce terror is sufficient to consummate the offence.[tt] Thus, if a man take another's child, and threaten to destroy him, unless the other give him money, this is robbery.[u] So, where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given; the prosecutor thereupon gave him 5s., but he insisted on more, and prosecutor being terrified, gave him 5s. more: the defendant and the mob then took bread, cheese, and cider from the prosecutor's house, without his permission, and departed; this was holden to be a robbery.[v] Where a mob came to the house of the prosecutor, and with the mob the prisoners, who advised the prosecutor to give them something to get rid of them and prevent mischiefs, by which means they obtained money from the prosecutor; Parke, J., (after consulting Vaughan, B., and Alderson, J.,) admitted evidence of the acts of the mob at other places, before and after, on the same day, to show that the advice of the prisoners was not *bona fide*, but in reality a mere mode of robbing of the prosecutor.[w]

§ 1700. To extort money under a threat of charging the prosecutor with an unnatural crime, had in many cases been holden to be robbery;[x] even where it appeared that the prosecutor parted with his money from fear merely of losing his character or situation by such on imputation.[y]

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[s] R. *v.* Mason, R. & R. 419; R. *v.* Davies, 2 East, P. C. 709.

[ss] State *v.* McCune, 5 Rh. Is. (2 Ames) 60. [t] State *v.* John, 5 Jones (N. C.) 163.

[tt] See Long *v.* State, 12 Georg. 293.

[u] Per Eyre, C. J., in R. *v.* Reeve, 2 East, P. C. 705; and see R. *v.* Donnelly, Ibid. 718, S. P.; see Virginia statute, ante, § 1696.

[v] R. *v.* Simons, 2 East, P. C. 231; see R. *v.* Brown, Id. 731, S. P.; R. *v.* Astley, 2 East, P. C. 712.

[w] R. *v.* Winkworth, 4 C. & P. 444.

[x] R. *v.* Jones, 1 Leach, 139; 2 East, P. C. 714; R. *v.* Donally, 1 Leach, 193; 2 East, P. C. 715; R. *v.* Cannon, R. & R. 146; People *v.* McDaniels, 1 Parker C. C. 199.

[y] R. *v.* Hickman, 1 Leach, 278; R. *v.* Egerton, R. & R. 375; and see R. *v.* Elmstead, 2 Russ. 86.

Obtaining money by such and similar means, in New York, Massachusetts, and Virginia, as has already been seen, is made felony; and provisions to the same effect exist in other States. To extort money, or other valuable things, by threatening a criminal prosecution for passing counterfeit money, or by any prosecution, except that for an unnatural crime, is not to commit a robbery.[z]

It must be noticed, however, that a felonious intent at the time is necessary. Thus, in a recent case, the prisoner had set wires, in which game was caught. The prosecutor, a game-keeper, took them away, for the use of the lord of the manor, while the prisoner was absent. The prisoner demanded his wires and game with menaces, and, under the influence of fear, the prosecutor gave them up. The jury found that the prisoner acted under a *bona fide* impression that the game and wires were his property, and that he merely, by some degree of violence, gained possession of what he considered his own. It was held no robbery, there being no *animus furandi*.[a]

§ 1701. The snatching a thing unawares is not considered a taking by force, but if there be a struggle to keep it, or any violence, the taking is robbery,[b] the reason of the distinction being that, in the former case, fear is not presumed. If fear is proven, the case is altered. Thus, where a special verdict found that the prisoner took the prosecutor by the cravat, with an intention to steal his watch, and also pressed his breast against the prosecutor's, and held him against a wall, during which he took the prosecutor's watch from his fob, without his knowing it, and "that the prosecutor had no idea that he meant to rob him," but "was afraid that he meant to whip him," this was held to be robbery.[c]

§ 1702. It makes no matter what pretences were employed to induce the owner to surrender possession, if he was put in bodily fear. Thus, if a man with a sword drawn ask alms of me, and I give it him, through mistrust and apprehension of violence, it is as much a robbery as if he had demanded money in the ordinary way.[d] So, where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of payment for them, this was holden to be robbery.[e] Where the defendant at the head of a riotous mob stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence, the mob pillaged the cart, this was holden to be robbery.[f] So, if thieves

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[z] Britt *v.* State, 7 Humph. 45; Long *v.* State, 12 Georg. 293.

[a] R. *v.* Hall, 3 C. & P. 409.

[b] State *v.* Trexler, 2 Car. L. R. 90; R. *v.* Macaulay, 1 Leach, 287; R. *v.* Baker, 1 Leach, 299; R. *v.* Steward, 2 East, P. C. 702; R. *v.* Horner, 1d. 703; R. *v.* Walls, 2 C. & K. 214; R. *v.* Gnosel, 1 C. & P. 304.

[c] Com. *v.* Snelling, 4 Binney, 379.

[d] 4 Bl. Com. 242.

[e] R. *v.* Simons, 2 East, P. C. 712; and see R. *v.* Spencer, Id. 712.

[f] Merriman *v.* Hundred of Chippenham, 2 East, P. C. 709.

come to rob A., and finding little upon him, force him by menace to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continued to operate upon him.[g]

§ 1703. To constitute the crime, it is not necessary that the taking should be from the person of the owner, nor that it should be severed from him;[h] it is sufficient if it be done in his presence; as if by intimidation, he is compelled to open his desk or to throw down his purse, and the money is taken in his presence.[i]

An indictment which charges the offence to have been committed near the highway, is good.[j] But an indictment charging the robbery to have been committed in the highway, is not supported by evidence of a robbery *near* the highway.[k]

An indictment which alleges the taking of the property from the person "feloniously and violently," sufficiently alleges the putting in fear.[l]

The rules heretofore laid down for the description of personal property, apply to cases of robbery.[m]

§ 1704. An indictment for robbery, which alleges that the "defendant made an assault upon A., and put him in fear of his life, and did take, steal and carry away feloniously, the money of said A.," is insufficient, because it does not state that the money was taken from the person of A., and against his will, which is an essential averment.[n]

An averment in an indictment for robbery that the property was feloniously taken will not supply the want of an averment of the intent to rob or steal.[o]

CHAPTER V.

LARCENY.[a]

A. STATUTES.

UNITED STATES.

Larceny in exclusive jurisdiction of U. S. or on high seas, § 1705.
Destroying or carrying away records, § 1705.*(a)*

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[g] Fitz. co., pl. 464; 1 Hale, 532.
[h] Turner *v.* State, 1 Ohio St. R. 422.
[i] U. S. *v.* Jones, 3 Wash. C. C. R. 209.
[j] State *v.* Anthony, 7 Iredell, 234.
[k] State *v.* Cowan, 7 Iredell, 239.
[l] Ibid.
[m] See ante, § 354, 363, 610, 614; see Turner *v.* State, 1 Ohio St. R. 422.
[n] Kit *v.* State, 11 Humph. 167. For forms of indictment, see Wh. Prec. as follows:
(410) General frame of indictment at common law.
(411) Robbery—the prisoner being armed with a dangerous weapon. Mass. Rev. Stats. ch. 125, § 15.
(412) Robbery—the prisoner being armed with a dangerous weapon, and striking and wounding the person robbed. Rev. Stats. of Mass., ch. 125.
(413) Robbery, not being armed. Rev. Stats. of Mass., ch. 125, § 15.
(414) Attempting to extort money by threatening to accuse another of a crime. Rev. Stats. of Mass, ch. 125, § 17.
[o] Mathews *v.* State, 4 Ohio, (N. S.) 539.
[a] By the act of 28th February, 1839, the punishment of whipping and the pillory were abolished. The offence of larceny is not punishable under this act, unless com-

MASSACHUSETTS.
Breaking, &c., in night, office, ship, and not adjacent dwelling-house with intent, &c., § 1706.
Entering same without breaking, in night-time, or breaking, &c., in day, § 1707.
Same as to any dwelling-house, &c., or office, shop, ship, &c., with intent, &c., § 1708.
Stealing in day-time in dwelling-house, &c., or breaking and entering in night any meeting-house, &c., and stealing therein, § 1709.
Stealing in any building on fire, § 1710.
Stealing from the person, § 1711.
Stealing notes, bills, deeds, receipts, &c., § 1712.
Stealing railway tickets, § 1712.(a)
Jurisdiction, &c., § 1713.
Second conviction, § 1714.
Breaking and entering in night-time, § 1715.
Stealing in dwelling-house in night-time, § 1716.
Unless specially averred, presumed to be in night, 1717.
Larceny of beast or bird, § 1718.
Punishment generally, § 1719.
Trespass with intent to steal, § 1720.
Accessories, § 1721.
Stealing of real property, 1722.
Property of person deceased, § 1723.
Breaking and entering in night-time any building with intent, &c., § 1724.
Entering in the night-time without breaking, or in the day-time with breaking, any building with intent, &c., § 1725.
Breaking and entering in day-time, any building, &c., with intent, § 1726.
Punishment, &c., § 1727.

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

PENNSYLVANIA
Larceny, § 1736.
Stealing, choses in action, &c., made larceny, § 1737.
Horse stealing, § 1738.
Stealing lead, iron, &c., from houses, § 1739.

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mitted in a place under the sole and exclusive jurisdiction of the United States; and, to bring the case within the statute, there must be an averment of such sole and exclusive jurisdiction in the indictment. (U. S. *v.* Davis, 5 Mason's C. C. R. 356.) Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the United States, it may yet be punishable under the third section of the act of 1825, ch. 276. Offences are punishable under that section, according to the state laws where they were committed, under circumstances or in places in which, before that act, no court of the United States had authority to punish them. (Ibid.)

Larceny, committed on board an American ship in an enclosed dock, in a foreign port, is not punishable under the statute of 30th April, ch. 9, sect. 16. (U. S. *v.* Hamilton, 1 Mason's C. C. R. 152.)

The feloniously stealing goods which had been cast away from a vessel wrecked at Rockaway Beach, the goods, when so taken, having been above high-water mark, in the county of Queens, in the state of New York, was an offence under the ninth section of the act, entitled "An act more effectually to provide for the punishment of certain crimes against the United States," passed 3d March, 1825. (U. S. *v.* Coombs, 12 Peters, 72.)

Money and bank notes and coin are personal goods, within the meaning of this section, respecting stealing and purloining on the high seas. (U. S. *v.* Mouton, 5 Mason's U. S. R. 537; see U. S. *v.* Davis, 5 Mason, 356.)

Clerks, servants, or other employees, stealing property of their master or employer, § 1740.
Larceny by bailee, § 1741.
Larceny of dogs, § 1741. (a)
VIRGINIA.
Simple larceny, § 1742.
Bank note, check, etc., § 1743.
Severance from the realty, § 1744.
Stealing slave, § 1745.
Taking oysters, etc., § 1746.
OHIO.
Larceny generally, § 1747.
Destroying bank notes or bills, etc., § 1748.
Larceny under thirty-five dollars, § 1749.
Horse stealing, receiving or buying stolen horse, concealing such horse or a horse-thief, § 1750.

B. LARCENY AT COMMON LAW.

I. SUBJECTS OF LARCENY, § 1751.
II. FELONIOUS INTENT, § 1769.
III. TAKING AND CARRYING AWAY, § 1802.
IV. OWNERSHIP, § 1818.
V. VALUE, § 1837.
VI. TAKING WHERE THE OFFENDER HAS A BARE CHARGE, § 1840.
VII. TAKING WHERE THE POSSESSION OF THE GOODS HAS BEEN ACQUIRED ANIMO FURANDI, § 1847.
VIII. TAKING WHERE THE POSSESSION OF THE GOODS HAS BEEN OBTAINED WITHOUT ANY FRAUDULENT INTENTION IN THE FIRST INSTANCE, § 1860.
IX. INDICTMENT, § 1869.

UNITED STATES.

§ 1705. *Larceny in exclusive jurisdiction of U. S. or on high seas.*—If any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another, such person so offending, his counsellors, aiders, abettors, (knowing of any privy to the offences aforesaid,) shall on conviction, be fined not exceeding the four-fold value of the property so stolen, embezzled or purloined; the one moiety to be paid to the owner of the goods, and the other moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty-nine stripes. By act 23d August, 1842, the punishment for the offences mentioned in the preceding article, upon conviction thereof, shall be by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the nature and aggravation of the offence.[b]—(Act 30th April, 1790, sect. 16.)

§ 1705 (a). *Destroying or carrying away records, &c.*—Any person who shall willfully and knowingly destroy, or attempt to destroy, or with intent to steal or destroy, shall take and carry away any record, paper or proceeding of a court of justice, filed or deposited with any clerk or officer of such court, or any paper or document or record, filed or deposited in any public office, or with any judicial or public officer, shall, without reference to the value of the record, paper, document or proceeding so taken, be deemed guilty of felony, and on conviction in any court of the United States having jurisdiction thereof, shall pay a fine not exceeding two thousand dollars, or suffer imprisonment in a penitentiary, not exceeding three years, or both, as the court in its discretion shall adjudge.—(26 Feb. 1853, § 4, 10 Stat. 170.)

[b] See forms, Wh. Prec. 417-8-9.

§ 1705 (*b*). *By officers of Courts.*—Any officer having the custody of any record, document, paper or proceeding specified in the last preceding section of this act, who shall fraudulently take away, or withdraw, or destroy any such record, document, paper or proceeding filed in his office, or deposited with him, or in his custody, shall be deemed guilty of felony, and on conviction in any court of the United States having jurisdiction thereof, shall pay a fine not exceeding two thousand dollars, or suffer imprisonment in a penitentiary not exceeding three years, or both as the court in its discretion shall adjudge, and shall forfeit his office and be for ever afterwards disqualified from holding any office under the government of the United States.—(Ibid. sect. 5.)

MASSACHUSETTS.

§ 1706. *Breaking, &c., in night, office, shop, and not adjacent dwelling-house, with intent, &c.*—Every person who shall break and enter, in the night-time, any office, shop or warehouse not adjoining to or occupied with a dwelling-house, or any ship or any vessel within the body of any county, with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, shall be punished by imprisonment in the state prison not more than twenty years.[c]—(Rev. Stat., Ch. 126, sect. 9.)

§ 1707. *Entering same, without breaking in night-time, or breaking, &c., in day.*—Every person who shall enter, in the night-time, without breaking, or shall break and enter, in the day-time, any dwelling-house, or any out-house thereto adjoining, and occupied therewith, or any office, shop or warehouse, or any ship or vessel, within the body of any county, with intent to commit the crime of murder, rape, robbery, larceny or any other felony, the owner, or any other person lawfully therein, being put in fear, shall be punished by imprisonment in the state prison not more than ten years.[d]—(Ibid. sect. 12.)

§ 1708. *Same as to any dwelling-house, &c., or office, shop, ship, &c., with intent.*—Every person who shall enter any dwelling-house in the night-time, without breaking, or shall break and enter in the day-time, any dwelling-house, or any out-house thereto adjoining, and occupied therewith, or any office, shop, or warehouse, or any ship or vessel, within the body of any county, with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, (no person lawfully therein being put in fear,) shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than two years.[c]—(Ibid. sect. 13.)

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[c] See forms, Wh. Prec. 433–4. In the eleventh section the Legislature have not omitted to provide, as for an aggravated larceny, for the offence of breaking and entering in the night-time with a felonious intent, a shop, warehouse, &c., "adjoining to and occupied with a dwelling-house;" but not for one so adjoining, &c., as to make part of the messuage. (Devoe *v.* Com., 3 Met. 316.)

It is not necessary to aver, on an indictment under the same section, that the office was "not adjoining to or occupied with a dwelling-house." (Evans *v.* Com., 3 Met. 453; Devoe *v.* Com., 3 Met. 316; but see Com. *v.* Tuck, 20 Pick. 356.)

Moving a loose plank, which is not attached to the freehold, in the partition wall of a building, is not a breaking under the eleventh section. (Com. *v.* Trimmer, 1 Mass. 476; see Com. *v.* Cavillo, 8 Mass. 490.)

The right of the owner of stolen property to a summary restitution thereof, under Rev. Sts. c. 126, § 25, is limited to the articles stolen, and does not extend to money into which they have been exchanged by the thief. (Commonwealth *v.* Boudrie, 4 Gray, (Mass.) 418.

[d] See forms, Wh. Prec 438 9.

When an indictment for breaking and entering a building, with intent to steal

§ 1709. *Stealing in day-time in dwelling-house, &c., or breaking and entering in night any meeting-house, &c., and stealing therein.*—Every person who shall steal in the day-time, in any dwelling-house, office, bank, shop, or warehouse, ship or vessel, or shall break and enter in the night-time, any meeting-house, church, court-house, town-house, college, academy, or other building erected for public use, and steal therein, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail not more than two years.[f]—(Ibid. sect. 14.)

§ 1710. *Stealing in any building on fire.*—Every person who shall commit the offence of larceny, by stealing in any building that is on fire, or by stealing any property removed in consequence of alarm caused by fire, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than two years. —(Ibid. sect. 15.)

§ 1711. *Stealing from the person.*—Every person who shall commit the offence of larceny by stealing from the person of another, shall be punished by imprisonment in the state prison, not more than five years, or in the county jail, not more than two years.[g]—(Ibid. sect. 16.)

§ 1712. *Stealing notes, bills, deeds, receipts, &c.*—Every person who shall commit the offence of larceny by stealing of the property of another, any money, goods, or chattels, or any bank note, bond, promissory note, bill of exchange, or other bill, order, or certificate, or any book of accounts, for or concerning money, or goods due, or to become due, or to be delivered; or any deed or writing containing a conveyance of land, or any other valuable contract in force, or any receipt, release, or defeasance, or any writ, process, or public record; if the property stolen shall exceed the value of one hundred dollars, shall be punished by imprisonment in the state prison, not more than five years, or by a fine not exceeding six hundred dollars, and imprisonment in the county jail, not more than two years, and if the property stolen shall not exceed the value of one hundred dollars, he shall be punished by imprisonment in the state prison or the county jail, not more than one year, or by fine not exceeding three hundred dollars.[h]—(Ibid. sect. 17.)

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therein, is correctly framed, an additional charge that the defendant committed a larceny therein, though defective, and such as would not of itself be a sufficient indictment for larceny, is no cause for reversing a judgment rendered on a general verdict of guilty. (Larned and another *v.* Commonwealth, 12 Metcalf, 240; see ante, 285, 287.)

[f] In an indictment under this section for breaking and entering and stealing in any of the buildings therein mentioned, the amount or value of the property stolen is immaterial; and it is a sufficient allegation as to the stealing, if there is a larceny properly and technically charged of any of the goods alleged in the indictment to be stolen. (Commonwealth *v.* Williams, 2 Cushing, 583; see ante, 285, 287.)

See form, Wh. Prec. 440.

[g] To constitute the offence of larceny "by stealing from the person," within the Rev. Sts. c. 126, s. 16, it is not necessary that the taking should be either openly and violently, or privily or fraudulently; but if it be with the knowledge, though without the dissent or resistance of the owner, the offence is equally committed, provided the taking be with an intention, on the part of the offender, to deprive the owner of his property. (Com. *v.* Dimond, 3 Cush. 235.

For form, see Wh. Prec. 442.

[h] The term "book of account," &c., covers a memorandum book, kept by a person who works for a tailor by the piece, in which entries are made of the names of the persons owning the garments worked upon, and the price of the work. (Com. *v.* Williams 9 Met. 273.)

§ 1712 (*a*). *Stealing railroad passenger tickets.*—Every person who shall be convicted of stealing, taking, and carrying away any railroad passenger ticket or tickets, prepared for sale to passengers, previous to or after the sale thereof, being the personal property of any railroad company, or of any other corporation or corporations, or of any person or persons, shall be adjudged guilty of grand or petit larceny, as prescribed in the next following sections.—(N. Y. Rev. Sts. 680, sect. 75.)

§ 1712(*b*). *Grand Larceny.*—If the price or prices authorized to be charged for such ticket or tickets on a sale thereof, shall exceed the sum of twenty-five dollars, such price or prices shall be deemed the value of such ticket or tickets, and the offence of stealing, taking or carrying away the same, shall be adjudged grand larceny, and the person convicted of the same shall be imprisoned in the state prison for a term not exceeding five years; but if such price or prices shall only amount to twenty-five dollars or under, the offence of stealing, taking and carrying away such ticket or tickets, shall be adjudged petit larceny, and the person convicted of the same shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment.—(3 Rev. St. 680, sect. 17.)

§ 1712(*c*). *Definition of ticket.*—Railroad passenger tickets of any railroad company, as well before the same shall have been issued to its receivers or other agents for sale as after, and whether endorsed by such receivers or other agents or not, are to be deemed railroad tickets within the meaning of this act.—(Ibid., sect. 77.)

§ 1713. *Jurisdiction, &c.*—Every justice of the peace shall have jurisdiction concurrent with the Court of Common Pleas, and the Police Court of the city of Boston shall have jurisdiction concurrent with the Municipal Court, of all the larcenies mentioned in the preceding section, when the money or other property stolen shall not be alleged to exceed the value of fifteen dollars; and of all other larcenies whatever, when the property stolen shall not be alleged to exceed the value of five dollars; in all which cases the punishment for a first offence shall be by a fine not exceeding fifteen dollars, or by imprisonment in the county jail, not more than six months; and, upon a second conviction of the like offence, committed after the former conviction, before a Police Court or justice of the peace, the punishment shall be by a fine not exceeding twenty dollars, or by imprisonment in the county jail, not more than one year, saving to every person so convicted the right to a trial by jury, upon his appeal, as in other like cases.—(Rev. Stat. ch. 126, sects. 9, 18.)

§ 1714. *Second conviction.*—Every person, who shall have been convicted, upon indictment, either of the crime of larceny, or of being accessory to the crime of larceny before the fact, and shall afterwards commit the crime of larceny, or be accessory thereto before the fact, and be convicted thereof, upon indictment, and every person who shall be convicted at the same term of the court, either as principal or as accessory before the fact in three distinct larcenies, shall be deemed a common and notorious thief, and shall be punished by imprisonment in the state prison, not more than twenty years, or in the county jail not more than three years. —(Ibid. sect. 19.)[1]

[1] A conviction on an indictment for larceny, which contains three counts, each describing different property and different owners, but each alleging the offences to have been committed on the same day, is not a conviction of three distinct larcenies, within the meaning of this section, and therefore, does not require that the convict should be sentenced as a common and notorious thief. Stevens *v.* Com. 4 Met. 310.)

A conviction, on an indictment, which charges in a single count, the breaking and

§ 1715. *Breaking and entering in night-time.*—Every person, who shall break and enter, in the night-time, any office, shop, or warehouse adjoining to or occupied with a dwelling-house with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, shall be punished by imprisonment in the state prison, not more than twenty years.—(Stat. 1839, ch. 31; Sup. Rev. Stat. 112.)[h]

§ 1716. *Stealing in dwelling-house in night-time.*—Sect. 1. Every person who shall feloniously steal, take and carry away the money, goods, chattels, or property of another in a dwelling-house in the night-time, shall be punished by solitary imprisonment in the state prison or house of correction, not exceeding five days, and by confinement afterwards to hard labor not exceeding five years, or by fine not exceeding three hundred dollars, and imprisonment in the common jail not exceeding two years.—(Gen. Laws of Mass. Sess. 1843, c. 1.)

§ 1717. *Unless specially averred, presumed to be in night.*—Sect. 2. Whenever, in any complaint, indictment or other criminal process, the offence of larceny is alleged to have been committed on any particular day, it shall be deemed and taken to have been committed in the day-time, unless there be an express averment that it was committed in the night-time.—(Ibid.)[i]

§ 1717(*a*). *Punishment of larceny in a shop, &c., in the night-time.*—Every person who shall feloniously steal, take and carry away the money, goods, chattels or property of another, in the night-time, in any office, bank, shop or warehouse, ship[j] or vessel, shall be punished by solitary imprisonment in the state prison or house

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entering of a building, with intent to steal, and stealing therein, is not such a conviction of larceny as requires or authorizes the court, under Rev. Sts. c. 126, s. 19, to sentence the convict as a common and notorious thief, on his being convicted, at the same term, of two or more other larcenies; and if such sentence be awarded in such case, the conviction is held to be of burglary only—the larceny being merged, and the sentence must be that only which the law prescribes for burglary. (Kite *v.* Commonwealth, 2 Metcalf, 581.)

[h] In an indictment on the last act it is not necessary to aver that the defendant broke and entered the shop with intent to steal, take and carry away the goods and chattels of A., then and there in the shop being found. (Josslyn *v.* Com., 6 Metcalf, 236.)

Under stat. 1784, c. 66, s. 1, providing against the stealing of "any note or certificate of any bank, or any public office, securing the payment of money to any person, or certifying that the same is due," an indictment was held sufficient which charged the defendant with stealing a "bank note" of a certain value, without a more particular description of the note. (Com. *v.* Richards, 1 Mass. 337; see ante, 178.)

The Stat. of 1839, c. 31, by prescribing the same punishment for breaking and entering, in the night-time, an office adjoining to a dwelling-house, with intent to steal therein, which was before prescribed by Rev. Sts. c. 126, s. 11, for breaking and entering in the night-time, an office not adjoining to a dwelling-house, with the like intent, has not made it necessary, in an indictment for breaking and entering an office in the night time, with intent to steal therein, to allege that the office was or was not, adjoining to a dwelling-house. (Larned *v.* The Commonwealth, 12 Metcalf, 240.)

Under the provision of the Rev. Stat. c. 86, s. 10, allowing an appeal to the S. J. C., in a case of a conviction in the municipal court, for an offence punishable with confinement at hard labor for a term exceeding five years, one conviction of three distinct larcenies at the same term of the court last named, and therefore liable as "a common and notorious thief," to a sentence exceeding five years' confinement at hard labor, might appeal, notwithstanding he was liable for either of his offences separately to a sentence of the length above indicated. (Com. *v.* Tuck, 20 Pick. 356.)

[i] Since the St. 1843, c. 1, § 2, an averment of a larceny from a vessel "on the 24th day of July, &c.," is to be deemed an allegation that the offence was committed in the day-time, and is not supported by proof of such a larceny in the night-time of that day; but the defendant might be found guilty of a simple larceny. Commonwealth *v.* McLaughlin, 11 Cush. (Mass.) 598.

[j] Stealing from a vessel in the night-time is a distinct offence from that of stealing from a vessel in the day-time. (Com. *v.* McLaughlin, 11 Cush. (Mass.) 598.)

of correction, not exceeding five days, and by confinement afterwards to hard labor not exceeding five years, or by fine not exceeding three hundred dollars, and imprisonment in the common jail not exceeding two years.—January 31, 1845; Rev. Stat. of Mass. 1845, chap. 28.)

§ 1718. *Larceny of beast or bird.*—The taking without the consent of the owner, and without a felonious intent, of any beast or bird ordinarily kept in a state of confinement, and not being the subject of larceny at common law, shall be held to be larceny, and any person so taking any such beast or bird shall be punished in the manner provided in the revised statutes for the punishment of persons guilty of the crime of larceny.—(Gen. Laws of Mass. sess. 1850, ch. 303.)

§ 1719. *Dwelling-house, night-time.*—"Every person who shall feloniously steal, take and carry away the money, goods, chattels, or property of another in a dwelling-house, in the night-time, shall be punished by solitary confinement in the state prison or house of correction, not exceeding five days, and by confinement afterwards to hard labor not exceeding five years, or by fine not exceeding three hundred dollars, and imprisonment in the common jail not exceeding two years."[k]—(Stat. 18th February, 1843, see 3 Met. 460.)

§ 1720. *Trespass, with intent to steal.*—Sect. 1. Whoever by a trespass, with intent to steal, shall take and carry away anything which is parcel of the realty or annexed thereto, the property of another of some value, against his will shall be guilty of such simple or aggravated larceny, as he would be guilty of, if such property were personal property.[l]

§ 1721. *Accessories.*—Sect. 2. Any person may become an accessory before or after the fact to such larceny, or a receiver of the property stolen, in the manner in which he would become such if the property stolen were personal, and shall be punished in the same manner.

Sect. 3. Such courts and justices shall have jurisdiction of such simple or aggravated larcenies, and of the offence of being accessory before and after the fact, to the same, or receiver of the property stolen, or any of the same, as would have jurisdiction, if the property so stolen were personal property.

§ 1722. *Stealing of real property.*—Sect. 4. The stealing of such real property may be a larceny from any one or more tenants, sole, joint or in common, in fee, for life or years, at will or sufferance, mortgagors or mortgagees, in possession of the same, or who may have, at the time of the larceny, an action of trespass against the offender, for a trespass at the same time upon the same, but not from one having only the use or custody of the same. The larceny may be from a wife in possession, where she is authorized by law to hold such property as if sole, otherwise her occupation may be the possession of the husband.

§ 1723. *Property of person deceased.*—When property, which was of a person deceased, is stolen, it may be a larceny from any one or more heirs, devisees, re-

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[k] Tully *v.* Com., 4 Met. 357.

An indictment for breaking a "store" is not sufficient, under Stat. 1784, c. 66, sec. 8, which contained the words "ware-house, shop, or other building whatsoever," unless it aver that the store is a building; (Com. *v.* M'Monagel, 1 Mass. 517,) but it was otherwise under Stat. 1804, c. 143, s. 6, which contains the term "store." (Com. *v.* Lindsay, 10 Mass. 153.)

In an indictment for breaking and entering an office in the night time, under the Stat. 1804, c. 143, sect. 4, it is not necessary to aver that the office is "not adjoining to, or occupied with a dwelling-house." (Devoe *v.* Com., 3 Met. 316; Evans *v.* Com., 3 Met. 453; Phillips *v.* Com., 3 Met. 588.)

[l] See for form, Wh. Prec. 443.

versioners, remainder-men or others, having a right upon such decease to take possession, but not having entered, as it would be after entry.

The larceny may be from a person unknown, when it would be such if the property stolen were personal.

Sect. 5. Such larceny cannot be committed by one, against whom no action of trespass could be maintained for acts like those constituting the larceny, but may be committed by those having only the use or custody.

Sect. 6. Nothing in this act shall prevent any civil action, which might have been maintained, if the same had never been enacted.—(Approved, May 15, 1851. —Gen. Laws, 1841, chap. 151.)[n]

§ 1724. *Breaking and entering in night-time any building with intent, &c.*—Sect. 1. Every person who shall break and enter, in the night-time, any building, with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, shall be punished by imprisonment in the state prison not more than twenty years.

§ 1725. *Entering in night-time without breaking, or in the day-time with breaking any building with intent, &c.*—Sect. 2. Every person who shall enter, in the night-time, without breaking, or shall break and enter, in the day-time, any building, with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, the owner or any other person lawfully therein, being put in fear, shall be punished by imprisonment in the state prison, not more than ten years.

§ 1726. *Breaking and entering, in day-time, any building, &c., with intent.*—Sect. 3. Every person who shall break and enter, in the day-time, any building with intent to commit the crime of murder, rape, robbery, larceny, or any other felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than two years.

§ 1727. *Punishment, &c.*—Sect. 4. Every person who shall commit the offence of larceny, by stealing in any building, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding five hundred dollars, or imprisonment in the house of correction or county jail not exceeding three years.—Approved May 15, 1851. Gen. Laws, 1851, chap. 156.)

1727(*a*). *Jurisdiction of police courts and justices of the peace extended.*—Sect. 1. The fourth section of an act relating to shop-breaking and aggravated larceny, chapter one hundred and fifty-six, passed May the fifteenth, eighteen hundred and fifty-one, is so far modified, that justices of police courts and justices of the peace may, in their discretion, take jurisdiction and punish by fine not exceeding twenty dollars, or by imprisonment in the county jail or house of correction, not exceeding one year, where the money or property stolen shall not exceed in value the sum of ten dollars.—(Stat of 1852, chap. 4.)

NEW YORK.

§ 1728. *Larceny, generally.*—Every person who shall be convicted of the felonious taking and carrying away the personal property of another, of the value of more than twenty-five dollars, shall be adjudged guilty of grand larceny, and shall be imprisoned in a state prison not exceeding five years.—(2 R. S. 679, sect. 63.)[m]

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[n] A wife, stealing in a building owned by her husband, is not liable to the punishment, prescribed by St. 1851, c. 156, § 4, for larceny "in any building." (Com. *v.* Hartnett, 3 Gray, (Mass.) 450.)

[m] A receipt for the payment of a debt is the subject of larceny. (People *v.* Loomis, 4 Denio, 380; Beardsly, J.) In an indictment for simple larceny, it is sufficient to

§ 1729. *In dwelling-house or ship.*—if such larceny be committed in a dwelling-house or in a ship or other vessel, the imprisonment of the offender may be increased by the court three years in addition to the term hereinbefore prescribed.—(Ibid. sect. 64.)

§ 1730. *In the night-time from the person.*—If such larceny be committed by stealing in the night-time from the person of another, the offender may be punished by imprisonment in a state prison not exceeding ten years.—(Ibid. sect. 65.)

§ 1731. *Under twenty-five dollars.*—Every person who shall be convicted of stealing, taking and carrying away the personal property of another, of the value of twenty-five dollars or under, shall be adjudged guilty of petit larceny, and shall be punished by imprisonment in a county jail not exceeding six months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment.[n]—(Ibid. 690, sect. 1.)

§ 1732. *Bonds, notes, &c.*—If the property stolen consist of a bond, covenant, note, bill of exchange, draft, order or receipt, or any other evidence of debt, or of any public security, issued by the United States, or by this state, or of any instrument whereby any demand, right or obligation shall be created, increased, released, extinguished or diminished (except such as are specified in the next section,) the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or effected thereby, as the case may be, shall be deemed the value of the article so stolen.—(Ibid. sect. 66.)

§ 1733. *Lottery tickets, &c.*—If the property stolen consist of any ticket in any lottery authorized by the laws of this state, or of any certificate or other legal evidence of a share or interest in any such ticket, and shall be stolen before the drawing of such lottery, the price paid for such ticket, certificate, or other legal evidence of such share or interest, shall be deemed the value thereof; and if the same be stolen after the drawing of such lottery, the amount due and payable to the holder thereof shall be deemed the value of such ticket, certificate, or other legal evidence of any share or interest therein.—(Ibid. sect. 67.)

§ 1734. *Severance from realty.*—If any person shall sever from the soil of another, any produce growing thereon, of the value of more than twenty-five dollars, or shall sever from any building, or from any gate, fence, or other railing and enclosure, any part thereof, or any material of which it is formed, of the like value, and shall take and convert the same to his own use, with the intent to steal the same, he shall be deemed guilty of larceny in the same manner, and of the same degree, as if the articles so taken had been severed at some previous and different time.—(Ibid. sect. 68.)

§ 1735. *Record, paper, &c.*—Whoever shall be convicted of having stolen and carried away any record, paper or proceeding of a court of justice, filed or deposited with any clerk or officer of such court, or any paper, document or record filed or deposited in any public office, or with any judicial officer, shall be adjudged guilty of larceny, without reference to the value of the record, paper, document, or proceeding so stolen; and shall be punished by imprisonment in a state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.—(Ibid. sect. 69.)

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allege the taking to have been in the county when the indictment is found. Haskins *v.* People, 16 N. Y. (2 Smith,) 344.)

[n] See People *v.* Cæsar, 1 Harris, C. C. 645.

Every officer having the custody of any record, paper or proceeding specified in the last section, who shall steal or fraudulently take away or withdraw, or destroy any such document or paper, filed or deposited with him, shall, upon conviction, be punished by imprisonment in a state prison for a term not exceeding five years.—(Ibid. sect. 70.)[o]

PENNSYLVANIA.

§ 1736. *Larceny.*—If any person shall be guilty of larceny, he shall, on conviction be deemed guilty of felony, and be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.—(Rev. Act, Bill I., sect. 103.)

§ 1737. *Choses in action.*—If any person shall steal any bank bill, note, draft or check, of, or on any bank, or any bill of exchange, order, warrant, draft, bill or promissory note, for the payment of money, or any certificate or security whatsoever, entitling or evidencing the title of any person or body corporate, to any share, portion or interest in any public debt or security, or fund, either of this commonwealth or of the United States, or of any of the states thereof, or of any foreign state, or to any interest in any stock, fund, or debt of any body corporate, company or society, or to any deposit in any saving bank or company, being the property of another person, or any corporation, association or society, notwithstanding the said enumerated particulars are, or may be deemed in law choses in action, such person shall be deemed guilty of larceny, and punished as is provided in the preceding section; and any person who shall steal any letters patent, charter, testament, will or deed, whether indented or poll covenant, assurance, lease, indenture, contract, letter of attorney, or other power or instrument of writing, respecting any property, real or personal, or any release, acquittance, voucher, receipt, receipt book, letter book, waste book, day book, journal, ledger, or other book of accounts belonging to another, every person so offending shall, on conviction, be adjudged guilty of larceny, and be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment, by separate or solitary confinement, not exceeding two years, or either, or both, at the discretion of the court.—(Ibid. sect. 104.)

§ 1738. *Horse stealing.*—If any person shall be guilty of horse stealing, or as accessory thereto before the fact, or of having received or bought any horse, knowing the same to have been stolen, the person so offending shall be guilty of felony, and shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.—(Ibid. sect. 105.)

§ 1739. *Stealing lead, iron, &c., from houses.*—If any person shall steal or rip, cut or break, with intent to steal, any glass or wood work belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square, street or other place dedicated to public use or ornament, every such offender shall be deemed guilty of larceny, and being thereof convicted, shall be sentenced to pay a

[o] Petit larceny, under the revised statutes, is not a felony. (Carpenter *v.* Nixon, 5 Hill, 260. See Ward *v.* People, 3 Hill, 395.) In it there are no accessories; but all concerned in the commission of the offence are principals. (Ward *v.* People, 3 Hill, 395.)

fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.—(Ibid. sect. 106.)

§ 1740. *Clerks, servants or other employees, stealing from employers.*—If any clerk, servant, or other person in the employ of another, shall, by virtue of such employment, receive and take into his possession any chattel, money or valuable security, which is or may be made the subject of larceny, for, or in the name, or on account of his master or employer, 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 or employer, although such chattel, money or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant or other person in his employ, and shall be punished as is provided in cases of laceny of like property.—(Ibid. sect. 107.)

§ 1741. *Larceny by bailee.*—If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any other person, except the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny, and punished as is provided in cases of larceny of like property.[p]—(Ibid. sect. 108.)

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[p] "Sections 104 and 105. Larceny is now prescribed against by the third and fourth sections of the act of 5th April, 1790, entitled "An Act to reform the penal laws of this State." 2 Smith's Laws, 531. Brightly's Digest, 731, Nos. 6 and 7. The second section of the act of 31st March, 1806, entitled "A supplement to sundry laws of this Commonwealth." 4 Smith's Laws, 334. Brightly's Digest, 731, No. 8. The fifth section of the act of the 5th April, 1790, entitled "An Act to reform the penal laws of this State." 3 Smith's Laws, 531. Brightly's Digest, 731, No. 9. The first section of the act of 10th March, 1817, entitled "An Act to repeal an act, entitled 'An Act to amend the penal laws.'" 6 Smith's Laws, 412. Brightly's Digest, 731, No. 10.

The essential difference between the provisions of the proposed sections and the existing laws is, that care has been taken in section one hundred and five, to embrace among the subjects of larceny, many articles of personal property, or as they are technically called in law, choses in action, which are not now the subjects of larceny. In the actual condition of our civilization and commerce, all the kinds of property enumerated in this section require to be protected.

Section 106. The crime of horse stealing is now prescribed against by the third section of the act of 5th of April, 1790, entitled "An Act to reform the penal laws of this State." 2 Smith's Laws, 531. Brightly's Digest, 420, No. 6; and the fourth section of the act of 23d April, 1829, entitled "A further supplement," &c. Pamphlet Laws, 341. Brightly's Digest, 420, No. 7. The amendments introduced extended the penalties of the crime to receivers, and increase the maximum punishment to ten years penal imprisonment.

Section 107. This section is new. It is intended to meet an offence which has arisen from the change of the habits of our people, particularly in the large cities. At present such a tenant could not be punished criminally. The heir having no other than a civil remedy.

Sections 108 and 109. According to the common law, personal goods only were the subjects of larceny; nothing therefore which was annexed or adhering to the land could be made the subject thereof Thus, if a person cut down trees, pluck fruit, pull down the stones or bricks of a building or the fixtures of a house, and instantly carry them away, he cannot be convicted of stealing, because the property is part and parcel of the freehold; but if once severed and allowed to lie on the ground for some period of time before being carried away, they then become personal goods, and the subsequent wrongful carrying them away was larceny. So strict is the law relating to land, or realty, (as it is called in the law,) that it was held that larceny could not be committed of the title deeds to the land, or the box in which they were contained. So written documents, such as bonds, bills of exchange, promissory notes, &c., were not as much the subjects of larceny, on the supposed ground, that as they are mere evidences of debt they were of no intrinsic value.

In our large cities thefts of the fixtures of dwelling-houses are a great evil. Such houses when vacant are entered by depredators, who not only injure the owner by taking away his gas or water fixtures, but subject him to loss and injury, consequent

§ 1741 (*a*). *Dogs.*—That in all cases where taxes are assessed and paid on dogs in the city and county of Philadelphia, and county of Allegheny, the said dogs

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upon the flowing of the gas or water. The necessity, therefore, of such provisions as are here proposed, is most absolute. In the one hundred and ninth section provisions are made against the robbery of fruit or vegetables, orchards or grain fields. The punishment provided against the stealing of roots, vegetables and fruit, has been confined to such offences, when committed in the night-time.

Section 110. This section is new, and introduces an important modification in our penal law. By the common law it is not larceny in a servant or other employee to convert to his own use property received by him for the use of his master or employer, which had never otherwise been in the possession of such master or employer, and where such servant or employee had done no act to determine his original lawful and exclusive possession, as by depositing the goods in the master's house or the like. Waite's case, 1 Leach, 33; Bull's case, 2 Leach, 980; Bazeley's case, 2 Leach, 973, exemplify the operation of this doctrine. In the first, a cashier of the Bank of England had received in deposit certain East India bonds, which he did not carry to the usual place of deposit, but put them in his own desk, from whence he afterwards took and sold them. This was held not to be larceny, because the bank had never actual possession of the bonds, but the possession remained always in the prisoner. The second was a case in which a confectioner, suspecting a person in his employ of purloining money received at the counter, sent an individual, who made a purchase from the servant, and paid him with a marked piece of silver. The master immediately afterwards examined the till, and not finding the marked piece, caused the servant to be searched, and found it on his person. The servant was acquitted of larceny, on the ground that the money never had been in the possession of the master, *as against the prisoner*. The third case was that of a banker's clerk receiving a deposit in bank notes from a customer, part of which, instead of placing in the drawer, he kept, and appropriated to his own use. This, after much discussion, was ultimately held by nine of the twelve judges not to be felony; inasmuch as the note kept back never had been in the possession of the banker, distinct from the possession of the prisoner; but that it would have been otherwise if the prisoner had deposited it in the drawer and had taken it afterwards.

In neither of these cases did there exist any moral difference between the crimes of which the prisoners were actually guilty, and technical larcenies. A nice and highly artificial distinction between what was, and what was not, a sufficient possession in the master of the property purloined, enabled the offenders to escape with impunity. It is to obviate such results which are really discreditable to criminal justice, and to protect masters and employers from the want of fidelity of those in wh m they are compelled, from the exigencies of business, to confide, that this section has been introduced. A similar enactment has long since in England remedied this defect in the common law.

Section 111. This section is also new, and framed to meet another strange anomaly in the common law. If a carrier is entrusted with the transportation of a package of goods or other property, and appropriates the whole to his own use, he is not criminally liable; but if he opens the package and withdraws a portion of its contents, he is guilty of larceny. This distinction proceeds upon the ground, that the act of breaking the package is an act of trespass in the carrier, by which the privity of contract is determined.—Whereas, if there be no breaking of the package, no severance of part of the commodity from the rest by the carrier, but the whole be parted with by him in the state in which it was delivered into his hands, there will be nothing which will amount to a trespass while the package remained in his possession. The section proposed will, if adopted, place the law and common sense in harmony with each other on this subject.

Sections 112 and 113. The one hundred and twelfth section prescribes against the receivers of any property made the subject of larceny by this act, knowing the same to have been stolen, and whether the stealing took place in this Commonwealth, or any of the States or Territories of the Union. The one hundred and thirteenth section makes it lawful to punish such receivers, as well before as after the principal felon shall have been convicted. These provisions are substantially the same with those of the act of 11th April, 1825, entitled "A further supplement to the penal laws of this Commonwealth." 8 Smith's Laws, 438. Brightly's Digest, 645, No. 27, 28 and 29. And the fifth clause of the resolution of 26th April, 1844, entitled "A resolution to authorize the county commissioners of Philadelphia County to borrow money, and for other purposes." Pamphlet Laws, 605. Brightly's Digest, 643, No. 16."—(Revisor's Report.)

shall be considered as personal property, and the owners thereof shall be entitled to all the rights and privileges in relation to the same as in other cases of personal property.—(Act of April 29, 1844, sect. 2.)

[*As to restitution, see ante,* § 778.]

VIRGINIA.

§ 1742. *Simple larceny.*—If a free person commit simple larceny of goods or chattels, he shall, if they be of the value of twenty dollars or more be deemed guilty of grand larceny, and be confined in the penitentiary not less than one, nor more than five years; and if they be of less value, be deemed guilty of petit larceny, and be confined in jail not exceeding one year, and at the discretion of the court may be punished with stripes.—(Code, 1849, sect. 14.)

§ 1743. *Bank note, check, &c.*—If any free person steal any bank note, check, or other writing, or passes of value, or any book of accounts for or concerning money or goods due or to be delivered, he shall be deemed guilty of larceny thereof, and receive the same punishment, according to the value of the thing stolen, that is prescribed for the punishment of larceny of goods and chattels.[s]—Ibid. sect. 15.)

In a prosecution under the preceding section, the money due on or secured by the writing, paper or book, and remaining unsatisfied, or which in any event might be collected thereon, or the value of the property or money affected thereby, shall be deemed to be the value of the article stolen.—(Ibid. sect. 16.)

§ 1744. *Severance from the realty.*—Things which savor of the realty, and are at the time they are taken, part of the freehold, whether they be of the substance, or produce thereof, or affixed thereto, shall be deemed goods and chattels, of which larceny may be committed although there be no interval between the severing and taking away.—(Ibid. sect. 17.)

§ 1745. *Stealing slave.*—If a free person steal a slave, he shall be confined in the penitentiary not less than two nor more than ten years.—(Ibid. sect. 18.)

§ 1746. *Taking oysters, &c.*—If any person take or sell the planted oysters of another, otherwise than from the natural beds, or shoals in the channel of a river or a creek, he shall be fined not less than fifty nor more than one hundred dollars, and may, at the discretion of the court, be confined in jail not less than one nor more than six months.—(Ibid. sect. 23.)

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[s] See Boyds's case, 1 Robinson, 691; and Vaughn *v.* Com. 10 Grattan, 759, where it was held that an obliger in a bond might commit larceny of it.

In the construction of this act, from which the above is drawn, it has been determined that as its object was to protect the currency of the state of Virginia, and as the bank notes of neighboring states circulate freely in that state, they are therefore, within the reason as well as the words of the law. (2 Va. Cases, 128.) If in a prosecution for the larceny of a bank note, it be proved that the prisoner, after stealing the note, passed it away as genuine, this act of his affords *primâ facie* evidence that the note, was genuine and of some value, and dispenses with the necessity of further proof of that fact. (Ibid.)

A general description of a bank note as one for a specified sum, and current within the United States, without mentioning the name of the bank by which it was issued, is sufficient in an indictment for the larceny thereof; (2 Va. Cases, 154;) though if the name of the bank be stated, the proof must correspond with the averment. (2 Va. Cases, 342.) The term "bank note." it was said, was not intended to apply to the notes of chartered banks only, but to include any available chose in action called a bank note, though issued by an immaterial averment which need not be proved. (Ibid.)

On a prosecution for larceny of bank notes, it is not indispensably necessary to produce them on the trial. (2 Leigh, 701.)

No other possession of bank notes, &c., mentioned in this act, is necessary to render

OHIO.

§ 1747. *Larceny generally.*—That if any person shall steal any money, or other personal goods, or chattels,[u] the property of another, of the value of thirty-five dollars or upwards, the person so offending shall be deemed guilty of larceny, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than seven years, nor less than one year.—(Act of March 7, 1835, Swan's Stat. 18, 271.)

§ 1748. *Destroying bank notes, or bills, &c.*—That if any person shall steal, or maliciously and feloniously destroy any bank bill or bills, or promissory note or notes, bill of exchange, order, receipt, warrant, draft, check or bond, given for the payment of money, or receipt, acknowledging the receipt of money or any other property, of the value of thirty-five dollars, or upwards, knowing them, to be such,[v] every such person shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than seven years, nor less than one year.—(Act of March 7, 1835; Swan's Stat., sect. 19, 271.)

§ 1749. *Larceny under* $35.—That if any person shall steal any money or other goods and chattels of any kind whatever, of less value than thirty-five dollars, the property of another; or shall steal or maliciously destroy any bank bill, promissory note, bill of exchange, order, warrant, draft, check or bond, or any accountable receipt for money, given for the payment or acknowledgment of any sum, under thirty-five dollars, the property of another, every person so offending, on conviction thereof, shall make restitution to the party injured in two-fold the value of the property stolen or destroyed; and be fined in any sum not exceeding two hundred dollars; or shall be imprisoned in the county jail, in a dungeon or cell thereof, if such jail contain either, and shall be fed on bread and water only, during his or her confinement, for any time not exceeding thirty days. Any or all of the foregoing punishments may be inflicted according to the aggravated nature of the offence. The sheriff shall receive twelve and a half cents only, per day, for thus subsisting the prisoner on bread and water.—(Act of March 9, 1835; Swan's Stat. sect. 1, 295, 6.)

§ 1750. *Horse-stealing, receiving or buying stolen horse, concealing such horse, or a horse thief.*—That if any person shall steal any horse, mare, gelding,[w] foal or

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them the subject of larceny, than is required in the case of goods; and if the expression "from the possession" means an actual possession, it can only apply to taking by robbery.

[u] "Larceny is the felonious taking and carrying away the personal goods of another: in other language, it is a taking and conversion of another's property, in a secret and clandestine manner, and with the intention by secrecy and fraud to deprive the owner of his remedy to recover his goods." Wood, J., Cheadle *v.* Buell, 6 Ohio, 69.)

A person having possession in this State, of property which he had stolen in another, may be convicted here of larceny. (Hamilton *v.* State, 11 Ohio, 435.)

Bank notes are properly described as property, rather than as "goods and chattels." or "money;" but in such case, if the indictment contains a particular description of the bank notes taken, but erroneously averring them to be "money, goods and chattels," these words may be rejected as surplusage, and the charge will be good. (Warren's C. L. 67.)

[v] An indictment for stealing bank bills must aver a scienter, or it is defective, (Gatewood *v.* State, 4 Ohio, 386; see also, Rich *v.* State, 8 Ohio, 111.)

[w] A bill of exceptions stating, that upon the trial, it was proved to the jury, that the animal stolen by the prisoner was a *grey gelding*, and not a *grey horse*, as charged in the indictment; and thereupon the counsel for the prisoner moving to the court that the jury be instructed, that the prisoner could not be found guilty, if the jury

filly, ass or mule, of any value; or if any person shall receive or buy any horse, mare, gelding, foal or filly, ass or mule, that shall have been stolen, knowing the same to have been stolen, with intent, by such receiving or buying, to defraud the owner; or if any person shall conceal any horse thief, knowing him to be such; or if any person shall conceal any horse, mare or gelding, foal or filly, ass or mule, knowing the same to have been stolen; every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than fifteen, nor less than three years.—(Act of March 7, 1835; Swan's Stat. 27, 275.

B.—Larceny at common law.[x]

"The definitions of larceny," said Baron Parke, in a late case,[y] "are none of them complete; Mr. East's is the most so, but that wants some little explanation. His definition is, 'the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.' This is defective, in not stating what the definition of 'felonious' in this definition is. It may be explained to mean, that there is no color of right or excuse for the act; and the 'intent' must be to deprive the owner, not temporarily, but permanently, of his property. Cases also show, that a taking of goods with an intent to return them, is not larceny."

I. Subject of larceny.

§ 1751. In what way property laid in an indictment for larceny is to be described, has been already mentioned;[z] it being noticed that the proof of the larceny of a single article among many will sustain a conviction.[a]

§ 1752. Larceny cannot be committed, at common law, of a thing not the subject of determinate property, as treasure trove, waifs, &c., till seized,[b] though it would seem that the true owner, though unknown, has still a property in them before seizure by the lord, unless there be circumstances to show an intended dereliction of the property.[c] But it has been held in Massachusetts, that articles of clothing, taken from a dead body ashore from a wreck, are the subjects of larceny;[d] and such is clearly the case at common law with grave-clothes.[e] Taking deer-skins hung up in the woods at an Indian hunting-camp, may be larceny, though the skins

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were satisfied that the animal stolen was a *grey gelding*, the court refused the instructions. (Hooker *v.* State, 4 Ohio, 348.)

Counts for horse stealing and grand larceny of other property may be joined in the same indictment. (Darton *v.* State, 18 Ohio, 221.)

Association with horse thieves, or subsequent confederation to steal horses, is not admissible evidence on a prosecution for stealing a specified horse. (Cheny *v.* State, 7 Ohio, 222.)

[x] See Wh. Prec. generally, 415–449.
[y] R. *v.* Halloway, 2 Car. & Kir., 945.
[z] Antea, § 354–363–610, 613.
[a] People *v.* Wiley, 3 Hill, 194; see ante, § 361, 619, 628.
[b] 1 Hale, 510. 1 Hawk. c. 33, sect. 24.
[c] 2 East, P. C. 606, 607.
[d] Wenson *v.* Sayward, 13 Pick. 402.
[e] Haynes' case, 12 Co. 113.

were not in the actual possession of any one at the time.[f] Ice, when put away in an ice-house for domestic use, becomes individual property, so as to be the subject of larceny;[g] and so is gas, when severed from the general pipe before it reaches the meter.[h]

§ 1753. Larceny cannot be committed of things which savour of the realty,[i] though when they are severed the case is otherwise.[j] This principle is best illustrated by the very refined distinction taken by Chief Justice Gibbs, that though "if a thief severs a copper pipe, and instantly carries it off, it is no felony at common law; yet if he lets it remain, after it is severed, any time, then the removal of it becomes a felony, if he comes back and takes it; and so of a tree which has been some time felled.

A key, although in the lock of a door in a house, is the subject of larceny.[k]

§ 1754. No larceny at common law can be committed of such animals in which there is no property, either absolute or qualified; as of beasts that are *ferœ naturœ* and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; "coons,"[l] fish in an open river or pond; or wild fowls, rooks, for instance,[m] at their natural liberty.[n] A marten caught in a trap in the woods cannot be a subject of larceny while it remains in the trap;[o] and according to Sir Thomas Wilde, C. J., not only is a wild animal itself not the subject of larceny, but it imparts its character to the cage in which it is confined.[p] Bees are *ferœ naturœ*, and although confined in the top of a tree by the owner of the tree, yet while they remain in the tree, and are not secured in a hive, they are not the subject of a felony.[q] An indictment for larceny, which charges that the prisoner stole "three eggs of the value of two pence, of the goods and chattels of S. H.," is bad, for not stating the species of eggs, because it does not show that the eggs stolen might not be such as are not the subject of larceny.[r]

§ 1755. But when an animal is reclaimed or confined, and may serve for food, it is otherwise; for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk or net, and pheasants or partridges in a mew, larceny may be committed.[s] Swans, it is said, if lawfully marked, are the subject of larceny at common law, although at large in a public

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[f] Penn *v.* Becomb, et al., Add. 386.
[g] Ward *v.* People, 6 Hill's N. Y. R. 144; 3 Ibid. 395.
[h] R. *v.* White, 17 Jur. 536; 20 Eng. Law & Eq. 585.
[i] 2 Russ. on Cr. 6 Am. ed. 62.
[j] Ibid.; 5 Black. 417.
[k] Hoskins *v.* Tarrence. 4 Blackf. 417.
[l] Warren *v.* State, 1 Iowa, 106. "The principle is well settled," says Greene, J., "that taking from another's possession an animal *ferœ naturæ*, or of a base nature, in contemplation of law, will not render a person liable for larceny; though the right of the owner would be protected by a civil action. As this principle applies, by common law, to monkeys, bears, foxes, &c., it will evidently apply to coons."
[m] Hanman *v.* Mockett, 2 B. & C. 934; 4 D. & R. 518.
[n] 1 Hale, 511; Fost. 366.
[o] Norton *v.* Ladd, 5 N. Hamp. 203.
[p] R. *v.* Powell, see post, § 1755.
[q] Wallis *v.* Mease, 3 Binn. 546; Cook *v.* Weatherly, 5 Sm. & Mars. 323.
[r] R. *v.* Cox, 1 Car. & Kir. 494.
[s] 1 Hale, 511; 1 Hawk, c. 33, sect. 39.

river;[t] or whether marked or not, if they be in a private river or pond;[u] and doves and pigeons are not the subject of larceny, unless where in the care and custody of their owners, as when in his dove cote,[v] though it is for the jury to say whether they are wild or tame, in which last case they are the subjects of larceny.[w] So, all valuable domestic animals, as horses, and all animals *domitæ naturæ*, which serve for food, as swine, sheep, poultry, and the like, and the product of any of them, as eggs, milk from the cow while at pasture,[x] wool pulled from the sheep's back feloniously;[y] and the flesh of such as are *ferœ naturæ*, may be the subject of larceny.[z] But as to all other animals which do not serve for food, such as dogs and ferrets, though tame and saleable,[a] or other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law.[b] It is otherwise, however, when they are taxed.[c]

Oysters are not ferœ naturæ, and will not be considered as abandoned to the public, unless planted in a place where they grow naturally.[cc]

§ 1756. Deeds and mortgages are not "goods and chattels;"[d] and at common law, it would seem they are not the subjects of larceny.[e]

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[t] Dalt. Just. 156.

[u] Ibid.

[v] Com. *v.* Chace, 9 Pick. 15.

[w] R. *v.* Cheafor, 2 Den. C. C. 361; 5 Cox, C. C. 367; 8 Eng. Law & Eq. 598, Exchequer Chamber, Saturday, Nov. 22, 1851. (Sittings upon Crown Cases Reserved. Present—Lord Campbell, Mr. Baron Alderson, Mr. Baron Platt, Mr. Justice Talfourd, and Mr. Baron Martin.) Lord Campbell said,—"This case was not argued, but we are called upon to give judgment. It was tried at the Nottingham Quarter Sessions on the 7th of July, 1851. William Cheafor was indicted for feloniously stealing four tame pigeons, the property of John Mansell, alleged to be reclaimed. The pigeons at the time they were taken were in the prosecutor's dovecote over a stable on his premises. being an ordinary dovecote, having holes at the top, and having a door on the floor, which was kept locked. The prisoner entered the dovecote at twelve o'clock at night, and took away the pigeons. The prisoner's counsel contended that the pigeons being at liberty to go out at any time were not reclaimed, and were not the subject of larceny. The chairman directed the jury that the view contended for by the prisoner's counsel was correct, and the pigeons were not the subject of larceny, but the jury took a better view of the law than the judge, and found the prisoner guilty. Judgment was postponed till the opinion of the court had been given as to whether the direction of the chairman was right, and whether the prisoner was properly punishable. Now, we think the direction of the learned chairman was wrong, because it comes to this—is it possible there can be larceny committed of tame pigeons, because the pigeon from his nature must have egress to the open air, and unless it has a hole for that purpose it c nnot get out? According to the direction of the learned chairman there can be no larceny committed of chickens, or geese, or ducks. It was a pure question of fact for the jury whether the pigeons were tame and reclaimed; the jury seem to have come to a very proper conclusion, that they were tame pigeons and reclaimed. The pigeons were the subject of larceny, although they had the opportunity of getting out and enjoying themselves. We shall direct that judgment be passed at the next quarter sessions." Conviction affirmed. Ev. Mail, 23 Mar. 1852; see also R. *v.* Howell, reported 1 Bennett & H. Lead. Cases, 65; though see R. *v.* Brooks, 4 C. & P. 131.

[x] Foster, 99.

[y] R. *v.* Martin, 1 Leach, 171.

[z] 1 Hale, 511.

[a] R. *v.* Spearing, R. & R. 250. See, however, State *v.* Latham, 13 Ired. 33.

[b] 1 Hale, 512; Findley *v.* Bear, 8 Serg. & Rawle, 571; see ante, § 1741, 1754.

[c] People *v.* Maloney, 1 Harris, C. C. 593; see ante, § 1741.

[cc] State *v.* Taylor, 3 Dutch. 117.

[d] See ante, § 348.

[e] Westbeer's case, Lawyer's Mag. 65; R. *v.* Powell, 14 Eng. Law & Eq. 575. In this case the prisoner was tried before Mr. Justice Talfourd, at the last assizes at Brecon, upon an indictment charging him with burglariously breaking and entering the dwelling

§ 1757. Bank bills redeemed by the bank that issued them, and in the hands of its agents, are the subject of larceny.[f]

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house of David Williams, with intent to steal "goods and chattels," therein. And it appeared from the evidence adduced at the trial, that in the year 1841 the prisoner borrowed of the prosecutor the sum of £600, and executed to him, as security, a mortgage in fee, of certain freehold land. And afterwards in the year 1848, he borrowed a further sum of £200, and executed a further mortgage upon the same land; subsequently, the prosecutor, the mortgagee, brought an action of debt against the prisoner for the recovery of the sums which he had lent, which action was impending, and approaching trial, when the burglary was committed. The evidence proved that the prisoner committed the burglary, in order to steal the mortgage securities, and the jury found that the offence was committed with intent to steal the mortgage deeds. In a bundle with the first deed, which had been kept in a drawer, ransacked on the night of the burglary, was a cancelled bond of a former mortgage belonging to Williams, the mortgagee, and which was also afterwards kept with both mortgage deeds; but these were in fact at the office of the mortgagee's attorney when the burglary was committed. At the trial it was objected, on behalf of the prisoner, that the intent was not properly alleged in the indictment, as, though the mortgage deeds might be the subject of statutable larceny as "valuable securities," they were not "goods and chattels;" but the learned judge overruled the objection, thinking that the mortgage deeds being substantially securities for debts, and containing covenants to pay principal and interest, were distinguishable from deeds, which, as savoring of realty, were not the subject of larceny at common law, and that the parchments on which the covenants were inscribed were chattels even if the words "goods and chattels" might not be rejected as surplusage. The prisoner was then sentenced to be transported for ten years; but was ordered to be detained in this country until the opinion of the Court of Error in criminal cases should have been taken upon the point. In Jan. 10, 1852, the case was argued as follows:—

Mr. Slade, Q. C. with whom was Mr. T Allen, contended, on behalf of the prisoner, that the indictment charged him with burglary, with intent to steal "goods and chattels," and the jury having found that the intent was to steal certain "mortgage deeds," there was, therefore, a fatal variance between the allegation and the finding, inasmuch as "mortgage deeds," savoring of realty, could not come within the definition of "goods and chattels," and in support of this argument the learned counsel cited a case from the third Institutes, to the effect that where charters which savored of realty were deposited in a box, that box could not be the subject of larceny by reason of its containing the charters.

Mr. Baron Alderson: Then if a lion were confined in a cage, I suppose the cage would be considered *fera naturæ*.

The Lord Chief Justice of the Common Pleas: It has been decided in Gloucestershire that larceny cannot be committed of a canary's cage, because it savors of the canary.

Mr. Slade: The offence alleged in the indictment was a felony, whereas the prisoner had only been guilty of a statutable misdemeanor, by the 23d section of the 7th and 8th Geo. IV., c. 29, which makes it a misdemeanor only, to steal deeds and writings relating to real estate.

No counsel appearing on behalf of the Crown, the court said they would take time to consider the case. The result is thus stated in the Evening Mail of the 26th inst. "It arose out of the charge of burglary against the prisoner, at the trial of which the jury found him guilty of the burglary, 'with intent to steal certain mortgage deeds,' and he was sentenced to ten years' transportation, subject to the opinion of this court. as to whether there could be a felony committed of the mortgage deeds, on the ground that they savored of the realty; and, secondly, whether the deeds were properly described in the indictment as 'goods and chattels.'

"The Lord Chief Justice of the Common Pleas now delivered judgment, and said that he court did not think it necessary to decide the question whether the mortgage deeds savored of the realty or not, for they were all of opinion that the deeds were not properly described as 'goods and chattels.' The conviction would therefore be reversed."

The other judges who were present during the argument concurred. Exchcq. Chamber, Jan. 25, 1852.

[f] Com v. Rand, 7 Metcalf, 475.

Gold and silver coin, it is said, are embraced under the word "chattels," in the Delaware statute.[g]

§ 1758. Bonds, notes, and bills, being mere choses in action, and of no intrinsic value, were not held the subjects of larceny at common law.[h] By statute, however, in England and in this country, they are recognised as property, and the stealing of them made penal. In what way, under the statutes of the several States, bank notes are to be described, has already been examined under another head,[i] and the provisions of the federal government, and of five of the States, have been given at the head of this chapter.[j]

Under these statutes, questions frequently arise as to the meaning of descriptive terms. These terms have already been considered as follows:

(*a*) "Purporting to be," § 342.
(*b*) "Receipt," § 343.
(*c*) "Bill of Exchange," § 344.
(*d*) "Promissory note," § 345.
(*e*) "Bank note," § 346.
(*f*) "Money," § 347.
(*g*) "Goods and chattels," § 348.[jj]
(*h*) "Warrant and order," &c., § 349.
(*i*) "Piece of paper,"[k] § 349.

By the laws of New Jersey, bank notes are not "goods and chattels," and the receiver of bank bills which have been stolen cannot be indicted under the statute making it a misdemeanor to receive stolen "goods and chattels."[l]

In order to render bonds, notes, &c., the subjects of larceny in Alabama, they must be, at the time of taking, legally valid, and subsisting securities for the payment of money or some specific article of value.[m]

Some evidence is necessary of the genuineness and value of bank notes, charged to have been stolen out of a letter.[n]

§ 1759. In a late case in England, A. was indicted in one count for stealing a cheque, and in another count for stealing a piece of paper. It was proved that the Great Western Railway Co. drew in London a cheque on their London bankers, and sent it to one of their officers at Taunton, to pay a poor-rate there. He, at Taunton, gave it to the prisoner, a clerk of the company, to take to the overseer, but instead of

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[g] State *v.* Bonwell, 2 Harrington, 529.
[h] Archbold's C. P. 9th ed. 165; State *v.* Tillery, 1 Nott & McCord, 9; Culp *v.* State, 1 Porter, 33; R. *v.* Watts, 24 Eng. C. L. 573; U. S. *v.* Bowen, 2 Cranch C. C. R. 133; U. S. *v.* Carnot, Ibid. 469.
[i] See ante, § 314, 349.
[j] See also, State *v.* Wilson, 2 T. R. Com. S. C. R. 49; State *v.* Holbrook, 13 Johnson, 90.
[jj] See post, § 1763.
[k] Ante, § 342–50.
[l] State *v.* Calvin, 2 N. J. 207.
[m] Wilson *v.* State, 1 Por. 118; R. *v.* Craven, R. & R. 14; R. *v.* Phipoe, 2 Leach, 673; R. *v.* Hart, 6 C. & P. 106; R. *v.* Clark, R. & R. 181; 2 Leach, 1036; Ante, § 362.
[n] U. S. *v.* Nott, 1 McLean's U. S. R. 499.

so doing he converted it to his own use; it was held by the judges that even if the cheque was void under the 13th section of the Stat. 56 Geo. 3, c. 184, the prisoner might be properly convicted for stealing a piece of paper.[o] The practice, in fact, seems to have grown up lately in England, of introducing into indictments for the larceny of bank notes, counts for the larceny of "one piece of paper, of the value of one penny," and in several cases such counts have been held sufficient to support a conviction.[p] In New York, however, it was held that the stealing of a letter was not indictable, as it was of no intrinsic value.[q] And such now seems to be the settled law in England, it being there determined that as long as the paper contains a valid agreement, it must be described as such, and cannot be described as a "piece of paper." Where, however, the agreement is a nullity, the paper may be described as such.[r]

Bank bills, complete in form, but not issued, are the property of the bank, and may be so treated in criminal proceedings for receiving them with knowledge of their having been stolen.[s]

§ 1760. Where, upon an indictment upon the repealed stat. 7 G. 3, c. 50, s. 1, which made it felony for persons employed in the post-office to secrete any letter, &c., containing any note, &c., it appeared that the note had been paid to the holder, and had not been re-issued; the judges were of opinion that such notes retained the character, and fell within the description of promissory notes, and were, as promissory notes, valuable to the owners of them.[t]

§ 1761. An indictment for larceny charging the defendant with having stolen "ten dollars, good and lawful money of the State of Tennessee," is insufficient, because money should be described as so many pieces of gold or silver coin, and the coin must be called by its appropriate name.[u]

In a prosecution for the larceny of a bank note, it is not necessary to prove that the note is a genuine one and of some value by any positive evidence, if the jury shall be satisfied from the evidence, that the prisoner feloniously stole the bank note, and afterwards passed it away as a genuine note; the prisoner having, by those acts, precluded himself from calling on the commonwealth for further proof of the paper being genuine.[v] But on the trial of an indictment for stealing foreign bank bills, when such passing is not proved, it is incumbent upon the prosecutor to produce at least *prima facia* evidence of the existence of such banks and of the genuineness of the bills.[w]

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[o] R. *v.* Perry, 1 Car. & K. 725.

[p] R. *v.* Perry, 1 Car. & K. 727; S. C. 1 Den. C. C. 69; R. *v.* Clark, R. & R. 181; R. *v.* Bingley, 5 C. & P. 602; see, however, R. *v.* Powell, 14 Eng. Law and Eq. 574; 2 Den. C. C. 403.

[q] Pay *v.* People, 6 Johnson, 103.

[r] R. *v.* Watts, 24 Eng. Law and Eq. 573; R. *v.* Powell, Eng. Law and Eq. 574; 2 Den. C. C. 403; ante, § 1755, note; post, § 1837.

[s] People *v.* Wiley, 3 Hill, 194. [t] R. *v.* Ransom, R. & R. 232; 2 Leach, 1090, 1093.

[u] State *v.* Longbottoms, 11 Humph. 39. [v] Cummings *v.* Com., 2 Virg. Cases, 128.

[w] People *v.* Caryl, 12 Wendell, 547; but see Johnson *v.* People, 4 Denio, 364; People *v.* Jackson, 8 Barbour, 632.

§ 1762. Evidence that bills of the same kind have been received and passed away in the ordinary course of business, as part of the currency of the country, would be presumptive evidence of such fact. But the fact that a witness for the prosecution, a broker, had exchanged the bills alleged to have been stolen, giving other money for them, after the larceny, but who did not speak of any former knowledge of such bills, or express any belief as to their genuineness, is no evidence that the bills were genuine.[x]

Though the circulation of the bills of the banks of other States is prohibited, and they are declared by law to be worthless, yet in the hands of a *bona fide* holder they are property, and may be the subject of larceny.[xx]

Money acquired by the illegal sale of intoxicating liquors may nevertheless be the subject of larceny from the possessor.[y]

§ 1763. Where the defendant was indicted for receiving certain pieces of stamped paper, the goods and chattels of the prosecutor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country to be re-issued, when they were stolen, the judges held that they were properly described in the indictment as goods and chattels; but some of the judges doubted whether they were valuable securities within the meaning of the statute 8 G. 4, c. 29, s. 5.[yy] The halves of notes, if stolen, should be described as goods and chattels.[z] It seems, however, that a security which is in full force, as an uncancelled bond or note, does not fall under the head of "goods and chattels."[a]

§ 1764. An improper description of the instrument stolen, as has already been shown, will be fatal.[b] Where an indictment for stealing a bank note described it "as a certain note, commonly called a bank note," it was held that the description was not sufficiently certain to warrant a conviction on 2 G. 2, c. 25.[c] Where an information for larceny described the stolen property as "thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank in this State;" the description was held sufficient.[d]

Where the defendant was indicted in the county of Gloucester for stealing a bill of exchange, whereon were endorsed the names of A. B. and C. D., and when it was negotiated by the defendant in that county, the name of a third endorser was added, the judges held that the addition of the third name made no difference, the names of the two endorsers only being on the bill at the time it was stolen from the prosecutor at Manchester.[e]

§ 1765. Bank notes are considered and treated as money, and the

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[x] Johnson *v.* People, 4 Denio, 364.
[xx] Starkey *v.* State, 6 Ohio, (N. S.) 266.
[y] Commonwealth *v.* Rourke, 10 Cush. (Mass.) 397.
[yy] R. *v.* Vyse, 1 Mood. C. C. 218.
[z] R. *v.* Mead, 4 C. & P. 535.
[a] P. *v.* Powell, 14 Eng. Law and Eq. 575; 2 Den. C. C. 303. See ante, § 348.
[b] See ante, § 341, 350, 606.
[c] R. *v* Craven, R. & R. 14; 2 East. P. C. 10.
[d] Salisbury *v.* State, 6 Conn. 101.
[e] R. *v.* Austin, 2 East, P. C. 602.

true rule of their value, as respects the graduating the offence of stealing, is the sum which, upon their face, they promise to pay.[f]

1766. Where the bill or note is in possession of the defendant, it will not be necessary to produce it on the part of the prosecution, parol evidence of its contents being admissible, without notice to produce, the indictment itself being sufficient notice.[g]

§ 1767. Slaves are the subjects of larceny, though there is no statute specially making slave-stealing an offence; and it is punished in the same manner as the larceny of any other chattel.[h] A husband may be convicted of stealing his wife, she being a slave.[i] The owner of a slave having ascertained that a person designed to steal the slave, directed the slave to meet the prisoner and arrange to go away with him. The slave obeyed his master's order, and while proceeding to go away in his company, the prisoner was seized, and the slave ran home. It was held that the prisoner had no such possession of the slave as would constitute the crime of larceny.[j]

In Mississippi, a negro is *prima facie*, a slave, and it is the duty of any person finding a slave at large, without a permit from his master, to deliver him to the nearest justice of the peace for commitment. A runaway slave, therefore, may be the subject of larceny.[k]

§ 1768. Where a debtor procured his creditor to sign a receipt for the debt, under the pretence that he was about to pay him, and then took it from him with a criminal intent, and without paying the money, it was held that he was not guilty of larceny, the receipt never having taken effect by delivery, and being therefore worthless.[l]

Under the Iowa statute prescribing the punishment of "any person who shall steal" property of less value than twenty-five dollars, an indictment charging that the defendant, "a box of percussion caps of the value of twenty-five cents, did steal contrary to the form of the statute," is good.[m]

How money and coin is to be described, has been already considered.[n]

Felonious intent.

§ 1769. Every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such, it must be accompanied by circumstances which demonstrate a felonious intention.[o]

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[f] State *v.* Casial, 2 Harr. & Gill, 407; see ante, § 362, as to the averment of value generally.

[g] People *v.* Holbrook, 13 Johnson, 90; Com. *v.* Messenger, 1 Binney, 274; see ante, § 311.

[h] Nabors *v.* State, 6 Ala. 200; Cash *v.* State, 10 Humph. 111.

[i] State *v.* Bonwell, 2 Harring. 527. [j] Kemp *v.* State, 11 Humph. 320.

[k] Randal *v.* State, 4 Smedes & Marsh. 349; Cash *v.* State, 10 Hump. 111.

[l] People *v.* Loomis, 4 Denio, 380; see R. *v.* Smith, 9 Eng. Law and Eq. R. 532.

[m] State *v.* Chambers, 2 Greene, Iowa, 308. [n] Ante, § 363.

[o] Smith *v.* Shultz, 1 Scammon, 492; State *v.* Hawkins, 8 Porter, 461; Whitt *v.* State, 9 Mis. 671; Hite *v.* State, 9 Yerger, 198; Fulton *v.* State, 8 Eng. (13 Ark.) 168; see Wright *v.* State, 5 Yerger, 154; post, § 1846, etc., § 1860.

§ 1770. The *intent* being necessary to complete the offence, if a man, under the honest impression that he has a right to the property, takes it into his possession, it is not larceny.[p] If the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another.[q] If, under color of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony.[r] If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be.[s]

§ 1771. When a defendant assisted in secreting a slave, to the end that she might escape from her master, and obtain her freedom, but there was no intention to convert the property to the use of the defendant, it was held, that an indictment for larceny could not be sustained.[t]

§ 1772. Where a master's horse is taken by the servant, without his knowledge and brought home again; where a man takes his neighbour's plough that is left in the field, uses it upon his own land, and then returns it, these may be trespasses, but are not felonies,[u] because the returning the thing taken sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; for if it appear that he took them originally with the intention of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence.[v]

§ 1773. On the trial of J. L., for stealing a horse, it was ruled that the intention of the defendant, at the time he took the horse, was the criterion of the offence; that if he then meant to appropriate the horse to his own use, by selling or retaining him, it was a felony; that if he only took him to aid in his escape as a runaway slave, and did not mean to sell or retain him, it was no more than a trespass.[w]

§ 1774. In another case, it was proved that the defendants took two horses out of the prosecutor's stables at night, without his leave, and having rode them about thirty miles, left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day, at the distance of fourteen miles from the inn, walking in a direction from it; the jury found the defendants guilty, but at the same time found, specially, that the defendants meant merely to ride the horses the thirty miles, and to leave them there, with-

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[p] Com. *v.* Weld, Thacher's C. C. 157; State *v.* Homes, 17 Mis. (2 Bennett) 379; State *v.* Conway, 18 Miss. (3 Bennett) 321.
[q] 1 Hale, 506. [r] 1 Hale, 509. [s] Ibid.
[t] State *v.* Hawkins, 8 Porter, 461. [u] 1 Hale, 509.
[v] See 1 Hawk. c. 34, sect. 2; 1 Hale, 533.
[w] State *v.* Bonwell et al., 2 Harrington, 529.

out an intention to return for them or otherwise dispose of them; and ten of the judges held that this was no felony, as there was no intention in the prisoners to change the property or make it their own.[x]

§ 1775. Where the prosecutor met the prisoner, whom he knew to be a poacher, and seized him, and the prisoner, being rescued, seized the gun of the prosecutor, and ran away with it, and subsequently was heard to say that he would sell it, and the gun was never afterwards heard of, Vaughan, B., upon an indictment for stealing the gun, told the jury that it would not be felony if the prisoner took the gun under an impression at the time that it might be used so as to endanger his life, and not with an intention of disposing of it, although he afterwards might have determined to dispose of it; and the jury, being of opinion that he had no intention of disposing of the gun at the time he took it, acquitted the prisoner.[y]

§ 1776. Where the captain of a ship, taken as a prize, secreted some of the cargo, and clandestinely removed it from the ship, it being doubtful whether he did so for his own benefit, or for that of his owners, he was recommended for a free pardon; but the majority of the judges were of opinion that if the goods had been secreted for his own benefit, it would have amounted to larceny.[z] And where a person stole certain articles, and also took a horse, not with an intention to steal it, but merely to get off more conveniently with the property, this was holden not to be a felonious stealing of the horse.[a]

In another case, it having appeared that the prisoner had clandestinely taken the goods alleged to have been stolen from a young woman, for the mere purpose of inducing her to call for them, that he might have an opportunity of soliciting her to commit fornication with him, the judges held this not to be a felonious taking.[b]

§ 1777. The felonious intent may be negatived by a particular defendant showing that the object of one of such defendants was to affect the apprehension of the others, and that the larceny was a trap of his to get an offered reward.[c]

As has already been seen, the possession of property recently stolen is *prima facie* evidence of guilt, in the possessor of the property; but it may be satisfactorily accounted for, as that the accused purchased it, in a public manner, unconnected with circumstances of guilt.[d]

§ 1778. It depends on circumstances what offence it is to force a man in the possession of goods to sell them. If the defendant takes them, and throws down more than their value, it will be evidence that it was only trespass; if less were offered, it would probably be regarded as felony.[e]

§ 1779. It seems that a taking may be only a trespass where the

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[x] R. *v.* Phillips, 2 East, P. C. 662, 663.
[y] R. *v.* Halloway, 5 C. & P. 524.
[z] R. *v.* Van Muyen, R. & R. 118.
[a] R. *v.* Crump, 1 C. & P. 658.
[b] R. *v.* Dickinson, R. & R. 420.
[c] 2 Russ. on Crimes, 6 Am. ed. 18; R. *v.* Donnelly, R. & R. 310; 2 Marsh. R. 571.
[d] Ante, § 728.
[e] Burrows *v.* Wright, 1 East's Rep. 615, 616.

original assault was felonious. Thus, if a man searches the pocket of another for money and finds none, and afterwards throws the saddle from his horse on the ground, and scatters bread from his packages, he will not be guilty of robbery,[f] though he might certainly have been indicted for feloniously assaulting with an intent to steal, for that offence was complete.

A taking by mere accident, or in joke, or mistaking another's property for one's own, is neither legally nor morally a crime.[g]

Larceny cannot be committed unless against the will of the owner.[h]

§ 1780. It is said, by Lord Hale, if one man take another man's corn or hay, and mingle it with his own hay or cock; or take another man's cloth, and embroider it with silk or gold, such other person may retake the whole heap of corn, or cock of hay, or garment and embroidery also; and this retaking it is no felony, nor so much as a trespass.[i] In a case where a person purchased, at an auction, a bureau, in which he afterwards discovered, in a secret drawer, a purse of money, which he appropriated to his own use; it was held, that if he had express notice that the bureau only, and not its contents, if any, was sold to him, or if he had reason to believe that anything more than a bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny; but that if he had a reasonable ground for believing that he bought the bureau, with its contents, if any, he had a colorable right to the property, and it was no larceny.[j] For, in every case in which there is any mark upon the property by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion will amount to larceny.[k]

§ 1781. If the taking be fraudulent, however, it is not necessary that it should be *lucri causa*, and with intent wholly to deprive the owner of the property. As, where A., to screen his accomplice, who was indicted for horse-stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal-pit and killed; it being objected, at the trial, that this was not larceny, because the taking was not with an intention to convert the horse to the use of the taker, *animo furandi et lucri causa;* seven of the judges held that it was larceny, and six of that majority expressed their opinion that, to constitute larceny, if the taking were fraudulent, and with intent wholly to deprive the owner of the property, it was not essential that it should be *lucri causa;* but some of the majority thought that the object of the prisoner might be deemed a benefit, and the taking *lucri causa.*[l]

§ 1782. The same doctrine has received in England several subsequent emphatic recognitions. Thus, in a case which came ultimately before the

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[f] 2 East's P. C. 662.
[g] Hale, 507, 509; 2 Russ. on Cr., 6 Am. ed. 8.
[h] Dodd *v.* Hamilton, 2 Taylor, 31.
[i] 1 Hale, 513.
[j] Merry *v.* Green, 7 M. & W. 623.
[k] R. *v.* James, 2 Russ. 102; 2 R. *v.* Jones, 2 Russ. 102, post, § 1792.
[l] R. *v.* Cabbage, R. & R. 292.

court of criminal appeal, it was proved that the prisoners took from the floor of a barn, in the presence of the thresher, five sacks of unwinnowed oats, and secreted them in a loft there, for the purpose of giving them to their master's horses, they being employed as carter and carter's boy, but not being answerable at all for the condition or appearance of the horses. The jury found that they took the oats, with intent to give them to their master's horses, and without any intent of applying them for their private benefit. The learned judge reserved the case for the opinion of the judges on the point whether the prisoners were guilty of larceny. The greater part of the judges (exclusive of Erle, J., and Platt, B.,) appeared to think that this was larceny, because the prisoners took the oats knowingly against the will of the owner, and without color of title or of authority, with intent not to take temporary possession merely, and then abandon it, (which would not be larceny,) but to take the entire dominion over them; and that it made no difference, that the taking was not *lucri causa*, or that the object of the prisoners was to apply the things stolen in a way which was against the wish of the owner, but might be beneficial to him. But all agreed that they were bound by the previous decisions to hold this to be larceny, though several of them expressed a doubt if they should have so decided, if the master were *res integra*. Erle, J., and Platt, B., were of a different opinion; they thought that the former decision proceeded in the opinion of some of the judges on the supposition that the prisoners would gain by the taking, which was negatived in this case; and they were of opinion that the taking was not felonious, because to constitute larceny, it was essential that the prisoner should intend to deprive the owner of the property in the goods, which he could not if he meant to apply it to his use.[m]

§ 1783. The same rule was acted on in a case occurring about the same time, where the prisoner was indicted for stealing, at Ross, from an officer of the post-office, a post letter. The prisoner had been cook in the employ of Mrs. Garbett, of Upton Bishop, whose service she was about to leave, having herself given notice to do so, and was in a treaty with a Mrs. Dangerfield, of Cheltenham, for a similar situation; Mrs. Dangerfield had consented to employ her if a satisfactory answer from Mrs. Garbett should be returned to a letter, to be written for the purpose of making inquiries respecting her character. This letter, the subject of the present indictment, was written by Mrs. Dangerfield, directed to Mrs. Garbett, and posted at Cheltenham. and was from thence duly imported to the post-office at Ross. Mrs. Garbett having found fault with the prisoner for allowing the friend of another servant to breakfast in the kitchen without her leave, discharged her from her service, and told her that a character would not be given to her. The day after her dismissal she went to the post-office at Ross, and there applied to the clerk on duty for the letter

[m] R. *v.* Privett, 1 Den. C. C. 193; 2 C. & K. 114; 2 Cox, C. C. 40.

from Cheltenham, addressed to Mrs. Garbett, stating that she was a servant in Mrs. Garbett's employ, and that Mrs. Garbett expected a letter from Cheltenham that morning, which she was to take; but upon being informed that the one letter by itself could not be given, she first took from the office all the letters for Mr. and Mrs. Garbett, including that written by Mrs. Dangerfield, the subject of the present indictment, and burnt it; but delivered the others to the person who was in the habit of conveying the letters from the Ross post-office to the inhabitants of Upton Bishop, and they reached Mr. and Mrs. Garbett in safety. The question for the opinion of the judges was, whether the taking and destroying of the letter under these circumstances amounted to larceny. Afterwards, all the judges present, except Platt, B., were of opinion that this was larceny; for, supposing that it was a necessary ingredient in that crime, that it should be done *lucri causa*, (which was not admitted,) there were sufficient advantages to be obtained by the prisoner in making away with the written character. Platt, B., doubted whether the prisoner was guilty of the offence of larceny.[n]

In this country there has been some reluctance to accept this supposed modification of the common law definition of larceny, and in one or two cases it has been expressly rejected. Thus it has been declared not to be larceny, but malicious mischief, to take the horse of another, not *lucri causa*, but in order to destroy him,[o] and the principle of the English authorities which have just been cited was expressly repudiated in Alabama.[p]

§ 1784. It is not important that the intention of the prisoner should be to convert the property to his own use in the county where it is taken.[q]

In a case where A. and B., servants in husbandry, opened the granary of their master by means of a false key, and took thereout two bushels of beans, to give to their master's horses, in addition to the quantity usually allowed, this was holden larceny by a majority of the judges; but some of the judges alleged, that the additional quantity of beans would diminish the work of the men who had to look after the horses, and therefore the *lucri causa*, to give them ease, was an ingredient in the offence.[r]

§ 1785. If a man take a letter supposing it belongs to himself, and, on finding it does not, appropriates to himself any property it contains, this will not amount to larceny, there being no *animus furandi* when he first received the letter.[s]

§ 1786. There are cases where the taking is no more than a trespass;

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[n] R. *v.* Jones, 1 Den. C. C. 188; 2 C. & K. 236; 2 Cox, C. C. 6.

[o] State *v.* Connell, 1 Tenn. 305; see Com. *v.* Leach, 1 Mass. 59; People *v.* Smith, 5 Cowen, 218; State v. Wheeler, 3 Vermont, 344.

[p] State *v.* Hawkins, 8 Porter, 461.

[q] State *v.* Ware, 10 Ala. 814.

[r] R. *v.* Morfit, R. & R. 307; R. *v.* Grunnell, 9 C. & P. 365; R. *v.* Handley, 1 C. & M. 547.

[s] R. *v.* Mucklow, R. & M. 160; and see R. *v.* Godfrey, 8 C. & P. 563; see post, § 1788, 1790.

as where a man takes another's goods, openly before him, or before other persons, otherwise than by apparent robbery; or, having possessed himself of them, avows the fact before he is questioned.[t] So in the case already given, where the prisoners entered another's stable at night and took out his horses, and rode them thirty-two miles, and left them at an inn, and were afterwards found pursuing their journey on foot. On a finding by the jury, that the prisoners took the horses merely with intent to ride, and afterwards left them, not intending to return or make any further use of them, it was held trespass and not larceny.[u]

§ 1787. Sometimes larceny may exist where the property is taken from the owner's person, on the pretence that the defendant wants to look at it, and is then forcibly removed. K. holding a bond executed by V. to J., and supposing from what had passed between them before, that V. then intended to pay it off, took it out of his pocket book and held it in his left hand, whilst with his right hand he was searching in his pocket for a pencil to calculate the interest. Whilst K. was thus occupied V. took the bond out of his hand without violence, K. supposing that V. wished to look at it, and not objecting to his taking it. Upon getting possession of the bond, V. immediately rolled it up, put it into his mouth and chewed it, and then threw it to one side, K. supposing he had swallowed it. V. supposed at the time that the bond was still the property of J., who he believed had treated him badly, and against whom he was much incensed. It was held, under the circumstances, this taking of the bond was larceny.[v]

§ 1788. Although it is clear that the goods alleged to have been stolen must have been wrongfully or fraudulently taken and carried away, with the intent, at the time, to convert them to the taker's own use and make them his own property:[w] yet if during their removal, which is at first innocent, the taker discovers his error, and then persists, it may be larceny. Thus the prisoner had twenty-nine black-faced lambs, which he put in a field of C., where B. had two white-faced lambs. The next morning he left the field with his flock, taking, unknown to him, one white-faced lamb as well as the twenty-nine black-faced. On the same day he tried to sell the flock, and during the bargaining, it was pointed out to him that there were thirty lambs, and not twenty-nine, as he had said. He nevertheless sold the thirty, and was tried for and convicted of larceny, the jury finding that he had committed a felony, at the time the actual number was pointed out to him: it was held, that the conviction was proper.[x]

On the trial of a servant for larceny in stealing his master's plate, it

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[t] Hale, 509; 2 East's P. C. 661; M'Daniel *v.* State, 8 S. & M. 401.

[u] R. *v.* Phillips, 2 East's P. C. 662; ante, § 1774.

[v] Vaughan *v.* Com. 10 Grattan, 758.

[w] M'Daniel *v.* State, 8 S. & M. 401; see Russ. on Cr., 6 Am. ed. 7.

[x] R. *v.* Riley, 14 Eng. L. & Eq. R. 545; 17 J. P. 69; 20 L. S. 228. (Court of Cr. App.;) though see post, § 1790.

appeared that after the plate in question was missed, but before complaint was made to a magistrate, the prisoner replaced it; and it was proved by a pawnbroker that the plate had been pawned by the prisoner who had redeemed it; but the pawnbroker also stated that the prisoner had on previous occasions pawned plate, and afterwards redeemed it. Hallock, B., (Holroyd, J., being present,) left it to the jury to say whether the prisoner took the plate with the intent to steal it, or whether he merely took it to raise money on it for a time, and then return it; for that, in the latter case, it was no larceny. The jury acquitted the prisoner.[y]

§ 1789. It is sufficient if the prisoner intend to appropriate the value of the chattel, and not the chattel itself, to his own use, as where the owner of goods steals them from his own servant or bailee, in order to charge him with the amount. Taking away sheep for the purpose of killing them, with an intent to steal part of the carcass, and not for the purpose of getting the sheep in a live state into the party's complete possession, or dominion, was held not as an asportation to sustain an indictment under the 14 Geo. 2, c. 6, for stealing the live sheep.[z]

§ 1790. The intention must exist at the time of the taking, and no subsequent felonious intention will render the previous taking felonious; as where goods are removed by the prisoner during a fire, with intent to preserve them for the owner, and he afterwards determine to appropriate them to his own use[a] or, where a bailment is procured without any felonious intent on the part of the bailee, and he afterwards, and before the determination of the bailment, converts the property, this will not be larceny.[b]

§ 1791. Where the personal property of one is, through inadvertence, left in the possession of another, or a third person, and the defendant, *animo furandi*, conceals it, he is guilty of larceny; knowing it to be the property of another, his possession will not protect him from the charge of felony.[c]

A purchaser by mistake left his purse on the prisoner's market stall, without himself or the prisoner knowing it. The prisoner afterwards seeing it there, but not at the time knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner. It was held, that the prisoner was guilty of larceny, as the purse was not, strictly speaking, lost property, and, therefore, it was not necessary to inquire whether the prisoner had used reasonable means to find the owner.[d]

§ 1792. It seems that where the property is found in the highway, and the finder knows the owner, or there is any mark upon it, by which the

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[y] R. *v.* Wright, Old Bailey, 1828, Car. C. L. 278–9.
[z] R. *v.* Williams, R. & M. 107.
[a] 2 East, P. C. 694; ante, § 1785–8.
[b] East's P. C. 594, 837; R. *v.* Banks, R. & R. 441; but see ante § 1788.
[c] People *v.* M'Garvin, 17 Wed. 460; State *v.* McCann, 19 Miss. (4 Bennett, 249.
[d] R. *v.* West, 29 Eng. Law & Eq. R. 525.

owner may be ascertained, and the finder, instead of restoring, converts it to his own use, such conversion will constitute a felonious taking.[e]

But a *bona fide* finder of an article lost, as a trunk containing goods, lost from a stage coach, and found on the highway, is not guilty of larceny by any subsequent act, in secreting or appropriating to his own use the article found.[f] And in Tennessee, the extreme and very questionable position has been taken that if the finder of bank notes convert them to his own use, with a full knowledge of the owner, it is not larceny, there being no trespass committed in obtaining the possession,[g] the principle here being that bank notes being negotiable, and having no ear-mark, they are not supposed to bring home to the finder the guilty knowledge.

§ 1793. This case, however, is clearly not consistent with the weight of authority, which is that where the finder knows, or has the immediate means of knowing, who was the owner, and, instead of returning the goods, converts them to his own use, such conversion will constitute larceny,[h] and it has been said,—though this point has been doubted,—that it is his business to advertise the found property, and if he does not, the fact of finding is no excuse to an indictment for larceny.[i] But the better opinion seems that if a man find property which has been lost, and appropriate it to himself, he is not guilty of larceny for failing to take steps to discover the owner, unless he saw the article drop from the owner, or unless it had the owner's name upon it, or some circumstances of the sort occurred which afforded the finder an immediate means of knowing who the owner was at the moment when he picked it up and examined it.[ii] It is said, also, that if the defendant means to act honestly as to the goods when found, no subsequent felonious intent can make a conversion larceny.[j] And if, at the time of finding, he has no means of discovering the owner, he is not guilty of larceny, because he afterwards has means of finding him, and nevertheless, retains the property to his own use.[jj]

It is otherwise where there is implied notice. A bureau was given to a carpenter to repair, and he found money secreted in it, which he converted to his own use, and this was held a larceny.[k] So, if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is a felony, if he knew the owner, or if he took him up or

[e] People *v.* Cogdell, 1 Hill, N. Y. R. 94; ante, § 1780.

[f] People *v.* Anderson, 14 Johns. 294; Ransom *v.* State, 22 Conn. 153; State *v.* M'Cann, 19 Mo. 251; see 2 Russ. on Cr., 6 Am. ed. 6; R. *v.* Preston, 8 Eng. Law & Eq. 589: 5 Cox, C. C. 590; 2 Den. C. C. 353.

[g] Porter *v.* State, Martin & Yerger, 526; R. *v.* Kerr, 8 C. & P. 176.

[h] State *v.* Weston, 9 Conn. 527; Ransom *v.* State, 22 Conn. 153: State *v.* M'Cann, 19 Mo. 249; People *v.* Swan, 1 Parker, C. C. 9.

[i] State *v.* Jenkins, 2 Tyler, 379; State *v.* ———, Id. 387; State *v.* Brick, 2 Har. 530; R. *v.* Coffin, 2 Cox, 44; R. *v* Reed, Car. & M. 307; R. *v.* C. ———, 1 Craw. & D. 161; *Contra*, People *v.* Cogdell, 1 Hill, 94; Lane *v.* People, 5 Gilman, 305.

[ii] R. *v.* Dixon, 36 Eng. Law & Eq. 597.

[j] Ransom *v.* State, 22 Conn. 153; R. *v.* Preston, 8 Eng. Law & Eq. 589; 5 Cox, C. C. 590; 2 Den. C. C. 353.

[jj] R. *v.* Dixon, 36 Eng. Law, & Eq. 597.

[k] Cartwright *v.* Green, 1 Ves. 405; 2 Leach, 952.

set him down at any particular place where he might have inquired for him.[l] So where the prosecutor accidentally left his purse containing money on an old saddle in a livery stable, where he had placed it while changing his clothes; and the defendant requested a small boy to take it and hand it to him, which he did, when the defendant appropriated the contents to his own use without the owner's consent. It was held, that the defendant was guilty of larceny.[m]

§ 1794. Where the evidence established clearly that the articles of property alleged to have been stolen were found in the highway, and that there were no marks by which the owner could be ascertained, it was held not to be larceny.[n] Thus, where a shawl dropped in an exhibition-room, was picked up by the defendant, placed in a conspicuous situation, and afterwards, not being claimed, was appropriated to his own use, it was held no larceny.[o]

§ 1795. Reasonable diligence in discovering the owner, however, should be shown by the party finding if there be any ear-marks or natural presumption of ownership.[p] Thus, on the trial of a servant who, being indicted for stealing bank notes, the property of her master, in his dwelling house, set up as her defence that she found them in the passage, and kept them to see if they were advertised, not knowing to whom they belonged, Park, J., held, that she ought to have inquired of her master whether they were his or not, and that, not having done so, but having taken them away from the house, she was guilty of stealing them.[q] But although ignorance of the law will excuse none, yet, where an ignorant person found a five pound note, and appropriated it, the court directed the jury to consider the state of the finder's mind, and ruled that if the jury thought the person really believed the note to be her own by right of finding, the jury should not bring in a verdict of guilty on an indictment for a larceny of the note.[r] Where A. picked up the purse of B., which contained money, on a turnpike road along which B. had previously travelled by coach, and A. converted the purse and its contents to his own use, it was held no larceny, but that A. was liable civilly, but not criminally. If there had been any mark on the purse by which the owner could have been known, it would have been otherwise.[s] Any such mark, adequate to lead to the owner's discovery, infects the finder with felony, should he neglect to avail himself of the means thus opened.[t]

§ 1796. If a person drop any chattel, and another find it and take it

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[l] R. *v.* Wynne, 2 East, P. C. 664; 1 Leach, 413; R. *v.* Lamb, 2 East, P. C. 665; R. *v.* Sear, 1 Leach, 415, n.; see 2 Russ. on Cr., 6 Am. ed. 12.

[m] Pyland *v.* State, 4 Sneed (Tenn.) 327.

[n] Tyley *v.* People, Breese, 227; and thus though there be *animus furandi*. State *v.* Conway 18 Mis. (3 Bennett,) 321.

[o] State *v.* Ropper, 3 Dev. 473.

[p] 2 Russ. on Cr., Am. ed. 12. [q] R. *v.* Kerr, 8 C. & P. 177.

[r] R. *v.* Reed, 1 Car. & M. 306.

[s] R. *v.* Mole, 1 Car. & K. 417; see also, Merry *v.* Green, 7 M. & W. 623.

[t] 2 Russ. on Cr., 6 Am. ed. 17.

away with the intention of appropriating it to his own use, and only restore it because a reward is offered, he is guilty of larceny. The only cases in which a party finding a chattel of another can be justified in appropriating it to his own use are, where it may be fairly said that the owner has abandoned it, or where the owner cannot be found.[t]

§ 1797. The fact that the goods were afterwards returned, does not purge the original taking of its felony.[u]

§ 1798. Where a person found a pocket-book, containing a sum of money, on the highway, which he soon after converted to his own use, with various circumstances of fraud and concealment, it was held, that if, at the time of finding the pocket-book, and before he removed the money, he knew it to be the property of the prosecutor, the conversion, under such circumstances, would be larceny.[v]

A. placed his pocket-book on the table of a shop until he could get a bill changed, and on leaving the shop forgot to take it, but on missing it immediately recollected where he had left it. It was held, that the pocket-book at the time it was so left was not "lost property," but was the subject of larceny.[w]

§ 1799. "The result of the authorities is," says Parke, B., in a late case, "that the rule of law on this subject seems to be, that, if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire domain over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But if he has taken them with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as, indeed, in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed, that the taker would examine the chattel, as an honest man ought to do, at the time of taking it, and if he did not return it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel."[x]

In New York it is said that the rule that larceny is not committed by one who finds goods, the owner of which he supposes cannot be ascertained,

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[t] R. *v.* Peters, 1 Car. & Kir, 245, per Rolfe, B.; see Lawrence *v.* State, 4 Humph. 228; and see also R. *v.* Spurgeon, 2 Cox, 102; R. *v.* York, 3 Cox, 181; 1 Den. C. C. 342; R. *v.* Breen, 3 Craw. & D. C. C. 30.

[u] 2 Russ. on Cr. 6 Am. ed. 7.

[v] State *v.* Ferguson, 2 M'Mullan, 502.

[w] Lawrence *v.* State, 1 Humph. 228.

[x] R. *v.* Thurdon, 2 Car. & Kir. 839.

does not apply to one who finds cattle at large in the highway and converts them to his own use.[xx]

§ 1800. A late ingenious writer has stated the law to be, that in order to make the finder of lost property guilty of larceny, two things must concur:—1st. The finder must, at the time of the finding, have the intention of feloniously appropriating the chattel to his use. 2d. He must, at the time, either know the owner, or have reason to believe that he may be found.[y]

§ 1801. It has been recently said, however, that the law with regard to the finder of lost property does not apply to the case of property of a passenger accidentally left in a railway carriage, and found there by a servant of the company; and such servant is guilty of larceny, if, instead of taking it to the station or superior officer, he appropriates it to his own use.[z]

III. Taking and carrying away.

§ 1802. Taking is a material part of larceny, but it may be presumed from the possession of the property.[a]

Where, however, there is no trespass in taking goods, there can be no felony in carrying them away.[b]

If a wife carry away and convert to her own use her husband's goods it is no larceny, as husband and wife are but one person.[c] It has been held, however, that it is a felony for a man who elopes with another's wife to take his goods, though with the consent and at the solicitation of the wife.[d] Thus, where the prosecutor left his wife in the care of his house and property, and during his absence the prisoner, who had lodged for some time previously in the house, took a great many boxes, &c., from the house, and left them at a house to which he had gone a day or two before with the prosecutor's wife, passing her for his own, and where he had hired lodgings. He soon afterwards brought her with him to the lodgings, where they lived together till he was apprehended, and the wife, who took a small basket with her, swore that there was none of the property but what she had herself taken, or given to the prisoner to take, and the jury found that the prisoner stole the property jointly with the wife; it was held, on a case reserved,

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[xx] People *v.* Raatz, 3 Parker C. R. (N. Y.) 129.

[y] Law Rep. N. S. 681; 2 Bennett & Heard's Lead. Cases, 18. The following authorities are cited on the first point:—Melburne's case, 1 Lew. 251; R. *v.* Breen, 3 Craw. & D. C. C. 30; People *v.* Anderson, 14 Johns. 294; R. *v* Mucklow, 1 Mo. C. C. R. 160; R. *v.* Steer, 1 Den. C. C. 349; R. *v.* Banks, R. & R. 441; R. *v.* Levy, 4 C. & P. 241; R. *v.* Thristle, 3 Cox, 575. On the second point:—R. *v.* Pope, 6 C. & P. 346; State *v.* Weston, 9 Conn. 527; State *v.* Ferguson, 2 M'Mul. 502; R. *v.* Beard, 1 Jebb, 9; Lane *v.* People, 5 Gilman, 305; R. *v.* Mole. 1 C. & K. 417; Tyler *v.* People, 1 Breen, 227; People *v.* Cogdell, 1 Hill, 94; R. *v.* Peters, 1 C. & K. 245; People *v.* M'Garren, 17 Wend. 460; R. *v.* Pierce, 6 Cox, 117.

[z] R. *v.* Pierce & others, 20 L. J. 182. (Per Williams, J.)

[a] Penn. *v.* Myers, Add. 820.

[b] 2 Russ. on Cr., 6 Am. ed. 4; Hite *v.* State, 9 Yerger, 198.

[c] 1 Hale, 514.

[d] People *v.* Schuyler, 6 Cowen, 572; R. *v.* Thompson, 1 Eng. Law & Eq. R. 542; R. *v.* Clark, 1 Moody, C. C. 376, n.; R. *v.* Featherstone, 26 Eng. Law & Eq. 570–6, Cox C. C. 570.

that this was larceny in the prisoner, for though the wife consented, it must be considered that it was done *invito domino*.[e]

§ 1803. If no adultery has actually been committed, but the goods of the husband are removed by the wife and the intended adulterer, with an intent that the wife should elope with him, this taking of the goods is in point of law a larceny. If a wife elope with an adulterer, who takes her clothes with them, it is a larceny; and it is as much a larceny to steal her clothes, which are her husband's property, as it would be to steal anything else that is his property. If, on the trial of a man for larceny, the jury are satisfied that he took any of the prosecutor's goods, there then being a criminal intention, or there having been a criminal act between the prisoner and the prosecutor's wife, the jury ought to convict, even though the goods were delivered to the prisoner by the prosecutor's wife; but if the jury should think that the prisoner took away the goods merely to get away the wife from the husband as a friend only, and without any reference to any connexion between the prisoner and the wife, either actual or intended, they ought to acquit.[f]

§ 1804. But an adulterer cannot be convicted of stealing the goods of the husband, brought by the wife alone to his lodgings, and placed by her in the room in which the adultery is afterwards committed, merely upon the evidence of there being found there; but it seems it would be otherwise if the goods could be traced in any way to his personal possession.[g]

§ 1805. The consent of a slave to part with his master's property is a nullity; and if a person receives property from him, with the fraudulent and felonious intent of converting it to his own use, he is guilty of larceny; it is taking from the possession of the owner, and without his consent.[h]

§ 1806. An actual taking and removing is essential to the larceny of a slave as to that of any other chattel; and if a slave leave his master at the persuasion of any person, even to deliver himself into the possession of such person, this is not a larceny by that person.[i] But assisting a slave to escape from his master in order to obtain his freedom, is not larceny.[j]

§ 1807. It is said, in England, that where a man takes his own goods, it is not larceny, unless they be in the hands of a bailee, and the taking them have the effect of charging the bailee.[jj] Where thirty bales of nux vomica, which pays no duty on exportation, but a large duty if intended for home consumption, were deposited by A. with B., who gave the usual bond to the custom house, were sent by B., under the care of C., to be shipped on board a foreign vessel for exportation, and A., by collusion with C., took the nux vomica from the bales, substituted cinders for it,

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[e] R. *v.* Tolfree, R. & M. 243; R. *v.* Featherstone, 26 Eng. Law & Eq. 570.
[f] R. *v.* Collet, 1 C. & M. 113, Coleridge, J.
[g] R. *v.* Rosenberger, 1 C. & Kir. 233; 1 Cox C. C. 21: *per* Lord Denman, C. J.; Parke, B.
[h] Hite *v.* State, 9 Yerger, 198.
[i] State *v.* Wisdom, 8 Port. 511.
[j] State *v.* Hawkins, 8 Port, 461.
[jj] Kirksey *v.* Fike, 29 Alab. 206.

and shipped the bales on board the vessel, this was holden, by a majority of the judges, to be larceny, because the taking rendered B. chargeable to the custom house, and liable to a suit upon his bond.[k]

§ 1808. The rule has been still more relaxed in New York, where it has been said that larceny may be committed by a man stealing his own property, wherever the intent is to charge another with the value.[l]

The prisoner assigned his goods to trustees for the benefit of his creditors; but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury found that the goods were not in his custody as agent of the trustees. It was held that he was not guilty of larceny.[m]

Where one got staves upon the land of another, upon contract to have half for getting them, it was held that while they remained on the land undivided, the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of the staves; and therefore he, or any other person, with his connivance, might be guilty of larceny in taking them.[n]

§ 1809. Where there are joint tenants, or tenants in common, of a personal chattel, and one of them carry away and dispose of it, this is no larceny;[o] there is, in fact, no taking, for he is already in possession; it is merely the subject of an action of account, or bill in equity. But if he were to take it out of the possession of a person in whose hands it was for safe custody, and the effect of the taking would be to change the bailee, it would be otherwise; as, where a member of a benefit society entered the room of the person with whom a box containing the funds of the society was deposited, and took and carried it away, this was holden to be larceny, the bailee being answerable to the society for the funds.[p]

J. had employed M. to load sacks of oats, the property of J., from a vessel on to the trams of K., who was to carry them on the trams to the warehouse of J. By previous concert between M. and K., oats were taken by M. from two of the sacks and put into a nosebag in the absence of K., and hidden under a tram. K. returned in a few minutes and took the nosebag and its contents from under the tram and took them away, M. being then within three or four yards of him. It was held that both were principals in the larceny, and that K. was not a receiver; and that, as it was all one transaction and both had concurred in it, and both had been present at some parts of the transaction, both could be convicted as principals in the larceny.[q]

§ 1810. The taking of another's goods or other property out of the

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[k] R. *v.* Wilkinson, R. & R. 470.
[l] People *v.* Palmer, 10 Wendell, 165; People *v.* Wiley, 3 Hill, 194.
[m] R. *v.* Pratt, 26 Eng. Law & Eq. 574; see R. *v.* Reed, 24 Eng. Law & Eq. R. 562.
[n] State *v.* Jones, 2 Dev. & Bat. 544. [o] 1 Hale, 513.
[p] R. *v.* Bramley, R. & R. 478.
[q] R. *v.* Kelly, 2 Car. & Kir. 378.

place where it was put, though the taker be detected before they are actually carried away, is larceny.[r] In North Carolina, it has been said that the taking must be forcible and violent, though such a limitation cannot always hold good.[s] Where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but, whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket, this was considered a sufficient asportation to constitute larceny.[t] And so where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain which was passed through the button-hole of the waistcoat and kept there by a watch key at the other end of the chain, turned so as to prevent the chain from slipping out. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain and watch key out of the button-hole, but the point of the key caught upon a button, and, the prisoner's hand being seized, the watch remained there suspended. It was held that the prisoner was guilty of stealing from the person, as the watch and chain were in his possession, and severed from the person of the prosecutor for the interval of time after the key was drawn out of the button-hole, and before it caught the button.[u] Where the defendant merely set a package on end, in the place where it lay, for the purpose of cutting open the side of it, to get out the contents, and was detected before he had accomplished his purpose, the judges held that this was not sufficient;[v] and where the thief was not able to carry off the goods on account of their being attached by a string to the counter;[w] or to carry off a purse, on account of some keys attached to the strings of it being entangled in the owner's pocket;[x] the court in these cases held, that as there was no severance, there was not a sufficient carrying away to constitute larceny.[y] The distinction between the latter cases and that just given, where the point of the watch key caught in a button-hole while the watch was being withdrawn, is, that in one case there was a moment when the goods were loose, but not so in the other.

Where the defendants took away several sheep from a field, and left them, having first killed them, and skinned one of them under a tree in an adjoining field, it was held that there was sufficient evidence of asportation.[z]

The prisoners were charged with stealing four sacks of barley and three sack bags from their master. It was proved in evidence that the prisoners and B. were employed by the prosecutor to winnow barley which he had mixed with canary seed. One of the prisoners fetched several sacks from

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[r] State *v.* Wilson, Coxe, 439; State *v.* Carr, 13 Vermont, 571.
[s] State *v.* M'Dowell, 1 Hawks. 440; 2 Russ. on Cr. 6 Am. ed. 5.
[t] R. *v.* Thompson, 1 Mood. C. C. 78.
[u] R. *v.* Simpson, 29 Eng. Law and Eq. Rep. 530.
[v] R. *v.* Cherry, 2 East, P. C. 556.
[w] Anon., 2 East, P. C. 556.
[x] R. *v.* Wilkinson, 1 Hale, 598.
[y] 2 Russ. 96; see 2 Russ. on Cr. 6 Am. ed.
[z] State *v.* Carr, 13 Vermont R. 751.

the prosecutor's house, which he and B. filled with barley. The two prisoners then sent B. home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the two prisoners entered the stable. In a few minutes after this the prosecutor saw the carter in the loft above with a lantern, and found the two prisoners concealed under the straw in the loft, and then, in a dust-bin in a stable beneath, he found three sacks full of barley mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks, or to put the sacks of barley into the dust-bin. The jury found both the prisoners guilty. It was held that the evidence was sufficient to support the conviction.[a]

§ 1811. The omission of the word "steal" will not vitiate an indictment, if the feloniously taking and carrying it away is sufficiently charged.[b]

In an indictment for larceny one cannot be convicted as a principal, unless he were actually or constructively present at the taking and carrying away of the goods. His previous consent to or procurement of the caption and asportation, will not make him a principal, nor will his subsequent reception of the thing stolen, or his aiding in concealing or disposing of it have that effect.[c]

Where A. had agreed to buy straw of B., and sent his servant C. to fetch it, C. did so, and put down the whole quantity of straw at A.'s stable, which was in a court-yard of A.'s, and then went to A. and asked him to send some one with the key of the hay-loft, which was over the stable, which A. did, and C. put part of the straw into the hay-loft, and carried the rest away to a public house, and sold it, it was held that this carrying away of the straw by C., if done with a felonious intent, was larceny, and not embezzlement, as the delivery of the straw to A. was complete when it was put down at the stable door.[d]

§ 1812. When a larceny has been committed in one county, and the thief, at any subsequent time, removes the stolen property into another county, (*animo furandi*,[e]) he is, in the eye of the law, guilty of the larceny in every county into which the goods may thus have been carried.[f] The rule applies as well to property which is made the subject of larceny by statute, as to the property which is the subject of larceny by the common law.[g]

A. took the horse, wagon and harness of B. from his stable by a trespass, and drove to a neighboring town. While on the way, he changed

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[a] R. *v.* Samways, 26 Eng. Law and Eq. Rep. 576.
[b] Damewood *v.* State, 1 How. Miss. R. 262. See ante, § 402.
[c] State *v.* Hardin, 2 Dev. & Bat. 407.
[d] R. *v.* Hayward, 5 Car. & Kir. 518.
[e] R. *v.* Simmons, 1 Mood. C. C. 408.
[f] People *v.* Brock, 11 Wendell, 129; State *v.* Mills, 17 Maine, 211; Com. *v.* Somerville, 21 Maine, 14; Com. *v.* Dewitt, 10 Mass. 153; Com. *v.* Cousins, 11 Leigh, 708; Haskins *v.* People, 16 N. Y. (2 Smith) 344; R. *v.* Parkin, 1 Mood. C. C. 45; 1 Hale, 507; 1 Hawk. P. C. c. 33, sec. 52; 3 Inst. 113.
[g] Com. *v.* Rand, 7 Metcalf, 475; Com. *v.* Simpson, 9 Met. 138.

the horse for another, which was in a pasture by the roadside. He then drove to another county, and there sold the second horse. It was held, that although when he took the property he intended to return it, he might nevertheless be convicted of larceny in the county where he committed the trespass.[gg]

§ 1813. The rule, however, does not apply to cases where there has been a transmutation of the property on its transit; so that an indictment describing it as it was when originally stolen, would cease to describe it as it was when it arrived at the county where the trial takes place;[h] nor to cases where after a joint larceny there has been a severance before asportation;[i] nor to purely statutory larcenies, as stealing from dwelling-houses, &c.[j]

§ 1814. When there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or intermediate act.[k]

§ 1815. One aiding or abetting in a larceny in one county, and afterward concerned in the possession and disposal of the stolen property in another county, though the goods were removed to the latter county without his agency or consent, may be convicted of larceny in the latter county.[l]

§ 1816. By the revised statutes of New York, it is provided that when larceny is committed in another state, and the stolen property brought into that state, the offence may be punished to the same effect as if the original larceny had been there committed.[m]

A similar statute exists in Alabama.[n]

§ 1817. In New York, however, before the passage of the statute, such was not the law. When a man stole a horse in Vermont, and afterward carried it into New York, the Supreme Court of New York held that when the original taking was out of the jurisdiction of the state, the offence does not continue and accompany the thing stolen, as it does in the case where a thing is stolen in one county, and the thief is found with the property in another county.[o] Such is the rule in Pennsylvania, as declared by a majority of the court after elaborate argument, it being held that in such

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[gg] Commonwealth *v.* White, 11 Cush. (Mass.) 483.
[h] R. *v.* Halloway, 1 C. & P. 127; R. *v.* Edwards, R. & R. C. C. 497.
[i] R. v. Burnett, 2 Russ. on Cr. 174.
[j] R. *v.* Thompson, 2 Russ. on Cr. 174; R. *v.* Millar, 7 C. &. P. 665.
[k] State *v.* Trexler, 2 Car. L. R. 90.
[l] Com. *v.* Dewitt, 10 Mass. 154; Tippins *v.* State, 14 Georg. 422; see ante, § 284.
[m] Rev. Stat. 694, ante, § 603.
[n] State *v.* Leay, 3 Stewart, 123.
[o] People *v.* Gardner, 2 Johnson, 477; People *v.* Schenck, Ibid, 479. In New York, in a case under the Revised Statutes, the principle ruled in People *v.* Gardner, as cited above, was re-examined, and doubts were thrown out as to its original correctness; and Savage, C. J., stated that he had drawn the bill in People *v.* Gardner, and had always been convinced that the offence existed under the laws. (People *v.* Burk, 11 Wendell, 129.)

a case the defendant must be acquitted, and be detained to wait a requisition from the state where the larceny was committed.[p] And such is the law in Kentucky,[q] and Tennessee.[r] But in Massachusetts, the opposite doctrine has been held, and convictions for larcenies in other states, when the property stolen has been brought within her limits, have repeatedly taken place.[s] The Connecticut Court of Errors, in an opinion which received the unanimous assent of the judges, asserted at an early period, the same doctrine.[t] A similar conclusion was reached in North Carolina[u] and Maryland, though not without much argument,[v] and also in Ohio.[w] In Vermont the Supreme Court has gone farther, and transcending the common law limits, has held that when goods were stolen in Canada and brought into that state, the larceny was complete.[x]

IV. Ownership.

STATUTES.

Pennsylvania.

§ 1817 (*a*). *Ownership of partners, &c.*—In order to remove the difficulty of describing the ownership of property, in the case of partners and joint owners, in any indictment for any felony or misdemeanor committed on or with respect to any money, chattels, bond, bill, note or other valuable security or effects belonging to or in the possession of any partners or joint owners, it shall be sufficient to aver that the particular subject-matter on which, or with respect to which, any such offence shall have been committed, to be the property of some one or more of the partners or joint owners named in the indictment, and of other persons being partners or joint owners with him or them, without stating any of the names of such other persons; and that in any indictment for any felony or misdemeanor, committed on or with respect to any house or building whatsoever, belonging to or in the possession of any partners or joint owners; or for any felony or misdemeanor committed on or with respect to any property being in any such house or building, it shall be sufficient to aver that the particular house or building on or with respect to which, or on or with respect to the property being in which any such offence shall have been committed, is the property of some one or more of the partners or joint owners named in the indictment, and of other persons being partners or joint owners with him or them, without stating any of the names of such other persons.—(Rev. Act 1860, Bill 2, sect. 14.)

§ 1817 (*b*). *Frauds against partners, &c.*—With regard to frauds committed against partners and joint owners, it shall be sufficient in any indictment for any

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[p] Simmons *v.* Com. 5 Binney, 618.
[q] Simpson *v.* State, 4 Humph. 456.
[r] Simpson *v.* State, 4 Humph. 456.
[s] Com. *v.* Collins, 1 Mass. 116; Com. *v.* Andrews, 2 Mass. 14.
[t] State *v.* Ellis, Connect. 186.
[u] State *v.* Brown, 1 Haywood, 100.
[v] Cummins *v.* State, 1 Harris & M'Hen. 340.
[w] Hamilton *v.* State, 11 Ohio, 435.
[x] State v. Bartlett, 11 Vermont R. 650. Contra, Com. *v.* Uprichard, 3 Gray (Mass.) 440.

felony or misdemeanor committed with any intent to defraud any partners or joint owners, to allege that the act was committed with intent to defraud any one or more of the partners or joint owners named in the indictment, and other persons being partners or joint owners with him or them, without stating any of the names of such other persons.—(Ibid. sect. 15.)

§ 1817 (c). *Property of counties, &c.*—With respect to property belonging to counties, city, township and districts, it shall be sufficient in any indictment for any felony or misdemeanor committed on or with respect to any goods, chattels, furniture, provisions, clothes, tools, utensils, materials or things whatsoever, which have been, or at any time shall be, provided for or at the expense of any county, city, township or district, to be used in any court, jail, house of correction, almshouse or other building or place, or in any part thereof respectively, or to be used for the making, altering or repairing of any bridge or road, to aver that any such things are the property of such county, city, township or district.—(Ibid. sect. 16.)

§ 1818. To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be the absolute or special property of the alleged owner,[y] who cannot be the defendant.[yy] Possession of some sort in the prosecutor there must be, therefore, when goods are in the possession of a third person, and not yet delivered to the master, are delivered to the servant, who appropriates them to his own use, this is not a larceny, for, at the time of the receipt of the goods by the servant, in the case supposed, there was no possession in the master, without which there could be no trespass or larceny.[z] And hence if a servant appropriates to his own use bank bills, obtained by him at a bank, on a check drawn by his master, it is an embezzlement, and not a larceny.[a]

§ 1819. It is not necessary, however, to prove by the person whose property is charged to have been stolen, that the property belonged to him; the testimony of other persons who know the fact is sufficient.[b]

§ 1820. The property of the stolen goods must be averred to be in the right owner, if known, or in some person or persons unknown.[c] If the owner be misnamed; if the name thus stated be not either his real name or the name by which he is usually known; or if it appear that the owner of the goods is another, and a different person from the person named as such in the indictment, the variance will be fatal, and the defendant must be acquitted.[d]

§ 1821. Where the alleged owner of goods alleged to have been stolen, though he has lost such property, would not swear to it, nor that he had

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[y] Com. *v.* Morse, 24 Mass. 217, 218; Com. *v.* Manley, 12 Pick. 173, 174; as to the manner of setting out the names of owners, see ante, § 250, 259; as to variance in names, see ante, § 595–8.

[yy] People *v.* McKinley, 9 Cal. 250.

[z] Roscoe's Evi. 547; 2 East, P. C 568; Com. *v.* King, 9 Cush. R. 287.

[a] Com. *v.* King, 9 Cush. R. 284.

[b] 1 Archbold's C. P., 9th ed. 167.

[c] Com. *v.* Morse, 14 Mass. 217, 218; Com. *v.* Manley, 12 Pick. 173, 174; see ante, § 250–9; 595–8.

[d] Lawrence *v.* State, 4 Yerg. 145; ante, § 595–8.

not sold the same to some other person than the defendant, this is not sufficient proof of ownership of the alleged stolen property.[e]

If the name by which the prosecutor is usually known be used, it will be sufficient; as where "John Walter Hancock" was called in an indictment "John Hancock," by which name he was usually called and known, Parke, J., held it to be correct;[f] so where "Richard Jeremiah Pratt" was in like manner called "Richard Pratt," the variance was held immaterial, because by that name he was generally known;[g] and where a prosecutrix was named in an indictment by a name which she had assumed, and by which she was alone known in the neighborhood, the judge held it sufficient.[h] Any substantial varianee between the name of the owner as laid, and that as given in evidence, will be fatal. Misspelling, however, if the same sound be preserved, will not vitiate the indictment.[i] Whether the names are *idem sonans* is for the jury.[j]

§ 1822. Joint tenants, or tenants in common, have not an ownership as against each other, upon which an indictment for larceny can be sustained.[k]

How far larceny may be committed of the husband's goods by an adulterer jointly with the wife, has been already considered.[l]

§ 1823. An indictment for stealing the shroud of a dead person must state it to be the goods and chattels of the executor or administrator;[m] or if there be no will or no administration, it should seem that it may be laid to be the goods of the person who defrayed the expenses of the burial, or of the ordinary, if the shroud were purchased with the money of the deceased. So, if a coffin be stolen, it may be ascribed in the same manner; or if from length of time it be difficult to ascertain the personal representatives of the deceased, it may be laid as the property of a person unknown; but it cannot be described as the property of the church-wardens of the parish from which it was stolen.[n]

In Virginia the property of slaves alleged to be stolen, must be laid to be in the executors.[o]

§ 1824. Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either.[p] As, for instance, goods left at an inn,[q] or entrusted to a person for safe keeping,[r] or for sale,[s] or to a carrier to carry;[t] cloth to a tailor to make into clothes; linen to a

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[e] State *v*, Furlong, 1 App. 225.
[f] R. *v*. Berriman, 5 C. & P. 601.
[g] R. *v* ———, 6 C. & P. 408.
[h] R. *v*. Norton, R. & R. 510.
[i] See ante, § 250–9; 595–8.
[j] R. *v*. Davis, 2 Den. C. C. 231.
[k] 2 Russ. on Cr., 6 Am. ed. 86.
[l] Ante, § 1803.
[m] 2 Hale, 181; Haynes' case, 12 Co. 113.
[n] Anon. 2 East, P. C. 652.
[o] Cole *v*. Com. 5 Grattan, 696.
[p] State *v*. Somerville, 21 Maine, 586; State *v*. Grant, 22 Maine, 171; R. *v*. Remnant, R. & R. 136; 4 C. & P. 391; Langford *v*. State, 8 Texas, 115.
[q] R. *v*. Todd, 2 East, P. C. 658.
[r] R. *v*. Taylor 1 Leach, 356; R. v. Statham, Ib.
[s] People *v*. Smith, 1 Harris, C. C. 329.
[t] R. *v*. Deakin, 2 East, P. C. 653; see R. *v*. Spears, 2 Leach, 825; 2 East, P. C. 568.

laundress to wash;[u] and goods pawned for money; may be laid as the property either of the owner or of the person in whose custody they were at the time.[v] It seems, however, that goods let with a ready furnished lodging must be described as the lodger's goods, and not as the original owner's.[w]

§ 1825. If stolen goods are stolen from a thief, the goods may be alleged to belong either to the true owner or the first thief.[x]

An indictment laid a watch stolen to be the property of A. It was proved that B. was the general owner, but that he had exchanged it with A. for a few weeks, and that it was stolen while in A.'s possession. It was held that A. had a special property in the watch sufficient to sustain the indictment.[y]

§ 1826. Where leather has been delivered to a person to be manufactured into boots, which when made are to be delivered to the employer, the boots, when in the manufacturer's possession, may be laid as his.[z]

§ 1827. Where one labors upon the farm of another, upon an agreement to have a share of the crop, until his share is separated from the general mass and set apart for him, the property of the entire crop remains in his employer, and in case of larceny, the property must be laid in the latter.[a] If in such case it appear that the person named as owner is merely servant to the real owner, the defendant must be acquitted;[b] for a servant has not a special property in the goods, the possession of the servant being the possession of the master.[c]

Should the property be laid in a married woman, the defendant must be acquitted, because in law the goods are the property of the husband.[d] Even though she be living apart from her husband, upon an income arising from property vested in trustees for her separate use, because the goods cannot be the property of the trustees, and, in law, a married woman has no property.[e] Such is even the case with money given the wife for her support and that of her children, her husband having been three years absent at sea.[f]

In Pennsylvania it is said that under the married woman's act, property separately belonging to the wife must be laid as hers.[g]

In Massachusetts, however, it is ruled that personal property in the possession of a married woman is to be presumed, in the absence of other evidence, to be the property of the husband, notwithstanding the statute of 1855, c. 304, enabling married women to have property in their own

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[u] R. *v.* Packer, Ib.; 1 Leach, 357.
[v] 1 Hawk. P. C. c. 33, sect. 47.
[w] 2 Russ. on Cr., 6 Am. ed. 85.
[x] Ward *v.* The People, 3 Hill, 396.
[y] Yates *v.* State, 10 Yerg. 549.
[z] State *v.* Ayer, 3 Foster, N. H. 301; see R. *v.* Mucklow, R. & M. 160.
[a] State *v.* Jones, 2 Dev. & Bat. 544.
[b] 2 East, P. C. 652.
[c] R. *v.* Hutchinson, R. & R. 412; 2 Russ. 158.
[d] 1 Hale, 513.
[e] R. *v.* French, R. & R. 491; see R. *v.* Wilford, Ib. 517; Archbold's C. P. 9th ed. p. 29.
[f] Com. *v.* Davis, 9 Cush. 283.
[g] Com. *v.* Martin, 1 Am. Law Reg. 434.

right and to their own use, and to trade on their own account; and must be described as the property of the husband, in an indictment for stealing it.[gg]

Where after indictment a single woman marries, it is no variance that the evidence and the record in respect to her name do not correspond.[h]

§ 1828. Goods belonging to a corporation must be laid as the property of the corporation by its corporate name, and not as the property of the individual corporators, though they be all named; but where there has been no act of incorporation, the trustees or joint owners must be named seriatim.[i]

§ 1829. Where property is levied on by a constable, he acquires a special property in it, and if stolen, it may be charged in an indictment or complaint as his property.[j] But where a bailee of a sheriff received from him personal chattels, which had been attached, giving an accountable receipt, with a promise to re-deliver the same on demand, it was held that the bailee had no such special property in the chattels as to support an indictment.[k] The receipter of the goods taken by the sheriff in execution, has not even a special property, and a larceny cannot be laid of the goods as the property of the receipter.[l] Goods seized under writ of *fieri facias* may be described as the goods of the party against whom the writ issued, for although they are in *custodia legis*, the property is in them until they are sold.[m]

The London Dock Company by mistake delivered two hogsheads of sugar to a carrier who produced two delivery notes authorizing him to deliver two other hogsheads of sugar, the property of one B. The carrier broke bulk, and was indicted for larceny. It was held, that the property was well described as the property of the London Dock Company, they having still a special property in the chattels, notwithstanding that they parted with the possession by mistake.[n]

§ 1830. A special property in goods stolen is sufficient to support the allegation of ownership in an indictment for larceny. The legal possession of goods stolen continues in the owner, and every moment's continuance of the trespass and felony amounts in legal consideration to a new caption and asportation. Therefore, if goods stolen before a statute goes into operation are retained in the possession of the thief until afterwards, he may be indicted under that statute.[o]

A horse got loose from his owner and was taken in the field of a third person and placed in his stable, from whence he was stolen. It was held, that he was in the constructive possession of the owner, and in the actual

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[gg] Com. *v.* Williams, 7 Gray, (Mass.) 337.
[h] Com. *v.* Brown, 2 Gray, 358.
[i] 2 Russ. on Cr., 6 Am. ed. 100; ante, § 233.
[j] People *v.* Palmer, 10 Wendell, 165.
[k] Com. *v.* Morse, 14 Mass. 217.
[l] Norton *v.* People, 8 Cowen, 137.
[m] R. *v.* Easthall, 2 Russ. 158; 2 Russ. on Cr., 6 Am. ed. 91.
[n] R. *v.* Vincent, 9 Eng. L. & E. R. 548.
[o] State *v.* Somerville, 8 Shep. 14.

possession of such third person, and that the indictment might well allege the possession to be in the owner of such third person.[p]

A. owed a certain sum to the prosecutor, and the latter having demanded payment, the prisoner said he would settle with him on behalf of A. He took out of his pocket a piece of paper, stamped with a six-penny stamp, and put it upon the table, and then took out some silver in his hand. The prosecutor wrote a receipt, for the sum mentioned, on the stamped paper, and the prisoner took it up and went out of the room. On being asked for the money, he said, "It is all right," but never paid it. It is held, that this was not a case of larceny, the prosecutor never having had such a possession of the stamped paper as would enable him to maintain a trespass.[q]

§ 1831. A person who hires a pistol from the state, has such a property therein, that in an indictment for the larceny of it, it may well be alleged to be his property.[r]

If the goods of A. be stolen by B., and afterwards be stolen from B. by C., an indictment against the latter may allege the title to be in either A. or B., at the election of the pleader.[s]

Bank notes stolen from the mail may be laid as the property of the person forwarding them.[t]

§ 1832. Clothes, or other necessaries furnished by a father to his child, may, it seems, be laid as the property either of the father or of the child, particularly if the child be of tender age;[u] but the better practice is to allege them to be the property of the child.[v] And so a saddle furnished by a father to his infant son, may be laid in the indictment either as the property of the father or of the son.[w]

§ 1833. Where goods stolen are the property of partners, or joint-owners, all the partners or joint-owners must be correctly named in the indictment, otherwise the defendant will be acquitted.[x] Thus, where goods are stolen belonging to A. and B., as partners, an indictment alleging them to be the property of A. is bad, though at the time they were in A.'s custody.[y]

Whether or no the stealing of several articles of property at the same time and place, constitutes but one offence, has been much doubted,[z] and the circumstance of several ownerships of the property, it is intimated, cannot vary the nature of the offence.[a] But the weight of authority is to the contrary.[aa]

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[p] Owen *v.* State, 6 Humph. 330.
[q] R. *v.* Smith, 9 Eng. L. & E. Rep. 532; see People *v.* Loomis, 4 Denio, 380.
[r] Jones *v.* State, 13 Ala. 153.
[s] Ward *v.* People, 3 Hill, 395; R. *v.* Watkins, 1 Leach, 522; 1 Hale, 537; 2 East, P. C. 654.
[t] United States *v.* Burroughs, 3 M'Lean, 105.
[u] R. *v.* Hayne, 12 Co. 113; 2 East, P. C. 654.
[v] See R. *v.* Forsgate, 1 Leach, 463, 464, n.
[w] State *v.* Williams, 2 Strob 229.
[x] Com. *v.* Trimmer, 1 Mass. 476.
[y] Hogg *v.* State, 3 Blackford, 326; State *v.* Owens, 10 Rich. Law, (S. C.) 169.
[z] Ante, § 565.
[a] Lorbon *v.* State, 7 Miss. 35.
[aa] Ante, 259.

The prisoner was indicted for stealing a pair of boots, the property of A., and acquitted. She was then indicted again for stealing the same boots laid as the property of B., and pleaded *autrefois acquit*. It appeared that A. was a boy fourteen years of age, living with and assisting B., who was his father; that the boots were the property of B., but that at the time they were stolen by the prisoner, A. had temporarily, in his father's absence, the charge of the stall from which they were stolen. It was held, that A. was not a bailee, and that the ownership of the boots could not properly be laid on him.[b]

In a prosecution for money of the ward stolen from his guardian, the property is properly laid in the guardian.[bb]

§ 1834. If the owner be unknown, they may be laid as "the goods of a person to the jurors unknown," for it is the crown's suit, and the felony must be punished.[c] So, if in an indictment for receiving stolen goods, the principal felon be unknown, he may be described in like manner; but if the name of the owner or principal felon appear in evidence before the grand jury, and his name is on the back of the bill, such an indictment cannot be supported.[d]

§ 1835. Where the thing stolen is alleged to be the property of a corporate body by name, it is not necessary to aver the political existence of the corporation. Its existence is matter of evidence, and, after verdict, it is inferred from its corporate name.[e]

§ 1836. The possession by a slave of his master's property, is the possession of his master. The slave can acquire no right of property in pos-

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[b] R. *v.* Green, 37 Eng. Law and Eq. 597

[bb] Thomasson *v.* State, 22 Geo. 494.

[c] 1 Hale, 512; ante, § 242–250-9, 595-9.

[d] See ante, § 242, 250–9, 595-9: R. *v.* Walker, 3 Camp. 264. In R. *v.* Robinson, Holt's C. N. P. 595, the indictment was for plundering the wreck of a brig. In one count the property of the brig was laid in persons therein named; in the other, it was laid in persons unknown. The witness could not recollect the Christian names of some of the owners laid in the first count, and on the second count, Richards, C. B., held he could not say the owners were unknown. And prisoner was acquitted. He quoted a case at Chester, where the property being laid in a person unknown, it was clear at the trial that he was known, and might easily have been ascertained. Lord Kenyon directed an acquittal.

In R. *v.* Caspar and others, 2 Mood. C. C. 101; 9 C. & P. 289, S. C. *(gold-dust case.)* The Caspars were indicted in different counts as accessories before the fact, by an indictment which charged "that *a certain evil-disposed person* feloniously stole certain goods, and that Caspar feloniously *incited* the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously *received* the said goods, knowing them to be stolen." This was held bad as against the Caspars; for though in the case of receiving stolen goods, (first assimilated to the offence of an accessory *after* the fact, by 3 W. & M. c. 9, s. 4, and now by 7 and 8 G. IV. c. 29, s. 54,) the whole offence may be brought home by tracing the *goods*, without identifying the person of the thief; it is different in the case of an accessory *before* the fact, where the identity of the person to whom the accession is charged must be made out by naming and showing him to the jurors in the indictment, or stating as an excuse for the omitting his name, that he was unknown.

But it was held good against the other persons charged as *receivers* as for a substantive felony, without stating the name of the principal felon. The 7 and 8 G. IV. c..29, s. 54, confirms the old law as to *accessories*, though it also gives another mode of proceeding for a substantive felony. S. C.; ante, § 242, 250–9, 595.

[e] Lithgow *v.* Com. 2 Virg. Ca. 296.

session; it is a naked charge, unaccompanied with a trust, and he cannot part with the possession legally, except in particular cases, when he is authorized as agent to do so [r]

V. Value.

§ 1837. In order to constitute the offence of larceny, or of receiving stolen goods, it seems it is sufficient if the thing stolen or received be of some value, however small.[s]

An indictment for larency must state the value of the articles alleged to be stolen, and if it alleges the stealing of various articles, but states only the collective value of the whole of them, and the jury find the defendant guilty of stealing only a part of them, no judgment can be legally rendered against them.[h]

Though when there is a general verdict of guilty, it seems a value in gross is insufficient,[i] if value be given to some of the articles stolen, and none to the remainder, judgment must be arrested as to the part to which no value is given.[j]

As there can be no larceny of a thing destitute of value, an indictment was quashed which charged a person with stealing "one-half ten shilling bill of the currency of the state."[k] And in another case a conviction was opened where the subject of larceny was "a piece of paper, on which a certain letter of information was written, of the value of $12 50."[l] Still, however, as has already been noticed, counts have been sustained in England for the larceny of a piece of paper of the value of one penny, &c.[m] This, however, seems only to be the case where the instrument is on its face invalid. When it is valid, it must be described by its technical name.[n]

§ 1838. In an indictment charging the larceny of promissory notes, omission to charge the value of the notes is a fatal defect.[o]

§ 1839. There need not be direct evidence of value, of an article stolen, *e. g.*, a horse. The value may be inferred from the general evidence.[p]

VI. Taking where the offender has a bare charge.

§ 1840. If a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law;[q] because the goods, at the time they are taken, are deemed in law to be in the possession of the master,

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[r] Hite *v.* State, 9 Yerger, 198.

[s] People *v.* Wiley, 2 Hill. 194; State *v.* Allen, 1 Charlton, 518; State *v.* Bryant, 2 Car. 269; State *v.* Smart, 4 Rich. 355; see ante § 362, 610–14.

[h] Hope *v.* Commonwealth, 9 Met. 134; R. *v.* Forsyth, R. R. 274; ante § 361-2, 610–14.

[i] Clifton *v.* State, 5 Blackf. 224.

[j] Com. *v.* Smith, 1 Mass. 245; People *v.* Wiley, 3 Hill. 194.

[k] State *v.* Bryant, 2 Car. L. R. 615.

[l] Payne *v.* People, 6 Johnson R. 103.

[m] R. *v.* Perry, 1 Car. & Kir. 727; S. C. 1 Den. C. C. 69; R. *v.* Clark, R. & R. 181; R. *v.* Bingley, 5 C. & P. 602.

[n] Ibid. ante, § 17-59.

[o] Wilson *v.* State, 1 Por., 118; ante § 362.

[p] Houston *v.* State, 8 Eng. (13 Ark.) 66 ante, § 612, &c.

[q] 1 Hale, 506; People *v.* Wood, 2 Parker C. R 22.

the possession of the servant in such a case being the possession of the master.[r]

Where A., going on a journey, left his shop in the care of the defendant, under the superintendence of A.'s brother, and the latter, on account of the defendant's drunkenness, dismissed him; and A., on returning, found his goods missing, and pursuing the defendant overtook him with some of them in his possession, the court sustained a conviction.[s] Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, the larceny was held complete.[t] Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and instead of doing so, sold them, the judges held this to be felony.[u] Where a person employed to drive cattle, sells them, it is larceny; for he has the custody merely, and not the right to the possession.[v]

§ 1841. And generally, where one having only the care, charge or custody of property for the owner, converts it *animo furandi*, it is larceny, the possession, in judgment of law, remaining in the owner until the conversion.[w]

So, where the holder of a promissory note, having received a partial payment from the maker, handed it to him to endorse the payment, and he took it away and refused to give it up, it was held, that the possession remained in the owner, and that his subsequent conversion, being found to be felonious, was larceny; and it is not essential that a felonious intent should exist when the prisoner received the note; it is enough if he converted it *animo furandi*.[x]

§ 1842. Where personal property of one is, through inadvertence, left in the possession of another, who conceals it, *animo furandi*, he is guilty of larceny.[y] And so when he afterwards converts it.[z]

§ 1843. Where a servant was indicted for larceny, it appeared on the trial, that the prisoner lived in the house of the prosecutor, and acted as the nurse to her sick daughter, the prisoner having board and lodging and occasional presents for her services, but no wages. While the prisoner was so residing, the prosecutor's wife gave her money to pay a coal bill, which money the prisoner kept, and brought back a forged receipt for the coal bill; it was held, that the prisoner was not the servant of the prosecutor, but that this was a larceny of the money.[a] Where the servant of a master carman, employed to cart goods, by collusion with others, suffered the goods, with the cart, to be taken away, it was holden to be larceny in the servant; and to be immaterial whether the property were laid in the bailee or the original owner.[b] Where a man, having purchased corn on board a vessel, sent his clerk or lighterman with a barge for the purpose of landing it, and

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[r] U. S. *v.* Clew, 4 Wash. C. C. R. 700.
[s] State *v.* White, 2 Tyler, 352.
[t] R. *v.* Robinson, 2 East, P. C. 565.
[u] R. *v* Bass, 3 East, P. C. 566.
[v] R. *v.* M'Mane, 1 Mood, C. C. 368.
[w] People *v.* Call, 2 Denio, 120.
[x] Ib.
[y] People *v.* M'Garren, 17 Wend. 460.
[z] R. *v.* Riley, 14 Eng. Law & Eq. 544; 1 Pearce C. C. 149.
[a] R. *v.* Smith, 1 Car. & Kir. 423.
[b] R. *v.* Harding, R. & R. 125.

the clerk or lighterman embezzled a part of it, this was held larceny.[c] So, if money be given by a master to his servant to carry to another, and the servant apply it to his own use, it is larceny.[d]

§ 1844. Servants who clandestinely take their master's oats with intent to give them to their master's horses, and without any intent to apply them to their own private benefit, are guilty of larceny, even though they are not answerable at all for the condition of the horses [e]

§ 1845. Where a cancelled check, the property of an insurance company, has passed from the hands of the messenger, who received it at the bank, to the prisoner, a clerk in the employment of the company, whose duty it was to keep it for the directors; it was held, first, that as the check, when it came into his custody, had arrived at its ultimate destination, it was really in the possession of the directors, who had a special property in the check, and therefore that the prisoner, who had unlawfully abstracted it, was guilty of larceny, not of embezzlement; secondly, that where the directors of a company have a special property in checks or other articles, the interest of a shareholder in the company gives him no property in it, and that he may be indicted for stealing property from the directors.[f]

§ 1846. In a case tried at Philadelphia in 1848, and which received the benefit of the consideration of both the federal and the state courts, the evidence was that the defendant was a clerk to the treasurer of the United States mint, but not charged or credited with public moneys, there or elsewhere, and had abstracted a considerable amount of these moneys from the closet in which they were kept, of which he had a key, though he had no charge of the key to the outer vault, of which this closet was a part. It was held by the judges of both courts that the case was not embezzlement, under the federal statutes, but larceny at common law.[g]

The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the day-time, received from his master a bill of exchange, with directions to send it enclosed in a letter to J. S., in London; and the defendant absconded with the bill; the judges held this to be a felony.[h] A confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange unendorsed, got it discounted, and absconded with the produce of it; the offence was held larceny.[i] So, where a servant got ten guineas from her master, in order to get silver for them, and instead of doing so, ran away with the guineas.[j]

Where a person employed by a mercantile firm as a salesman in their store, having full control over the goods in the store-room, and the money

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[c] R. *v.* Abrahat, 2 Leach, 824; R. *v.* Spear, 2 Leach, 825; 2 East, P. C., 568.
[d] R. *v.* Lavender, 2 Russ., 201.
[e] Regina *v.* Privett, 2 Car. & Kir., 113. S. C. 1 Den. C. C., 193.
[f] R. *v.* Watts, 1 Eng. R., 550; S. C. Den. C. C., 14.
[g] Com. *v.* Hutchinson, 2 Parsons, 384; U. S. *v.* Hutchinson, reported, Whart. Prec. 205.
[h] R. *v.* Paradise, 2 East, P. C. 565.
[i] R. *v.* Chipchase, 2 Leach, 699; and see R. *v.* Murray, 1 Leach, 344.
[j] R. *v.* Atkinson, 1 Leach, 302.

in the cash drawer, for the purposes of his employment, abstracts a part of the goods and money, with a fraudulent intent to convert the same to his own use, it was held that he was guilty of larceny.[k]

Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's check for the sum thus falsely placed to his credit, and paid the amount of the check to himself by certain bank notes, entering the payment in the book as being made to "a man;" this was holden by the judges to be a larceny of the bank notes.[l] It is not larceny for an agent, employed to receive and pay out money, to increase his credits by false entries, and retain his principal's money thereby.[m] When the goods have never been in the master's possession, but have been delivered to the servant for the master's use, and the servant, instead of delivering them, converts them to his own use, the conversion is not felonious at common law.[n] But if the servant receive the goods in a wagon or carriage belonging to his master, and abstracts them after depositing them in it, though he is driving the wagon or carriage himself, this is larceny.[o]

If a servant appropriate to his own use bank bills, obtained by him at a bank, on a check drawn by his master, it is an embezzlement, and not a larceny.[oo]

Where a bank bill is delivered to a party to procure change, and he appropriates it, it is larceny; and it is no defence that the owner of the bill owed him a certain sum, which he intended to pay him out of the proceeds of that particular bill.[p]

VII. Taking where the possession of the goods has been acquired animo furandi.

§ 1847. Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*.[pp] Where the offender unlawfully acquired possession with an intent to steal them, the owner still retaining his property in them, such person will be guilty of larceny in embezzling them.[q] Hiring a horse, therefore, on pretence of taking a journey, and immediately selling, is larceny; because the jury found the defendant acted *animo furandi* in making the contract, and the nature of the property had not been changed by the parting with the possession merely.[qq] So, if a

[k] Walker's case, 8 Leigh, 743.

[l] R. *v.* Hammon, R. & R. 221; 2 Leach, 1083; 4 Taunt. 304.

[m] R. *v.* Green, 24 Eng. Law & Eq. 555.

[n] 2 East, P. C. 568; R. *v.* Bull, 2 Leach, 841; R. *v.* White, 1 Leach, 28; R. *v.* Sullens, 1 Moody, C. C., 159. R. *v.* Walsh, R. & R. 218; see ante § 1769, &c.

[o] R. *v.* Reed, 24 Eng. R. 562.

[oo] Commonwealth *v.* King, 9 Cush. (Mass.) 284.

[p] Farrell *v.* People, 16 Ill. 506

[pp] Carey *v.* Hotailing, 1 Hill. N. Y. R., 311; State *v.* Gorman, 2 N. & M'Cord, 90; Hite *v.* State, 9 Yerger, 198; State *v.* Lindenthall, 5 Rich. 237; see 2 Russ. on Cr., 6 Am. ed., 38, 39, 40, &c.

[q] White *v.* State, 11 Texas, 769.

[qq] R. *v.* Pear, 2 East's P. C. 685; 1 Leach, 212, S. C.; State *v.* Lindenthall, Richardson, 237.

hostler who has the care and charge of a horse, take him with an intent to convert him to his own use, it is felony; otherwise if he only take him to use him and return him again; in the latter case it is only breach of trust.[r] The *animus furandi*, however, in such a case is essential.[s]

§ 1848. Where a person hires for an indefinite period a post-chaise, and converts it to his own use, he may be convicted of larceny, if his original intent was felonious.[t] It was held, however, in Tennessee, that where the possession of personal property was obtained from the true owner by false and fraudulent representations, under pretence of hiring, the party thus obtaining the property intending at the time to convert it to his own use, this did not amount to larceny.[u] In a case where a prisoner procured the mail-bags to be let down to him by a string from the window of a post-office, with intent to steal, under the pretence that he was the mail guard, he was held guilty of larceny.[v] The prisoner, in another case, was hired for the special purpose of driving sheep from one farm to another, and instead of so doing, drove them, the following day after he had received them, a different road, and sold them; the jury having found, that at the time the prisoner received the sheep he intended to convert them to his own use, instead of driving them to the specified farm, the judges were unanimously of the opinion that he was rightly convicted of larceny.[w]

§ 1849. On a trial where it appeared that the prisoner decoyed the prosecutor into a public house, and there introduced the play of cutting cards, and that one of them prevailed upon the prosecutor, (who did not play on his own account,) to cut the cards for him, and then under pretence that the prosecutor had cut the cards for himself, and had lost, another of them swept his money off the table and went away with it; it was considered one of those cases which should be left to the jury to determine *quo animo* how the money was obtained, and which would be felony in case they should find that the money was obtained upon a preconcerted plan to steal it.[x]

Where a silversmith gave to the defendant two cream-ewers, that a customer of the silversmith, with whom the defendant said he lived, might select which he liked best, and absconded with them, but the silversmith did not charge for either of the ewers, and did not intend to charge for either of them until he had ascertained which would be chosen, this was holden by Bayley, J., to be larceny, because the possession only, and not the right of property had been parted with;[y] but if the prisoner had in fact been sent by the customer to the silversmith, the possession would have been in the prisoner, and the subsequent conversion would not have

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[r] State *v.* Self, 1 Bay, 242.
[s] People *v.* Anderson, 14 John. R. 294.
[t] R. *v.* Semple, 2 Leach, 420; 2 East, P. C. 691, S. C. And see R. *v.* Charlewood, 1 Leach, 409; 2 East, 689, S. C.; State *v.* Lindenthall, 5 Rich. 237; ante § 1769.
[u] Felter *v.* State, 9 Yerger, 397.
[v] R. *v.* Pearce, 2 East, P. C. 603.
[w] R. *v.* Stock, R. & M. 87. See R. *v.* Walsh, R. & R. 215; R. *v.* Parkin, R. & M. 45; R. *v.* Crump, 1 C. & P. 658.
[x] R. *v.* Horner and others, 1 Leach, 270; Cald. 295.
[y] R. *v.* Davenport, MSS., Arch. Peel's Acts, 5.

been larceny; and upon this ground in a case similarly circumstanced, but in which there was no evidence that the prisoner had not actually been sent for the goods, Patteson, J., directed an acquittal; for, *non constat* that the prisoner had not been sent for the goods as she had stated, and had delivered them to the person who sent her.[z]

§ 1850. If a person obtain possession of a watch from the owner by a false and fraudulent pretence of buying it for cash, and then carry it away without the consent or knowledge of the owner, he is not yet guilty of larceny, unless it was with a felonious intent that he so obtained possession of the watch and carried it away.[a] And it has been held that where goods have been obtained under a purchase, though fraudulent, an indictment for larceny does not lie.[b]

§ 1851. Where the prosecutor and the defendant had agreed that the defendant should discount a bill, and for that purpose a bill was given him, when the defendant told the prosecutor that if he then sent a person with him to his lodgings he would give him the amount, deducting commission and discount; a person was sent accordingly, but upon reaching the lodgings, the defendant left the messenger there, and went out under the pretence of getting the money, but never returned; the judge left it to the jury to say whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it; the jury being of opinion in the affirmative on the first proposition, and on the second in the negative, convicted the prisoner, and the judges held the conviction afterwards to be correct.[c]

Some wheat, not the property of the prosecutors, but which had been consigned to them, was placed in one of their store-houses in the care of a servant, E., who was to deliver the wheat only to the orders of the prosecutors or their managing clerk. C. The prisoner, who was in the employ of the prosecutors, obtained the key of the store-house from E., and was allowed to remove a quantity of the wheat, upon his representation to E. that he had been sent by C., and was to take the wheat to the Brighton Railway Station, This representation was false, and he subsequently disposed of the wheat:—It was held to be larceny of the wheat.[cc]

The prisoners, pretending that one of them was a sea captain, and a Frenchman unable to speak English, offered to the prosecutrix a dress for sale at 25*s*., saying that if she would give that price for it, she should have another dress, which was produced, worth 12*s*., into the bargain. The prosecutrix agreed to this, and took a sovereign and a shilling from her pocket. Whilst she was holding the money, one of the prisoners opened her hand and took it out, though not forcibly. He then declined to take the other 4*s*., but laid down the dress first produced, and refused

[z] R. *v.* Savage, 5 C. & P. 143.
[a] Blunt *v.* Com. 4 Leigh, 689.
[b] Ross *v.* People, 5 Hill, 294.
[c] R. *v.* Aickles, 2 East's P. C. 675; 1 Leach, 294, S. C.
[cc] R. *v.* Robins, 29 Eng. Law & Equity Rep. 544.

to let the prosecutrix have the other. The dress proved to be of little value. It was held that the prisoners were properly convicted of larceny.[d]

Where a party fraudulently and with intent to steal, obtains possession of a chattel, with the consent and by the delivery of the owner, under pretence of borrowing, and converts the chattel to his own use, he is guilty of larceny.[dd]

A. told B. he had sold goods for him to C. The representation was false; but B., on the faith of it, sent the goods to C.'s store, and A. told C. the goods had been sent there by mistake. C. was by this representation induced to give up the goods to A., who took them and converted them to his own use. It was held that these facts constituted a larceny.[e]

The defendant was found guilty of larceny of a chattel upon proof of the following facts:—He went into a shop and asked to buy the chattel, and was referred by the clerk to the shopkeeper, who refused to let him have it except upon his father's order; and he afterwards, without having obtained such order, and in the absence of the shopkeeper, asked to see the chattel, and it was shown him by the clerk, and he took it from the counter, told the clerk that he had made it all right with the shopkeeper, and carried away the chattel.[ee]

The prosecutor, in the hearing of the prisoner, told his servant to go to H. and pay him some money; upon which the prisoner offered to take the money for the prosecutor, falsely stating that he lived only six doors from H. Induced by the offer of the prisoner, the prosecutor delivered the money to him to carry to H. The prisoner appropriated the money to his own use. He was indicted for the larceny of the money, and found guilty, the jury stating that their verdict was grounded on their belief that the prisoner had obtained the money by a trick, intending at the time to appropriate it to his own use. It was held that the conviction was right.[f]

While a person is staying at a tavern, the landlord offers him a gun to go out and shoot robins. He takes the gun, goes out and shoots once or twice, and then goes away with it, and disposes of it. It was held, that under the circumstances he was guilty of larceny. [DANIEL, J., dissenting.][ff]

A common carrier undertook to transport cotton belonging to various persons, upon his boat from Orangeburg district to Charleston in South Carolina. Before reaching Charleston, he communicated his intention to one of the hands on board, of converting the cotton to his own use, and afterwards, while in Charleston district, he consummated such intention, by burning a portion of the cotton and disfiguring the marks on the other bales, and had the cotton shipped on board a steamer to Charleston and

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[d] R. *v.* Morgan, 29 Eng. Law & Eq. 543.
[dd] Starkie *v.* Com. 7 Leigh, 752; see State *v.* Lindenthall, 5 Rich. 237.
[e] People *v.* Jackson, 3 Parker, C. R. (N. Y.) 590.
[ee] Commonwealth *v.* Wilde, 5 Gray, (Mass.) 83.
[f] R. *v.* Brown, 36 Eng. Law & Eq. 610.
[ff] Richards *v.* Commonwealth, 13 Gratt. (Va.) 803.

sold, and appropriated the sales to his own use. Upon an indictment for grand larceny, in Orangeburg district, the court charged the jury that, to convict the prisoner of larceny, there must be a taking and carrying away the goods with a felonious intent, in the district of Orangeburg; that when the prisoner received the goods, if he intended to deliver them in good faith to the consignee in Charleston, then his subsequent fraudulent appropriation of them to his own use, could not make him guilty of larceny; and that, if when the goods were delivered to him, he received them with the intention of stealing them, then it was larceny from the beginning, as laid in the Orangeburg district. The jury found the prisoner guilty of petit larceny. Upon appeal it was held, that the jury, under the circumstances, were at liberty to infer that the defendant, at the time he received the cotton in Orangeburg, intended to steal it and to convert it to his own use, and that the verdict of guilty was properly given.[g]

§ 1852. Prevailing upon a tradesman to bring goods, proposed to be bought, to a given place, under pretence that the price shall then be paid for them, and further prevailing upon him to leave them there in the care of a third person, and then getting them from that person without paying the price, is a felonious taking, if, *ab initio*, the intention was to get the goods from the tradesman and not pay for them.[h] The defendant, by false pretences, induced a tradesman to send by his servant goods of the value of 2*s*. 10*d*., to a particular house, with the change for a crown piece. On the way he met the servant, and induced him to part with the goods and change a crown piece, which afterwards was found to be bad. Both the tradesman and servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, though the former admitted that he intended to sell the goods, and never expected them back again. It was held that the offence amounted to larceny.[i]

§ 1853. But when the owner intends at the time to part with the property, the case is different.[ii] For although fraudulent means may be used to induce him to part with it, yet he delivers the possession absolutely, and the purchaser receives the possession for the express purpose of doing with the goods what he pleases. The owner is not deceived by the manner in which the possession is taken. It is his intent that the possession should never return to him.[j] Thus, where a special verdict found that one M. D. Lewer, in the month of October, 1825, went several times to the store of Davis & Oakford, and by various false and fraudulent pretences did procure from the said Davis & Oakford sundry dry goods belonging to them, of the total value of two hundred and ninety-six dollars and fifty-five cents; that he falsely represented to the said Davis & Oakford that he was the agent for his brother, E. Lewer, of Morristown, New

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[g] State *v.* Thurston, 2 M'Mullan, 282.
[h] R. *v.* Campbell, R. & M. R. 179.
[i] R. *v.* Small, 8 C. & P. 46.
[ii] Ennis *v.* State, 3 Iowa, 67; Welsh *v.* People, 17 Ill. 339.
[j] Wilson *v.* State, 1 Porter, 118.

Jersey, for whom he wished to purchase goods; that he subsequently laid off some of the goods, falsely pretending that they were for the said E. Lewer, which goods were charged by the said Davis & Oakford to the aforesaid E. Lewer, and the receipt of Davis & Oakford given as from the said E. Lewer, and the goods, when packed, marked with E. Lewer, Morristown, New Jersey; that he subsequently exhibited to the said Davis & Oakford a letter, which he said was written by the said E. Lewer to him, purporting that E. Lewer had transmitted to the said M. D. Lewer, the sum of three hundred and fifty dollars, to pay for the goods which the said E. Lewer had authorised the said M. D. Lewer to purchase for him, and that the said M. D. Lewer had the bill for the same made in the name of E. Lewer, and told the said Davis & Oakford that he had deposited the above sum of three hundred and fifty dollars in the Southwark Bank of the County of Philadelphia,—whereas it appeared that no such person as E. Lewer existed, and that no money had been transmitted or deposited in bank; but that the letter was forged and false, and written by the said M. D. Lewer himself, with the intent, and for the purpose of defrauding the said Davis & Oakford, and obtaining fraudulently the possession of their property; and further, that the said M. D. Lewer fraudulently delivered to the said Davis & Oakford, after bank hours, a false check drawn on the Southwark Bank in the County of Philadelphia, for the sum of three hundred and fifty dollars, for which the said Davis & Oakford gave their receipt to E. Lewer, and the said check being for more money than the value of the said goods amounted to, the balance was delivered to the said M. D. Lewer by the said Davis & Oakford;—that the said M. D. Lewer had no money in the said bank, and had never kept any account there;—that by this series of false and fraudulent pretences he did unlawfully and dishonestly obtain possession of the goods of the said Davis & Oakford, with the premeditated design and intent wilfully to defraud and cheat them of their property, and without any intention of ever returning the same to the rightful owners. And that having thus fraudulently obtained possession of the said goods, he eloped from the city of Philadelphia, and went to New York, taking the said goods with him, where he was afterwards arrested with the said goods in his possession. The jury, also, found the said M. D. Lewer to have perpetrated all the acts herein enumerated, with a deliberate, premeditated design and intention to defraud the said Davis & Oakford; and having found the facts, they submitted the question of law to the decision of the court. It was held by the Supreme Court of Pennsylvania, after elaborate argument, that as the property had been delivered absolutely from the prosecutors to the defendant, and as the latter has received possession for the express purpose of doing with it what he pleased, the offence was not larceny.[k]

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[k] Com. *v.* Lewer, 15 Serg. & R. 93.

§ 1854. When the transaction is made to assume the form of a sale, unless it comes within the statute as to false pretences, the fraudulent vendee is shielded from the charge of taking, in a criminal sense, though it is otherwise in respect to the civil remedy.[1]

§ 1855. It is peculiarly the province of the jury to determine with what intent any act is done; and, therefore, though in general he who has a possession of anything on delivery by the owner, cannot commit felony thereof; yet that must be understood, first, where the possession is absolutely changed by the delivery, which has before been considered; and next, which is the chief object of inquiry, where such possession is not obtained by fraud, and with a felonious intent. For if, under all the circumstances of the case, it be found that a party has taken goods from the owner, though by his delivery, with an intent to steal them, such taking amounts to felony.[m] Where the defendant having bargained for goods, for which, by the custom of trade, the price should have been paid before they were taken away, took them without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession and dispose of them for his own benefit, this was holden to be larceny.[n] Where the defendant put goods into his cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them, his intention being from the beginning to get the goods by fraud, this was holden to be larceny.[o]

Where, in the presence of the prosecutor, the defendant picked up a purse containing a watch-chain and two seals, which the defendant and his confederate represented to be gold, and worth £18, and the prosecutor purchased the defendant's share for £7, intending to part with the property in the money as well as the possession of it; Coleridge, J., held that this was not larceny.[p]

Where A. received goods from B., (who was the servant of C.,) under color of a pretended sale, it was held that the fact of his having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B.[q]

§ 1856. It has been held larceny to obtain money or goods by the practice of *ring-dropping*. Thus, where the defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt for £147 for a "rich brilliant diamond ring," and also the ring itself; it was then proposed, that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money,

[1] Cary *v.* Hotailing, 1 Hill, N. Y. R. 311.
[m] 2 East's P. C. 685.
[n] R. *v.* Gilbert, 1 Mood. C. C. 185.
[o] R. *v.* Pratt, 1 Mood. C. C. 250.
[p] R. *v.* Wilson, 7 C. & P. 114.
[q] R. *v.* Hornby, 1 Car. & K. 305.

which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10s. only, and the watch and the money were never returned; it was left to the jury to say, whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion, convicted the defendant.[r] In another case, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion that this practice of ring-dropping amounted to larceny; and they distinguished it from the case of a loan; for here, although the possession was parted with, the property in the goods was not.[s]

§ 1857. Where a defendant offered to give the prosecutor gold for bank notes, and upon the prosecutor's laying down some bank notes for the purpose of having them changed, the defendant took them up, and went away with them, promising to return immediately with the gold, but in fact never returned, and was indicted for stealing them; Wood, B., left it to the jury to say, whether the defendant had the *animus furandi* at the time he took the notes; and said, that if they were of that opinion, the case clearly amounted to larceny.[t] To adopt the language of the same judge, "A parting with the property in goods could only be effected by contract, which required the assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter, but to steal."[u]

Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodgings, out of which the defendant chose six pairs, which were laid on the back of a chair; the defendant then sent the prosecutor back to his shop for some articles, and while he was absent, absconded with the stockings: the judges held, that this amounted to larceny, the defendant clearly obtained possession of the goods *animo furandi*.[v]

In another case, one of the defendants persuaded the prosecutor, by a preconcerted plan, to deposit his money with another of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; it was left to the jury to say, whether, at the time the money was taken, there was not a plan that it should be kept, under the false color of winning the bet, and the jury found that there was: the offence was held to be larceny; because, at the time the defendants obtained the

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[r] R. *v.* Patch, 1 Leach, 238.
[s] R. *v.* Watson, 2 Leach, 640; 2 East, P. C. 680, S. C. by all the judges; R. *v.* Moore, 1 Leach, 314.
[t] R. *v.* Oliver, 4 Taunt. 274; 2 Russ. 122, S. C.; 2 Leach, 1072; R. & R. 215; S. C.
[u] R. *v.* Rodway, 9 C. & P. 784.
[v] R. *v.* Sharpless, 1 Leach, 93; 2 East, P. C. 675.

money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party won the wager.[w]

§ 1858. Two men, J. and W., acting in concert, and intending to defraud S , entered the shop of S., and by means of an artifice induced him to draw a check on his bank for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to S. of forty-two sovereigns, and that the prisoner W. was to remain at the shop till J. and S. went and returned from the bank. At the bank, by the desire of S., the banker handed four ten-pound notes and two sovereigns to the prisoner J., in the presence of S. The prosecutor S., and the prisoner J., left the bank together, and while on their way back to S.'s shop, J. went into an inn-yard, and promising to return immediately, absconded with the four ten-pound notes, and the two sovereigns, which he and the prisoner W. (who in the meantime had gone off from the shop with the forty-two sovereigns) appropriated to their own use:—It was held, that the misappropriation of the notes and two sovereigns was larceny, S. never having parted with the property and possession in them, and the prisoner J. having no more than the bare custody of the money which he carried off.[x]

Where the prisoner went into a shop and asked for change for half-a-crown, and the shopman gave him two shillings and sixpence, the prisoner held out the half crown, and the shopman just took hold of it by the edge, but never actually got it into his custody, and the prisoner ran away with the change and the half-crown: upon an indictment for stealing the two shillings and sixpence, Parke, J., held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown.[y].

When a replevin was fraudulently sued out, and by that means another man's horse was obtained and carried away, it was held that an indictment for larceny would lie.[z] Where one, having no cause of action, sues out a writ for a fictitious demand, and so gets possession of the property of another, which he converts to his own use, and with intent to defraud the owner, it is larceny.[a]

§ 1859. It is no defence that the felony was induced by the artifice of the owner, when that artifice was exercised for the purpose of entrapping the thief. Thus, in a recent case, overtures were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and the former, by the direction of the latter, some weeks after, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master, having previously marked some money,

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[w] R. *v.* Robson, R & R. 413.
[x] R. *v.* Thomas, 24 Eng. Law & Eq. 570, 2 Den. C. C. 310.
[y] R. *v.* Williams, 6 C. & P. 390.
[z] 1 Hale, 507; 1 Hawk. c. 83, sect. 12; 3 Inst. 108; R. *v.* Farr, Kel. 43; 2 Leach, 1064, *n.*
[a] Com. *v.* Low, Thacher's C. C. 477.

by his direction, it was placed upon the counter by the servant, in order that it might be taken up by the party who had come for the purpose. It being so taken up, the offence was held larceny.[b]

VIII. Taking where the possession of the goods has been obtained without any fraudulent intention in the first instance.

§ 1860. This division has been already partially examined under the head of "Felonious Intent."[c] When the possession is obtained, *bona fide*, the mere fact of the subsequent existence of the *animus furandi* does not make the offence larceny,[d] unless by some new and distinct act of taking, as by some severing part of the goods from the rest, with intent to convert them to his own use, the offender thereby determines the privity of the bailment, and the special property thereby conferred upon him.[e] Mr. Collyer, in his collection of statues, remarks, "This latter position has been disputed, and much stress has been laid upon the unreasonableness of making a man guilty of a felony for stealing part of that, of which, if he had taken it all, he would be only guilty of a misdemeanor; but a man is equally guilty of a felony in taking the whole as in taking a part, when he has done an act to determine the privity of contract. The cause of the distinction is to be found in the necessity of an accurate distinction between a breach of trust and an act of felony; and the principle is, that felony cannot be committed by a person having a legal possession of goods; as, for instance, under a contract.[f] The contract must be put an end to before felony can be committed; for, during its existence, the person having possession under it has, *prima facie*, a legal possession; therefore, although by selling the goods without breaking, he, in fact, destroys the privity of the contract, still that act is executed in respect of goods which are at the time in his legal possession, the termination of the contract and the act of conversion being contemporaneous; there is not, therefore, a caption and asportation of the goods of another, which is essential to the offence of larceny. And, upon this principle R. *v.* Madox[g] was decided. The prisoner was master and owner of a ship, and stole some of the goods delivered to him to carry. It was held, not larceny, because he did not take them out of their packages. But if the package of goods be first broken, the contract is determined by that act; the legal possession of the carrier is at an end; and, although the actual possession is still in him, the property revests in the owner, and any subsequent act of conversion is strictly an act committed upon the goods of another, and the larceny is complete. It may be observed

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[b] R. *v.* Williams, 1 C. & K. 195; R. *v.* Gill, 24 Eng. Law & Eq. 550; R. *v.* Headge, 2 Leach, C. C. 1033, R. & R. 160.

[c] See ante, § 1769.

[d] People *v.* Anderson, 14 Johnson, 294; Dodd *v.* Hamilton, N. Car. T. Rep. 31; R. *v.* Thristle, 1 Den. C. C. 502.

[e] 1 Hawk. c. 33, sect. 1; 2 East's P. C. 554; 1 Hale, 504; 2 Russ. on Cr., 6 Am. ed. 56.

[f] See Charlewood's case, Leach, 456.

[g] R. & R. 92.

that in the latter case, the offence is the same, whether it be committed upon the whole or upon part."[h]

Where a letter, addressed to J. M., St. Martin's lane, Birmingham, enclosing a bill of exchange, drawn in favor of J. M., was delivered to the defendant, whose name was J. M., and who resided near St. Martin's lane, Birmingham, but, in truth, the letter was intended for a person of the name of J. M., who resided in New Hall street; and the prisoner who, from the contents of the letter, must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held, that it was no larceny, because, at the time when the letter was delivered to him, the defendant had not the *animus furandi*.[i]

§ 1861. Where the defendant saved some of the prosecutor's goods from a fire which happened at his house, and took them home to her own lodgings; but the next morning she concealed them, and denied having them in her possession; the jury finding that she took them originally solely for the purpose and desire of saving them for and returning them to the prosecutor, and that she had no evil intention until afterwards, the judges held that it was a mere breach of trust, and not a felony.[j] So where A. *bona fide* hired a horse for a particular purpose, and after that purpose was accomplished, sold the horse, it was no larceny: for, unless he had an original felonious intention, the subsequent withholding or disposing of the horse does not constitute a new felonious taking.[k] So, if A. deliver to B. a watch to be repaired, and B. sell it, it is not larceny, because it was delivered voluntarily, and not obtained *animo furandi*.[l]

§ 1862. There are exceptions to this rule, however, as has been noticed, arising where the defendant breaks a package or measure of goods obtained by him *bona fide*, and abstracts from them a portion. Thus, where a miller having received barilla to grind, fraudulently abstracted part of it, returning a mixture of barilla and plaster of Paris, it was considered larceny.[m] Where a carrier, to take a case commonly given in the books, while his contract is in the course of completion, opens the pack, and takes out part of the goods, he commits a larceny; but if he run away with the whole, it is a breach of trust, and no larceny. But if, after arriving at the place where he should deliver his charge, he steal a part or the whole, it is a larceny.[n] In Massachusetts, where several connected packages of goods were delivered to a common carrier, to be transported in a body, an abstraction of one package from the mass was held larceny.[o]

A carrier had entrusted to him for transportation a number of bars of pig-iron. Without the consent of the owner, he separated a portion of them

[h] Burns' Justice, 29th ed. title Larceny.
[i] R. *v.* Mucklow, R. & M. 160.
[j] R. *v.* Leigh, 2 East, P. C. 694.
[k] R. *v.* Banks, R. & R. 441; overruling R. *v.* Tunnard, 2 East, P. C. 687.
[l] R. *v.* Leary, 1 C. & P. 241.
[m] Com. *v.* James, 1 Pick. 375; 1 Hawk. 33, sect. 56.
[n] 1 Hale, 504; Staundf. 25.
[o] Com. *v.* Brown, 4 Mass. 580; Dame *v.* Baldwin, 8 Mass. 518.

from the rest, and converted them to his own use. It was held that the offence was larceny and not embezzlement.[oo]

§ 1863. In a crown case reserved, (Dec. 1854,) it appeared that the prisoner was convicted of larceny under the following circumstances. He had been a common carrier, and was employed by the prosecutor to carry a cargo of coals from a ship to a coal-yard, and from thence to another yard belonging to the prosecutor. The prisoner carted the coals to the first-mentioned coal-yard, and was engaged for several days in carting them from thence to the prosecutor's coal-yard. He left the first-mentioned coal-yard on one of those days, with two carts and a wagon all laden with coals; before he arrived at the other yard, he delivered the two cart loads to a third person on his own account; but he duly delivered the wagon load to the prosecutor's other yard. It was held that the conviction was wrong, the coals having been delivered to the prisoner as a carrier, and there having been no breaking of bulk, or other determination of the bailment.[p]

Where the prosecutor sent forty bags of wheat to the prisoner, a warehouseman, for safe custody, until they should be sold by the prosecutor, and the prisoner's servant, by direction of the prisoner, emptied four of the bags, and mixed their contents with other inferior wheat, and part of the mixture was disposed of by the prisoner, and the remainder was placed in the prosecutor's bags, which had thus been emptied, and there was no severing of any part of the wheat in any other bag, with intent to embezzle that part only which was so severed; it was held, that the prisoner was guilty of larceny in taking the wheat out of the bag.[q]

A. employed B., who was by business a drover, to drive pigs and deliver them to C. at L. He was to be paid by the day; but by the custom of the trade he had a right to drive other person's pigs with those of A. if he chose. He drove the pigs to L., and as C.'s wife would not receive them, he took them to L. market and sold them, and then absconded. It was held no larceny, as he was a bailee and not a servant, and had no original intention of stealing the pigs.[r]

§ 1864. Where, however, the original taking of the property was a trespass, there a subsequent felonious intent makes the offence larceny. Thus where a man driving away a flock of lambs, inadvertently took a lamb belonging to a third party, and then subsequently finding out the fact, feloniously converted the lamb to his own use, it was held that this was larceny.[s]

Where A. the owner of a boat, was employed by B., the captain of a ship, to carry a number of staves ashore in his boat; but B.'s men were

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[oo] Nichols *v.* People, 17 N. Y. (3 C. P. Smith,) 114. [DENIO and COMSTOCK, JJ., dissenting.

[p] R. *v.* Cornish, 33 Eng. Law & Eq. 527.

[q] R. *v.* Brazier, R. & R. 337; and see R. *v.* Madox, R. & R. 92.

[r] R. *v.* Hey, 2 Car. & Kir. 982.

[s] R. *v.* Riley, 14 Eng. R. 545, 1 Pearce, C. C. 149.

put in the boat, but were under the control of A., who did not deliver all the staves, but carried one to the house of his mother, it was held by Patteson, J., that this amounted to a bailment to A., so as to excuse him of the larceny if he had not delivered any of the staves; but that the separation of one stave, with intent to convert it to his own use, was a breaking of bulk, and so amounted to larceny.[t] So, where a person, not being the servant of the prosecutor, received from him a parcel containing notes, to take to a coach-office, and on the way he abstracted the notes and applied them to his own use, he was holden guilty of larceny.[u]

J. D., by mistake, received from the post-office a letter addressed to and intended for another person of the same name. The letter contained a post-office order for money. Not being able to read, J. D. took the letter to W. D., who read it to him. After reading it, both were aware that the letter and its contents were not intended for J. D., but, notwithstanding, they got the post-office order cashed, and appropriated the proceeds. On an indictment against J. D. and W. D., for stealing the post-office order, it was held that the prisoners could not be properly convicted, as it did not appear that they had any *animus furandi* when they first received the letter containing the order.[uu]

§ 1865. If the master and owner of a ship steal some of the goods delivered to him to carry, it is not larceny in him, unless he took the goods out of their package; nor, if larceny, would it be an offence within 24 Geo. II., c. 45.[v] So, if a parcel be delivered to a porter, and he run away with it, and in the pursuit it is lost, it will be left to the jury to say whether he opened it and took out the goods, or preserved it entire; and, on the decision of this point, the legal guilt or innocence of the party will depend.[w]

§ 1866. Where property is taken under a claim of right, if there be any fair pretence of property at all, the court should direct an acquittal; for, though the reason given by Mr. East, that "it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy," does not hold good here, there is a manifest impropriety, under a penal system, of trying in a criminal court a question of property, which the intention of the Legislature is to relieve from the incidents of imprisonment.[x]

§ 1867. If, as has been shown under this head, a person finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and, appropriating them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.[y]

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[t] R. *v.* Howell, 8 C. & P. 325.
[uu] R. *v.* Davis, 36 Eng. Law & Eq. 607.
[w] 2 East's P. C. 697.
[y] R. *v.* Thurborn, 2 Car. & Kir. 830.
[u] R. *v.* Jenkins, 9 C. & P. 38.
[v] R. *v.* Madox, R. & R. 92.
[x] See 2 Russ. on Cr., 6 Am. ed. 11.

§ 1868. Mere borrowing with subsequent converson, is no larceny. "If we were to hold, said Lord Denman, C. J., lately, "that wrongfully borrowing a thing for a time, with an intention to return it, would constitute a larceny, many very venial offences would be larcenies." In late cases there has been an understanding that, to constitute larceny, it is essential that there should be an intent to deprive the owner *permanently* of his property. It is certainly an odd excuse for a person who is challenged with his master's property, that he meant to return it, after having cheated his master in the first place, and his fellow-workmen in the second; still a man can hardly do this without committing some offence, although it be not larceny.[z]

On a trial for larceny, where the sentence depends upon the value of the property, the jury should be instructed not only to find a verdict of guilty or not guilty, but should also be directed to find the value of the property stolen.[zz]

IX. Indictment.

§ 1869. The indictment in larceny is considered under former heads to which reference is made, as follows:—

Name and addition of defendant, § 233–49, 1820–1830.
" " " " owner, &c., § 250–59.
Variance in proof of same, § 595–8.
Description of written instruments in, § 314–349.
Proof of same, § 606–9.
Description of articles stolen, § 354–62.
Evidence of same, § 610–15.
Averment of value, § 362.
Description of money or coin, § 363.
Proof of same. § 612–15.
Joinder of articles in, § 391.
Joinder of counts in with receiving stolen goods, § 419.
Technical averments in, § 402.[a]

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[z] R. *v.* Holloway, 2 C. & K.; S. C. 1 Den. C. C. 414; per Lord Denman, C. J.
[zz] Locke *v.* State, 32 N. H. 106.
[a] For forms, see Wh. Prec. as follows:
(415) General frame of indictment at common law.
(416) Stealing the property of different persons.
(417) Larceny at a navy yard of the United States.
(4 8) Larceny on the high seas.
(419) Larceny on the high seas. Another form.
(420) Larceny in an American ship at the Bahama islands.
(421) Second count. Receiving, &c.
(422) Larceny. Form in use in New York.
(423) Same in Pennsylvania.
(424) Second count. Receiving stolen goods.
(425) Same in New Jersey.
(426) Same in South Carolina.
(427) Same in Michigan.
(428) Bank note in North Carolina.
(429) Bank note in Pennsylvania.
(430) Bank note in Connecticut.

CHAPTER VI.

RECEIVING STOLEN GOODS.

A. STATUTES.
UNITED STATES.
Receiving stolen goods, § 1870.
MASSACHUSETTS.
Receiving stolen goods, § 1871.
First conviction of offence in preceding section, § 1872.
Conviction for buying, receiving, &c., stolen goods, § 1873.
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How to be prosecuted, § 1880.
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Receiving stolen goods, § 1884.
OHIO.
Receiving stolen goods of value of thirty-five dollars and upward, § 1885.
Receiving stolen bank bills, bills of exchange, &c., § 1886.
Concealing stolen goods of less value than thirty-five dollars, § 1887.
Receiving stolen bank notes of less value than thirty-five dollars, § 1887 (*a*).
Receiving stolen goods and chattels of less value than thirty-five dollars, § 1887(*b*).

B. OFFENCE GENERALLY.
I. IN WHAT THE OFFENCE CONSISTS, § 1888.
II. INDICTMENT, § 1899.

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(431) Bank note in Tennessee.
(432) Larceny in dwelling-house in day-time. Mass. Rev. stat. ch. 126, § 14.
(433) Breaking and entering a vessel in the night-time, and committing a larceny therein, under Mass. Rev. stat., ch. 126, § 11.
(434) Breaking and entering a shop in the night, and committing a larceny therein, under Mass. Rev. sts., ch. 126, § 11.
(435) Larceny by the cashier of a bank. Mass. stat., 1846, ch. 171, § 1.
(436) Breaking and entering a stable in the night-time, and committing a larceny therein. Mass. st. 1851, ch. 156, § 1.
(437) Breaking and entering a shop in the night-time, adjoining to a dwelling-house, with intent to commit the crime of larceny, and actually stealing therein. Mass. st., 1839, ch. 31.
(438) Entering a dwelling-house in the night-time without breaking, some persons being therein, and being put in fear. Mass. Rev. sts., ch. 126, § 12.
(439) Breaking and entering a dwelling-house in the day-time, the owner being therein, and being put in fear. Mass. Rev. sts., ch. 126, § 12.
(440) Breaking and entering a city hall, and stealing therein in the night-time. Mass. Rev. sts., ch. 26, § 14.
(441) Stealing in a building that is on fire. Mass. Rev. sts., ch. 126.
(442) Larceny from the person. Rev. sts. of Mass., ch. 126, § 16.
(443) Larceny of real property. Mass. st. 1851, ch. 151.
(444) Larceny and embezzlement of public property, on the statute of the United States of the 30th April, 1790, s. 26.
(445) Against an assistant postmaster, for stealing money which came into his hands as assistant postmaster, on the act of 3d March, 1825, s. 21.
(446) Larceny of a slave in Missouri.
(447) Same in Alabama.
(448) Same in North Carolina.
(449) Second count, seducing a slave, with intent to sell, under the North Carolina Act of 1779.

A.—Statutes.

United States.

§ 1870. *Receiving stolen goods.*—If any person or persons within any part of the jurisdiction of the United States as aforesaid, shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbor, or conceal, any felons or thieves, knowing them to be so, he or they being of either of the said offences legally convicted, shall be liable to the like punishments as in cases of larceny before are prescribed.—(Act of 30th March, 1790, sect. 17. See also, Piracy, "Act of 3d March, 1825, sect. 8; and offences against Post-office.)

Massachusetts.

§ 1871. *Receiving stolen goods.*—Every person who shall buy, receive, or aid in the concealment of any stolen money, goods, or property, knowing the same to have been stolen, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail, not more than two years.[b]—(Rev. Stat. c. 126, sec. 20.)

§ 1872. *First conviction of offence in preceding section.*—Upon a first conviction of the offence mentioned in the preceding section, and when the act of stealing the property was a simple larceny, if the party, convicted of buying, receiving, or aiding in the concealing of such stolen property, shall make satisfaction to the party injured, to the full value of the property stolen, and not restored, he shall not be imprisoned in the state prison.—(Ibid. sect. 21.)

§ 1873, *Conviction for buying, receiving, &c., stolen goods.*—Every person convicted of buying, concealing, or aiding in the concealment of any stolen money, goods, or property, knowing the same to have been stolen, having been before convicted of the like offence, and every person convicted at the same term of the court of three or more distinct acts of buying, receiving or concealing as aforesaid, shall be deemed a common receiver of stolen goods, and shall be punished by imprisonment in the state prison not more than ten years.—(Ibid. sect. 22.)

§ 1874. *Jurisdiction of courts in regard to trial of offence.*—Every police court, and every justice of the peace, shall have jurisdiction concurrent with the other courts, as before provided, of all offences of buying, receiving, or aiding in the concealment of stolen goods or other property, in all cases in which they would have had jurisdiction of a larceny of the same goods or other property, and the punishment of the offence of buying, receiving, or aiding in the concealment of such goods or other property, shall be the same, upon a first, and also upon a second conviction, as in the cases of a first and second conviction, respectively of a larceny of the same goods or other property, with the same right of appeal on convictions; provided, that if the party convicted of buying, receiving, or aiding in the concealment thereof, shall make satisfaction to the person injured, to the full value of the property stolen and not restored, the punishment of the offence may be mitigated as justice may require.—(Ibid. sect. 23.)

§ 1875. *Not necessary to prove the conviction of theft.*—In any prosecution for the offence of buying, receiving, or aiding in the concealment of stolen money, or other property, known to have been stolen, it shall not be necessary to aver, nor

[b] This section, prescribing the punishment of "every person who shall buy, receive, or aid in the concealment of any stolen goods, knowing the same to have been stolen,"

on the trial thereof to prove, that the person who stole such property has been convicted.—(Ibid. sect. 24.)

NEW YORK.

§ 1876. *Receiving stolen goods.*—Every person who shall buy or receive in any manner, upon any consideration,[bb] any personal property of any value whatsoever, that shall have been feloniously taken away, or stolen from another, knowing the same to have been stolen, shall, upon conviction, be punished by imprisonment in a state prison for a term not exceeding five years, or in the county jail not exceeding six months, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.—(2 Rev. Stat. 1st. ed. 680, sect. 71.)

§ 1877. *Not necessary to prove that principal had been convicted.*—In any indictment for any offence specified in the last section, it shall not be necessary to aver, nor on the trial thereof to prove, that the principal who stole such property has been convicted.—(Ibid. sect. 72.)

§ 1878. *Trial of offence.*—In the cases where any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted, tried, and convicted, in any county where he received or had such property, notwithstanding such theft was committed in another country.—(Ibid. 126, sect. 43.)

PENNSYLVANIA.

§ 1879. *Receiving stolen goods.*—If any person shall buy or receive any goods, chattels, moneys or securities, or any other matter or thing, the stealing of which is made larceny by any law of this commonwealth, knowing the same to be stolen or feloniously taken, such person shall be guilty of felony, and on conviction, suffer the like pains and penalties which are by law imposed upon the person who shall have actually stolen or feloniously carried away the same.—Rev. Act, Bill I., sect. 109.)

§ 1880. It may and shall be lawful to prosecute and punish all buyers and and receivers, as well before as after the principal felon shall be taken and convicted, and whether he be amenable to justice or otherwise, which prosecution, conviction and sentence of said receivers shall exempt them from being prosecuted as accessories after the fact, in case the principal felon shall be afterwards convicted.—(Ibid. sect. 110,)

VIRGINIA.

§ 1884. *Receiving stolen goods.*—If any free person buy or receive from another person, or aid in concealing any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted.—(Code of 1849, ch. 192, sect. 19.)

OHIO.

§ 1885. *Receiving stolen goods of value of thirty-five dollars, and upwards.*—That if any person shall receive or buy any goods or chattels, of the value of thirty-five-dollars or upwards, that shall have been stolen or taken by robbers, knowing

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describes only one offence, which may be committed either by buying, receiving, or aiding in the concealment of such goods, and an indictment which charges the three averments conjunctively is good. (Stevens *v.* Com., 6 Met. 241; and see O'Connell *v.* Com., 7 Metc. 460; Com. *v.* Lakeman, 5 Gray (Mass.) 82.)

For form, see Wh. Prec. 452.

[bb] Consideration need not be averred. Hopkinson *v.* People, 12 Wend. 76.

the same to be stolen or taken by robbers, with intent to defraud the owner, or shall harbor or conceal any thief or robber, knowing him to be such; every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor not more than seven years nor less than one year.[b]—(Act of March 7, 1835; Swan's Stat. sect. 26, 273.)

§ 1886. *Receiving stolen bank bills, bill of exchange, &c.*—That if any person receive or buy any bank bill or bills, or promissory note or notes, bill of exchange, order, receipt, draft, warrant, check or bond, given for the payment of money, of thirty-five dollars or upwards, which have been stolen, knowing the same to be stolen, with intent to defraud the owner thereof; every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary and kept at hard labor, not more than seven years nor less than one year.—(Ibid. sect. 20.)

§ 1887. *Concealing stolen goods of less value than thirty-five dollars.*—That if any person shall conceal any stolen money, goods or chattels of any kind whatever, of less value than thirty-five dollars, or shall conceal any bank bill or bills, promissory note or notes, bills of exchange, order, warrant, draft, check or bond, or any accountable receipt for money, given for the payment or acknowledgment of any sum under thirty-five dollars, the person so concealing, knowing the same to have been stolen, shall be considered as an aider, abettor, or accomplice, and, on conviction thereof, shall be fined for every such offence in any sum not exceeding two hundred dollars, or shall be imprisoned in the county jail, in a dungeon, or cell thereof, if any there be in such jail, and shall be fed on bread and water only, during his or her confinement, for any term not exceeding thirty days, or either or both, at the discretion of the court.—(Act of February 29, 1836, Swan's Stat. sect. 1, 296.)

§ 1887 (*a*). *Receiving or buying stolen bank bills or notes, &c., of less value than thirty-five dollars. &c.*—That if any person shall receive or buy any bank bill or bills, or promissory note or notes, bill of exchange, order, receipt, draft, warrant, check or bond, given for the payment of money in amount less than thirty-five dollars, which have been stolen, knowing the same to be stolen, with intent to defraud the owner thereof, every person so offending shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding thirty days, at the discretion of the court.—(Act of Feb. 25, 1859, sect. 1.)

§ 1887 (*b*). *Or goods or chattels stolen, &c., of less value than thirty-five dollars.*—That if any person shall receive or buy any goods or chattels of less value than thirty-five dollars, that shall have been stolen, or taken by robbers, knowing the same to be stolen or taken by robbers, with intent to defraud the owner, every person so offending shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, for a term not exceeding thirty days, at the discretion of the court.—(Ibid. sect. 2.)

B.—Offence generally.

I. In what the offence consists.

§ 1888. The first point to be shown, in an indictment for receiving stolen goods is, that the goods were stolen, and to prove this fact the thief is a

[b] Coin is embraced in the terms "goods and chattels," as used in the 26th section of the Crimes' Act. Hall *v.* State, 3 O. R. 575.

competent witness.[c] The confession of the thief himself, however, being the principal, is not admissible against any of his accessories.[d]

§ 1889. Guilty knowledge, on the part of the defendant, is essential to the constitution of the offence. This may be shown either directly, by the evidence of the principal felon, or circumstantially, by proving that the defendant bought them very much under their value,[e] or denied their being in his possession, or the like. To show a guilty knowledge, other instances of receiving may be proved;[f] even though they be the subject of other indictments antecedent to the receiving in question.[g]

§ 1890. Neither a principal in the first, nor a principal in the second degree can be treated as a receiver.[h] It is said, however, that the misdemeanor of receiving stolen goods is not merged in the offence of being accessory before the fact of the larceny.[i] And it seems, also, that a conviction for receiving is good, although a conviction for stealing would have been supported by the same evidence if the jury had so found.[j]

§ 1891. The intent, as in larceny, is the chief ingredient of the offence. Thus, where A. authorizes or licenses B. to receive property lost or stolen, and he receives the property from the thief, knowing it to be stolen, with a felonious intent, he is guilty of a felony in receiving the property, notwithstanding the license.[k]

On a charge for feloniously receiving stolen goods, the jury may find the guilty knowledge upon the testimony of an accomplice, corroborated by proof from other sources of an actual possession of the goods by the defendant, whether the accomplice does or does not testify to such possession [kk]

A person suffering a trunk of stolen goods to be put on board a vessel destined for North Carolina, as a part of his baggage, he having taken his passage, was held to have been guilty of such a reception of the goods, as purchaser or bailee, as justified a conviction under the statute for receiving stolen goods.[l]

§ 1892. If two defendants be indicted jointly for receiving, a joint act of receiving must be proved in order to convict both.[m] Proof that the goods were found in their possession is good presumptive evidence of this fact.[n]

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[c] R. *v.* Haslem, 1 Leach, 418.
[d] R. *v.* Turner, 1 Moody, C. C. 347.
[e] 1 Hale, 619.
[f] R. *v.* Dunn, 1 Mood. C. C. 146; see on this point, generally, ante, § 631–5, 639–40, 647–51.
[g] R. *v.* Davis, 6 P. & C. 177; 2 Russell, 251.
[h] R. *v.* Perkins, 12 Eng. Law and Eq. Rep. 587; 5 Cox C. C. 554; 2 Denison, C. C. 459; 2 Dears, C. C. 459.
[i] State *v.* Coppenbury, 2 Strob. 229.
[j] R. *v.* Smith, 33 Eng. Law & Eq. 531.
[k] Cassels *v.* State, 4 Yerger, 149; Wright *v.* State, 5 Yerg. 154.
[kk] Commonwealth *v.* Savory. 10 Cush. (Mass.) 535.
[l] State *v.* Scovell, 1 M. Com. 274.
[m] R. *v.* Messingham, 1 Mood. 257.
[n] State *v.* Weston, 9 Connect. 527; State *v.* Brewster, 7 Vermont R. 118.

§ 1893. Unless two defendants indicted jointly, are proved to have received jointly, and at the same time, both cannot be convicted, but the indictment, it seems, is good against the one who first received.[o] Thus, twelve turkeys, proved to have been stolen, got into A.'s hands, and were by him passed into B.'s; A. and B. having been indicted jointly, and convicted, the judgment was reversed as to B., all the judges assenting.[p]

A., B. and C. were jointly indicted for stealing and receiving some fowls. It was proved that A., carrying a sack containing stolen fowls, went with B. at past four in the morning, into the house of C.'s father, that in about ten minutes' time, A. (still carrying the sack,) came out at the back door with B., preceded by C. with a lighted candle; that C. was the only member of the family up in the house; that the three went together into a stable on the same premises; that the police went into the stable after them, and found the sack lying on the floor, and the three men standing around it as if bargaining. The bench told the jury, that the taking of A. and B. with the stolen goods by C into the stable over which he had control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving them within the meaning of the statute. The jury convicted A. and B. of stealing the fowls, and C. of receiving the fowls knowing them to have been stolen. Upon a case, stating the above facts, the question asked being, whether the conviction of C. was proper, it was held by a majority of the judges (eight to four,) that the conviction was wrong. The majority were of opinion that C. did not receive the fowls, as they all along remained in the mutual possession of A. and B., and were never under C's control, and it was not the intention of A. and B. that C. should have them, except on the contingency, which never happened, of his completing a bargain for them. The minority held, that as C. co-operated with A. and B. in the common purpose of carrying the fowls into the stable, he had a joint possession with them, and that as he knew that the fowls were stolen, and assisted in the removing them for the purpose of negotiating about the purchase, he had a possession with a wicked purpose, and therefore might properly be convicted as a receiver.[q]

A., who had stolen goods, and had them in his pocket, was caught by the owner, who sent for a policeman. The policeman took the goods out of A.'s pocket, but afterwards, in concert with the owner, gave them back to A., who was told by the owner to go and sell them where he had sold others. A. took and sold them to B., and B. bought them believing them to have been stolen. It was held, that B. could not be convicted, under the statute, as a felonious receiver of stolen goods.[qq]

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[o] R. *v.* Williams, 2 Eng. R. 532; R. *v.* Messingham, 1 Mood. C. C. 257.
[p] R. *v.* Williams, 2 Eng. R. 532.
[q] R. *v.* Wiley, 2 Den. C. C. 37; 1 Eng. R. 567.
[qq] R. *v.* Dolan, 29 Eng. Law & Eq. R. 567.

It is no defence to an indictment for feloniously receiving goods alleged to have been stolen by some person, to the grand jury unknown, and to have been the property of persons to the grand jury unknown, that the same grand jury have indicted a certain person for stealing the same goods, alleging them to be the property of certain persons named therein.[r]

On a trial for feloniously receiving goods alleged to have been stolen by A. and B., the government having proved that A. and B. were seen acting in concert on certain nights about the time of the larceny, is not thereby confined to proof of larcenies at those particular times.[rr]

§ 1894. Where a person, knowing goods to have been stolen, directs his servant to receive them into his premises, and the servant, in pursuance of that direction, afterwards receives them in his master's absence, the servant knowing them to have been stolen, they may be jointly indicted for receiving them.[s]

§ 1895. If it be proved that the defendant not only received the articles, but also assisted in stealing them, he may still be convicted, provided some other person assisted in the theft; because the stealing and receiving are both felonies, and a theft by several is a theft by each.[t]

§ 1896. If a stranger, pursuant to an arrangement with one whom he knows has stolen goods, invite an interview with the owner, and afterward receive the goods under the mere color of an agency, but in fact to make a profit out of the larceny, he is within the statute against receiving stolen goods. Thus, in a late case, W., a police justice of the city of New York, having learned that a large amount of funds had been stolen from a bank of Maryland, invited an interview with the agents of the latter, expressing his belief that the property could be recovered. An interview accordingly took place, in which W. proposed to procure the restoration of the property upon condition that the bank would pay therefor at the rate of ten per cent. on the amount, saying his employer would not take less. After several days spent in negotiating, during which W. professed to be acting with entire knowledge as to the views and wishes of the thief, it was finally agreed that the property should be restored for a less sum than the one first demanded, and a place was fixed for carrying the agreement into effect. W. brought the property to the appointed place and delivered it to the agents of the bank, who thereupon paid him the stipulated reward. It was held, that though W. received the property under color of an agency from the bank, the jury were authorized to find that he had procured the agency under a previous arrangement with the thief, intending to make a profit himself out of the crime, but concealing such intent from the bank, and if so, he was punishable as a receiver of stolen goods. If W., it was said, had only sought for such a reward as was insisted on by the thief,

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[r] Commonwealth *v.* Hill, 11 Cush. (Mass.) 137.
[rr] Commonwealth *v.* Hills, 10 Cush. (Mass.) 530.
[s] R. *v.* Parr, 2 M. & Rob. 346.
[t] R. *v.* Dyer, 3 East, P. C. 767; R. *v.* Atwell, Id. 768.

before giving up the goods, together with a fair compensation for his own trouble, he proposing and being allowed for the whole as such, the case might have been different.[u] There might, however, be a case, it was intimated, where, if the goods have been stolen from the bailee by another, the owner may render himself criminally responsible by fraudulently receiving them from the thief.[v]

§ 1897. Manual possession or touch is unnecessary in order to sustain a conviction; but it is sufficient if there is a control by the receiver over the goods.[w]

A person having a joint possession with the thief may be convicted as a receiver.[x]

In a late case, W. stole a watch from A., and while W. and L. were in custody together, W. told L. that he had "planted" the watch under a flag in the soot-cellar of L.'s house. After this, L. was discharged, and went to the flag, and took up the watch, and sent his wife to pawn it. It was held, that if L. thus took the watch in consequence of W.'s information, W. telling L. in order that he might use the information by taking the watch, L. was indictable for this as a receiver of stolen goods, but that if this was an act done by L., in opposition to W., or against his will, it might be a question whether it would be a receiving.[y]

A. stole fowls, and sent them by coach to Birmingham, in a box not addressed to any one; but A. made a verbal statement when he sent them, that a person would call for them at Birmingham. B. inquired for the box; it was shown to her, and she claimed it, but it was not delivered to her; held, that B. could not be properly convicted as a receiver.[z]

§ 1898. A person receiving, in Massachusetts, goods stolen in another state, is indictable at common law in Massachusetts for the receiving.[a]

A motion was made, on an indictment found in the city of New York, to dismiss the case or direct a verdict of acquittal, on the ground that it did not appear that the prisoners had received or had the property within the city and county of New York. It appeared that a large portion of the goods was found in a house apparently used for the purpose of storing and concealing goods, in Williamsburgh, in another county, but another portion was found at the store of the defendants, in New York, and used there as samples. It further appeared, that, at this store, one of the defendants offered to sell the witness the whole of the goods, and that the samples were brought in by another of the defendants after an absence of about fifteen minutes after he started for them. It was held, that the motion was properly overruled.[aa]

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[u] People *v.* Wiley, 3 Hill, N. Y. R. 194.
[v] People, *v.* Wiley, 3 Hill, N. Y. R. 194.
[w] R. *v.* Smith, 33 Eng. Law & Eq. 531.
[x] Ibid.
[y] R. *v.* Wade, 1 Car. & Kir. 739.
[z] R. v. Hill, 2 Car. & Kir. 978.
[a] Com. *v.* Andrews, 2 Mass. 14.
[aa] Wills *v.* People, 3 Parker, C. R. (N. Y.) 473.

II. Indictment.[b]

§ 1899. The indictment need not set forth the name of any person from whom the goods were received, nor that they were received from some person or persons unknown.[bb] Such, generally is the law under the statutes against receiving property, knowing the same to be stolen.[c] Thus, where an indictment charged that A., "On the 26th of May, in the year eighteen hundred and thirty-six, in the county of Blount aforesaid, two sides of upper sole leather, of the value of five dollars, of the goods and chattels of one Matthew H. Boyle, then, lately before, feloniously stolen, taken and carried away, feloniously and fraudulently did then and there receive and have, he the said A., then and there knowing the said goods and chattels to have been feloniously stolen and carried away, with intent to deprive the true owner thereof;" it was held, that the offence was described with sufficient certainty, and that it was unnecessary to expressly aver who was the principal felon, nor from whose possession the goods were stolen.[d] When, however, the principal felon is named, a variance is fatal.[e]

In North Carolina, an indictment for receiving stolen goods must aver from whom the stolen goods were received, so as to show that they received them from the principal felon. If received from any other person the statute does not apply.[ee]

It is not essential, in such case, to aver that the principal felon or thief has been convicted.[f]

An indictment for receiving stolen goods must charge the defendant with receiving them with intent to deprive the true owner thereof.[g]

§ 1900. A count for receiving stolen goods alleged that the prisoner received the goods of A. B., "he, the said A. B., then knowing them to have been stolen." After a verdict of guilty, the counsel moved in arrest

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[b] See Wharton's Precedents, as follows:
(450) General frame of indictment.
(451) Receiving goods stolen by a slave.
(452) Against receiver of stolen goods. Mass. Rev. st., ch. 126, § 20.
(453) Same in New York.
(454) Same in Pennsylvania.
(455) Against a receiver of embezzled property. Mass. st., 1853, ch. 184.
(456) Receiving stolen goods from some unknown person in Pennsylvania.
(457) Same in South Carolina.
(458) Same in Tennessee.
(459) Soliciting a servant to steal, and receiving stolen goods.

[bb] R. v. Wheeler, 7 C & P. 170; R. v. Pulham, 9 C. & P. 280; State v. Murphy, 6 Ala. 845; People v. Caswell, 21 Wendell, 86; R. v. Thomas, 2 East, P. C. 781.

[c] Swaggerty v. State, 9 Yerger; 338, State v. Coppenburg, 2 Strob. 273; R. v. Jervis, 6 C. & P. 156; Com. v. King, 9 Cushing, 284.

[d] Swaggerty v. State, 9 Yerger, 338; see State v. Hazard, 2 R. I. 474.

[e] Com v. King, 9 Cushing, 284; R. v. Woolford, 1 Mood. & Rob. 384.

[ee] State v. Ives, 13 Iredell, 338.

[f] Com. v. King, 9 Cushing, 284; R. v. Woolford. 1 Mood. & Rob. 384.

[g] Hurrell v. State, 5 Humphrey, 68.

of judgment, on the ground that the scienter was omitted It was held that the count was bad.[h]

The time and place when and where the goods were stolen need not be stated in the indictment.[i]

An indictment which alleges that the goods were "feloniously stolen," and that the defendant received them, "knowing the same to have been feloniously stolen," is sufficient without adding the words, "taken and carried away."[ii]

§ 1901. The indictment should describe the goods with certainty and accuracy, and a variance in this particular will be fatal.[j] 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 misdescribed 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 misdescription whatever and a general verdict of guilty was rendered; it was held on review that the erroneous construction 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.[k]

It is not necessary to allege that the goods were received upon any consideration passing between the thief and the receiver.[l]

The reception must be averred to have been felonious or fraudulent.[m]

§ 1902. Where an indictment charges a defendant with receiving various articles of stolen property, knowing them to be stolen, and specifically describes each article, and avers the value thereof, and he pleads that he is "guilty of receiving fifty dollars' worth of said property, in manner and form as set forth in the indictment," no valid judgment can be rendered against him on such plea.[n]

An indictment for breaking into the house of A., contained five counts, laying the property stolen in five different persons, A., B., C., D., and E. It also contained five other counts under the stat. 11 and 12 Vict. c. 46, for receiving the goods mentioned in each of the first five counts respectively, laying the property as in them; it was held to be correct, and that there may be as many counts on this statute for receiving as there are counts for stealing, and that the prosecutor ought not to be put to elect.[o]

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[h] R. *v.* Larkin, 26 Eng. Law & Eq. 572.
[i] State *v.* Halford, 2 Blackford, 103; 1 Leach, 109, 477.
[ii] Commonwealth *v.* Lakeman, 5 Gray, (Mass.) 82.
[j] People *v.* Wiley, 3 Hill, N. Y. R. 194. As to how goods are to be set out, and as to variance in same, see ante, § 353–63, 610–15; and as to the designation written instruments, ante, § 314-349.
[k] Ibid., ante § 361, 565.
[l] People *v.* Hopkins, 12 Wendell, 76.
[m] People *v.* Johnson, 1 Parker C. C. 564.
[n] O'Connell *v.* Com., 7 Met. 460.
[o] R. *v.* Beeton, 2 Car. & Kir. 959; S. C. 1 Den. C. C. 414; see ante, § 422.

§ 1903. When a defendant is convicted on an indictment which charges him with receiving and aiding in the concealment of stolen goods, he is convicted of only one offence, and if the indictment properly charges the defendant with aiding in the concealment of the goods, he may be legally sentenced, although the charge of receiving the goods is insufficiently made.[p]

Larceny, and receiving stolen goods may always be joined.[q]

A count for receiving may be tacked to one for stealing, so as to be dependant on the latter for its sense, and yet to stand independently in case of an acquittal on the stealing. This is the uniform practice in Pennsylvania. In England the practice was sustained on an indictment in which the first count charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the prisoner was charged with having received the article, "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty. It was held, that there was no repugnancy; for that, although the word "aforesaid" in a subsequent count virtually incorporates all the necessary averments as to time and place in that count, the words "so as aforesaid feloniously stolen," did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by *some person*.[r]

A thief and a receiver of stolen goods may be jointly indicted.[s]

An indictment against a thief and a receiver of the stolen goods jointly, which averred that the first "feloniously did steal, take and carry" the goods, and that the second feloniously received the goods, knowing them "to have been feloniously stolen, taken and carried away, as aforesaid," is insufficient, for want of adding "away" after "carry" to support a judgment against either defendant.[t]

A conviction and sentence for having received the goods of A. B., knowing them to be stolen, is no bar to a further indictment for having received the goods of C. D., at the same time and place, knowing them to have been stolen, though the act of receiving were one and the same.[u]

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[p] Stevens *v.* Com., 6 Met. 241.
[p] Ante, § 419.
[r] R. *v.* Craddock, 2 Denison, C. C. 31; Temple & Moo. C. C. 361; 1 Eng. Law & Eq. 563.
[s] Com. *v.* Adams, 7 Gray, (Mass.) 43. [t] Ib.
[u] Com. *v.* Andrews, 2 Mass. 409; see Ante, § 361–5.

CHAPTER VII.

EMBEZZLEMENT.

A. STATUTES.

UNITED STATES.

Embezzling instruments of war and victuals of the soldiers of U. S. § 1905.
Punishment, § 1906.

MASSACHUSETTS.

Embezzling bullion, money, note, bill, obligation, &c., of incorporated bank, § 1907.
Embezzlement of clerk in treasury of commonwealth, § 1908.
Embezzlement of officer, agent, clerk, or servant, &c., § 1909.
Embezzlement of carrier, § 1910.
Sufficient in prosecution to allege embezzlement to certain amount without particulars, § 1911.
Prosecution for embezzlement of real or personal estate, § 1912.
Embezzlement of officer of incorporated bank, § 1913.
Sufficient to allege in indictment, fraudulent conversion with such intent certain amount, without particulars, § 1914.
Prosecution for taking or receiving of bullion, money, note, bill, &c., § 1915.
Embezzlement of town, city, or county officer, § 1916.

NEW YORK.

Embezzlement of clerk, servant, officer, or agent, &c., § 1917.
Embezzlement of evidence of debt, § 1918,
Buying or receiving embezzled money, goods, right in action, &c., § 1919.
Embezzlement of carrier, § 1920.
Fraudulent issue and sale of bonds by officers, &c., § 1920(*a*).

PENNSYLVANIA.

Loaning money by public officers, § 1921.
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Cashiers of banks prohibited from following any other business or occupation, § 1922.
Embezzlement by public officers, § 1923.
Malversation by corporation officers, § 1924.
Solicitation to commit said offence, § 1925.
Issuing certificates as currency by corporation officers, § 1926.
Embezzlement, by trustees, of trust property, 1927.
Embezzlement by bankers, § 1927(*a*).
Embezzlement by attorneys in fact, § 1927(*b*).
Embezzlement by officers of banks and other corporations, § 1927(*c*).
Keeping fraudulent accounts, § 1927(*d*).
Wilfully altering, destroying or mutilating books of a corporation, § 1927(*e*).
False statements by officers and members of corporations, § 1927(*f*).
Receiving property fraudulently disposed of, § 1927(*g*).
Punishment for the foregoing misdemeanors, § 1927(*h*).
Construction of the preceding sections, § 1927 (*i*).
No person exempt from answering questions in court, § 1927(*j*).
Definition of the words "trustee" and "property," in this title, § 1927(*k*).
Embezzlement by consignees and factors, § 1927(*l*).
Embezzlement by transporters, &c., § 1927(*m*).
Distinct acts chargeable in same indictment, § 1927(*n*).

VIRGINIA.

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

OHIO.

Clerk or servant, &c., embezzling, using, or secreting, &c., money, goods, &c., § 1931.

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

B. OFFENCE GENERALLY, § 1935.

A.—Statutes.

United States.

§ 1905. *Embezzling instruments of war and victuals of the soldiers of U. S.*—If any person having charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war belonging to the United States, or of victuals provided for the victualling of soldiers, gunners, mariners, or pioneers, shall, for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin, or convey away any of the said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, then and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders and abettors, (knowing of and privy to the offences aforesaid,) shall, on conviction, be fined not exceeding the four-fold value of the property so stolen, embezzled, or purloined; the one moiety to be paid to the United States, and the other moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty-nine stripes.—(Act of 30th April, 1790, sect. 16.)

§ 1906. *Punishment.*—By act of 23d August, 1842, sect. 4, in lieu of the punishment prescribed by the preceding section, (sect. 16, act 1790,) for the offences therein mentioned, the punishment of the offender, upon conviction, is by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the nature or aggravation of the offence.—(See Offences against post-office, and larceny.)[a]

Massachusetts.

§ 1907. *Embezzling bullion, money, note, bill, obligation, &c., of incorporated bank.*—If any cashier or other officer, or agent, or servant of any incorporated bank, shall embezzle or fraudulently convert to his own use, or shall fraudulently take or secrete, with intent to convert to his own use, any bullion, money, note, bill, obligation, or security, or any other effects or property belonging to and in possession of such bank, or belonging to any person, and deposited therein, he shall be deemed by so doing, to have committed the crime of larceny in such bank, and shall be punished by imprisonment in the state prison, not more than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail, not more than two years.[b]—(Rev. Stat. ch. 126, sect. 27.)

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[a] For embezzlement in offices of the U. S. Mint, see 2 Parsons, 384, and Wharton's Prec. 460.

[b] The meaning of this section underwent a careful examination in the trial of William Wyman, the late president of the Phœnix Bank of Charlestown, for embezzlement. It was argued by Mr. Webster, for the defendant, that the case did not fall within the statute, and he quoted the language of the Supreme Court, given shortly previous, on the revision of a former trial, to support his position. It was held there to be "one of the incidents of an aggregate corporation, authorized to make by-laws, to delegate their authority to a part of their body, and the body to whom such authority is delegated

§ 1908. *Embezzlement of clerk in treasury of commonwealth.*—If any clerk or other person, employed in the treasury of this commonwealth, shall commit any fraud or embezzlement therein, he shall be punished by fine not exceeding two thousand dollars, or by imprisonment in the state prison for life, or for such term of years as the court shall order.—(Ibid. sect. 28.)

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become the efficient representatives of the corporation. In respect to the banks in this Commonwealth, they have all had, from the creation of the Massachusetts Bank, in 1783, to the present time, a board of directors selected from among themselves, one of whom has been constituted their president. These persons, as indicated by their name, have a directing and supervisory power over the affairs of the institution, rather than the active management of their internal concerns, which are usually intrusted to officers by them appointed, and are designated as cashiers, tellers, book-keepers, clerks, messengers and porters. The president and directors are also the higher officers of the institution. They control and employ the funds of the bank, and in the discharge of the duties of such employment they are made personally liable for official mismanagement." "We are, therefore, of opinion, that the term 'officer,' as used in the 27th sec. of the 126th chap. of the Revised Statute, is of that comprehensive character as to include within its embrace not only the officers in rank under the cashier, but the superior officers also; and that the president and directors being officers of banks, and as such within the mischief intended to be prevented, they are also within its remedies. And where they are properly charged as intrusted with the property of the bank, or of its depositors, they may, on proof of their guilt, be punished for the crime of embezzlement, and not merely of simple larceny." "The court are also of opinion that even if the Revised Statutes, chap. 133, sec. 10, did embrace within its provisions offences committed by officers of banks, as specified in chap. 126, sec. 27, still the language and terms made use of in the 10th section are such that if the person charged to be other than a clerk or servant of the bank, he must be indicted as an agent of the bank; and as such agent, averred to be intrusted with its funds or of those deposited therein, and which agency must be specially proved before evidence of embezzlement in the manner stated in the said section can be admitted against him." "It is for the officers of the government to determine in regard to the character of the indictment, whether the same can be sustained, as to the matter in which an agency on the part of the president as to the custody of the funds of the bank, can be proved," &c.

He further referred to the form of the indictment itself as sustaining this position. Mr. Rogers, on the other side, contended that the determination of this question was not called for in the former case, and the dicta of the court now read were mere obiter rulings upon assumed premises; that the directors never meant to divest themselves of the control of the money or funds, or to give it to the cashier; that here the evidence tended to show that the defendant acted as holding the whole power of the entire board; and that embezzlement does not necessarily imply custody at all. Mr. Webster having replied, and the court having intimated an opinion that it should regard the opinion of the Supreme Court already read as imperative in the trial of this case, stated to the counsel that the question whether the funds had been so intrusted to the defendant as to bring him within the rule laid down by the Supreme Court, was one of fact for the consideration of the jury. Mr. Rogers then inquired of the court what was to be understood as "an intrusting of the funds, within the language of the Supreme Court." The judge replied, that although not called upon to define what would be an intrusting, as applicable to all possible cases, he would suggest what struck his mind as not constituting an intrusting under that decision, and the counsel for the prosecution would see how it bore upon the present case.

"If the president and directors of an ordinary country bank, at a regular meeting of the board, with a fraudulent intent to get possession of the moneys of the bank, were to discount notes and direct the cashier to pay out the money upon them, knowing them to be worthless, it would be a conspiracy, and not an embezzlement, unless the cashier was privy to the fraud. If the cashier participated in the fraud, it would be embezzlement on his part, and the president and directors would be accessories. If the defendant, acting as president and directors, did the same thing, and no more, and the cashier innocently paid out the money, could it be any more an embezzlement in the defendant than in the president and directors in the case supposed? To test this, if the cashier was party to the fraud, he clearly would be liable for the embezzlement. Why? Because intrusted with the funds. Could the defendant in that case be otherwise indicted than as an accessory? Clearly not, unless he and the

§ 1909. *Embezzlement of officer, agent, clerk or servant, &c.*—If any officer, agent, clerk, or servant of any incorporated company, or if any clerk, agent, or servant of any private person, or of any copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without consent of his employer or master, any money or property of another, which shall have come to his possession, or shall be under his care, by virtue of such employment, he shall be deemed, by so doing, to have committed the crime of simple larceny.[c]—(Ibid. sect. 29.)

§ 1910. *Embezzlement of carrier.*—If any carrier or other person,[cc] to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, to be carried for hire, or if any other person, who shall be entrusted with such property shall embezzle or fraudulently convert to his own use, or shall secrete with intent to embezzle, or fraudulently convert to his own use, any such money, goods or property, either in the mass, as the same were delivered, or otherwise, and before delivery of such money, goods, or property, at the place at which, or to the person to whom, they were to be delivered, he shall be deemed, by so doing, to have committed the crime of simple larceny [d]—(Ibid. sect. 30.)

§ 1911. *Sufficient in prosecution to allege embezzlement to certain amount, without particulars.*—In any prosecution for the offence of embezzling the money, bank notes, checks, drafts, bills of exchange, or other securities for money, of any person, by a clerk, or agent, or servant of such person, it shall be sufficient to allege generally in the indictment, an embezzlement of money to a certain amount, without specifying any particulars of such embezzlement, and on the trial evidence may be given of any such embezzlement, committed within six months next after the time stated in the indictment, and it shall be sufficient to maintain the charge in the indictment; and shall not be deemed a variance, if it shall be proved, that any money, bank note, check, draft, bill of exchange, or other security for money, of such person, of whatever amount, was fraudulently embezzled by such clerk, agent, or servant, within the said period of six months.—(Ch. 133, sect. 10.)

§ 1912. *Prosecution for embezzlement of real or personal estate.*—In the prose-

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cashier had joint possession of the funds. If, then, the cashier was so intrusted with the funds as to render him liable for embezzling them, can the same funds at one and the same time be regarded, within the meaning of the Supreme Court, as intrusted to the defendant, so as to render him liable for embezzling them by an act in which the cashier did not partake? After such a view of the law, the prosecuting officer, stating he could not consistently ask a verdict of guilty, abandoned the case. (8 Boston Law Rep. 341; 2 Metcalfe, 247.)

See for form, Wh. Prec. 466.

[c] The phrase "money or property of another," in this section, applies to the money or property of the employer or master, as well as that of any other person than the clerk. (Com. *v.* Stearns, 2 Metc. 343.)

An auctioneer, whether he receives goods for sale in the usual mode, or on an agreement to pay a certain sum therefor, within a specified time after sale, is not within the act.—(Ibid.) A broker, also, is excluded.—(Com. *v.* Davis, 7 Bost. Law R. 94.)

A person who is employed to collect bills for the proprietor of a newspaper establishment, and converts to his own use the money which he collects for them, is not such an agent or servant as is intended by the Rev. Sts. c. 126, § 29, which prescribes the punishment for embezzlement by agents and servants. (Com. *v.* Libbey, 2 Metc. 64.)

See for form, Wh. Prec. 467.

[cc] This strictly applies only to one of whom, goods are to be entrusted, to be carried and delivered to another person. (Commonwealth *v.* Williams, 3 Gray, (Mass.) 461.)

[d] See for form, Wh. Prec. 468.

cution of any offences, committed upon, or in relation to, or in any way affecting any real estate, or any offence committed in stealing, embezzling, destroying, injuring, or fraudulently receiving or concealing any money, goods, or other personal estate, it shall be sufficient, and shall not be deemed a variance, if it be proved on the trial, that at the time when the offence was committed, either the actual or constructive possession, or the general or special property, in the whole, or in any part, of such real or personal estate, was in the person or community, alleged in the indictment or other accusation, to be the owner thereof.[e]—(Ibid. sect. 11.)

§ 1913. *Embezzlement of officer of incorporated bank.*—If any officer of an incorporated bank, or any person in the employment of such bank, shall fraudulently convert to his own use, or fraudulently take and secrete, with intent to convert to his own use, any bullion, money, note, bill, or other security for money, belonging to, and in possession of such bank, or belonging to any person and deposited therein, he shall, whether intrusted with the custody thereof or not, be deemed thereby to have committed the crime of larceny in the said bank, and shall be punished by imprisonment in the state prison not more than ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than two years.—(Gen. Laws Mass., sess. 1846, chap. 171, sect. 1.)

§ 1914. *Sufficient to allege in indictment fraudulent conversion with such intent, to a certain amount, without particulars.*—In any prosecution for either of the offences mentioned and described in the first section of this act, it shall be sufficient to allege generally, in the indictment, the fraudulent conversion or taking, with such intent, or money to a certain amount, without specifying the particulars of that amount; and, on the trial, evidence may be given of any such fraudulent conversion, or taking, with such intent, committed within six months next after the time stated in the indictment, and it shall be sufficient to maintain the charge in the indictment, and shall not be deemed a variance, if it shall be proved that any bullion,

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[e] By the statute of 1845, ch. 215, the 10th section of ch. 133, above given, was extended to prosecutions against bank officers; and the extension was considered not *ex post facto* as to offences which existed before its passage. (Com. *v.* Wyman, 8 Metc. 247.)

Under the Massachusetts Rev. Sts., c. 126, s. 130, "the defendant should, as far as is reasonably practicable, be apprised by the indictment of the precise nature of the charge against him." This in embezzlement, so far as respects the nature of the offence or character of the crime charged, may be easily indicated by setting forth the fiduciary relation, or the capacity in which the defendant acted, and by means of which the property came into his possession, and by charging the fraudulent conversion. The two offences of larceny and embezzlement are so far distinct in their character, that under an indictment charging merely a larceny, on evidence of embezzlement, the proper mode is, notwithstanding the statute to which we have referred, to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. (Com. *v.* Simpson, 9 Metc. 138; Dewey, J.)

Evidence which proves an embezzlement under the statute, will not sustain a general charge of larceny at common law. (Ibid. Com. *v.* King, 9 Cushing, 284.)

An indictment against the officers of a bank for embezzling bank funds, must charge a specific act of fraud, which must be sustained in fact. (Com. *v.* Wyman, 8 Metc. 247.)

An indictment for embezzlement, which avers that the defendant "was intrusted by J. S., with certain property, the same being the subject of larceny" (described) "and to deliver the same to said S. on demand," and afterwards "refused to deliver said property to said S., and feloniously did embezzle and fraudulently convert to his own use, the same then and there being demanded of him by said S.," is fatally defective, by reason of omitting to state the purpose for which the defendant was intrusted with the property, or what property he fraudulently converted to his own use. (Commonwealth *v.* Swart, 6 Gray, (Mass.) 15.)

For indictments under Mass. Stat., see Wharton's Prec. 209.

money, note, bill or security for money belonging to, and in possession of such bank, or belonging to any person and deposited in such bank, of whatever amount, was fraudulently converted or taken with such intent, as is set forth in said first section, within the said period of six months.—(Ibid. sect. 2.)

§ 1915. *Prosecution for taking or receiving of bullion, money, note, bill, &c.*—In any prosecutions for the offences mentioned and described in the first section of this act, the fraudulent taking or receiving, by any person or persons, of any bullion, money, note, bill, or other security for money belonging to such bank, by reason of any unlawful confederacy or agreement of him or them, with an officer of said bank, or any person in the employment thereof, with intent to defraud the same, shall be held and deemed to be a fraudulent taking by such officer or person in the employment of such bank, to his own use, within the meaning of the first section of this act; and it shall not be necessary on the trial, to identify the particular bullion, money, note, bill, or security for money so taken or received.—(Ibid. sect. 3.)

[*For receiving embezzled goods, see St.* 1853, *ch.* 184.]

§ 1916. *Embezzlement of town, city or county officer.*—If any town, city or county officer, in this commonwealth, shall embezzle or fraudulently convert to his own use, or shall fraudulently take or secrete, with intent to convert to his own use, any money, note, bill, obligation or security, or any other effects or property belonging to or in possession of said town, city or county, he shall be deemed by so doing to have committed the crime of larceny, and shall, upon conviction thereof, be punished in the same manner as is now provided, by the one hundred and twenty-sixth chapter of the Revised Statutes, in cases of embezzlement by bank officers.—(Supplement to Revised States, 1855, ch. 487.)

NEW YORK.

§ 1917. *Embezzlement of clerk, servant, officer or agent, &c.*—If any clerk or servant of any private person or of any copartnership, (except apprentices and persons within the age of eighteen years,) or of any officer, agent, clerk, or servant of any incorporated company, shall embezzle, or convert to his own use, or take, make way with, or secrete, with intent to embezzle or convert to his own use, without the consent of his master or employer, any money, goods, rights in action, or other valuable security or effects whatever, belonging to any other person, which shall have come into his possession, or under his care, by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for feloniously stealing property of the value of the articles so embezzled, taken or secreted, or of the value of any sum of money payable and due upon any right in action so embezzled.—(Rev. Stat. 678, sect. 59.)

§ 1918. *Embezzlement of evidence of debt.*—Every embezzlement of any evidence of debt negotiable to delivery only, and actually executed by the master or employer of any such clerk, agent, officer, or servant, but not delivered, or issued as a valid instrument, shall be deemed an offence within the meaning of the last preceding section.—(Ibid. sect. 60.)

§ 1919. *Buying or receiving embezzled money, goods, right of action, &c.*—Every person who shall buy, or in any way receive any money, goods, right in action, or any valuable security or effects whatever, knowing the same to have been embezzled, taken, or secreted, contrary to the provisions of the two last sections, shall, upon conviction, be punished in the same manner, and to the same extent, as therein prescribed upon conviction of a servant for such embezzlement.—(Ibid. sect. 61.)

§ 1920. *Embezzlement of carrier.*—If any carrier or other person, to whom any goods, money, right in action, or any valuable personal property or effects shall have been delivered to be transported or carried for hire, shall, without the assent of his employer, take, embezzle or convert to his own use, or make way with or secrete, with intent to embezzle or convert to his own use, such goods, money, right in action, property or effects, or any of them, in the mass, as they were delivered, without breaking the trunk, box, pack, or other thing, in which they or any of them shall be contained, and before delivery of such articles at the place or to the person entitled to receive them, he shall, upon conviction, be punished in the same manner as if he had taken, embezzled, converted, or secreted such goods or other personal property, after breaking the trunk, box, pack or other thing containing the same, or after separatiog any of them from the others.[f]—(Ibid. sect. 62.)

§ 1920 (*a*). *Fraudulent issue and sale of bonds of incorporated companies by officers and agents.*—Every officer and every agent of every incorporated company corporation, formed or existing under or by virtue of any of the laws of the United States, who shall, within this state, wilfully and designedly sign or procure to be signed, with intent to issue, sell, or pledge, or cause to be issued, sold or pledged, any false or fraudulent certificate, or other evidence of the ownership or transfer of any share or shares of the capital stock of such incorporated company or corporation, or any false or fraudulent bond, or evidence of debt of such incorporated company or corporation, or any certificate or other evidence of the ownership or transfer of any share or shares in such incorporated company or corporation, or any instrument purporting to be a certificate or other evidence of

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[f] Under the 59th section, as above given, it has been held that an indictment lies against a clerk or servant for converting to his own use the money, goods, &c., of his master or employer, as well as for converting to his own use the money, goods, &c, of any other person which may have come into his possession or under his care by virtue of his employment; the words "any other person" in the statute meaning any person other than he who is guilty of the embezzlement. (People *v.* Hennessey, 15 Wendell, 147.) A stage driver, entrusted by his employers to carry money from one place to another, is a servant who has obtained possession of property by virtue of his employment, within the meani g of the act. (People *v.* Sherman, 10 Wend. 296.)

A barkeeper in an inn, entrusted to carry letters to and from the post office, who fraudulently converts to his own use a letter enclosing money, given to him to carry to the post office, is guilty of embezzlement; and to convict him it is not necessary to show that he broke open the letter or fled after the commission of the offence, or to show the dissent of his employer; it is enough that there be a fraudulent conversion, and that being shown, a felonious intent is established. (People *v.* Dalton, 15 Wendell, 581.)

An indictment for embezzlement under the statute concerning that offence, (2 R. S. 678, sect. 59,) must aver that the defendant was the clerk or servant of some person, (or an officer or an agent of a corporation,) and that the property he is charged with embezzling came to his possession or under his care, by virtue of such employment. (People *v.* Allen, 5 Denio, 76.)

A count charging that the defendant received the property as the agent of an individual is bad So, also, it is bad, if it state that the defendant received the property as the agent of an individual named, though the count afterwards proceeded to aver, that it came to the defendant's possession, and under his care as such servant as aforesaid, and that while he was such servant he converted it. The construction being that such servant meant such a servant, as an agent may be. (Ibid.)

Where a constable was employed to collect such demands without suit, if the debtors would pay, and by procuring and serving process before a justice of the peace, if they would not, held, that he was not a servant of the creditor within the meaning of the statute concerning embezzlements. (Per Beardsley. C. J.; People *v.* Allen, 5 Denio, 76–7.)

For indictments under N. Y. statute, see Wharton's Prec., 210, 211.

ownership or transfer of such share or shares, or purporting to be such bond or evidence of debt, the signing, issuing, selling or pledging of which, shall not be authorized by the charter and by-laws of such incorporated company, or incorporation, or some amendment thereof, shall be deemed guilty of a felony, and shall be punished by a fine not exceeding three thousand dollars, and imprisonment in the state prison for a term not less than three nor more than seven years.—(3 Rev. Stat. 676, s. 48.

§ 1920 (*b*). *Issue and sale, by officers and agents of joint stock companies and corporations.*—Every officer and agent of every incorporated company, joint-stock company or corporation, formed or existing under or by virtue of the laws of any of the United States, who shall, within this state, knowingly, wilfully and designedly sign or procure to be signed, with intent to issue, sell or pledge, or cause to be issued, sold or pledged, or who shall knowingly, wilfully and designedly, issue, sell or pledge, or cause to be issued, sold or pledged, any certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such incorporated company, joint-stock company or corporation, or any bond or evidence of debt of such incorporated company, joint-stock company or corporation, or any instrument purporting to be a certificate or other evidence of ownership or transfer of such share or shares, or purporting to be such bond or evidence of debt, without being thereunto first authorized and empowered by such incorporated company, joint-stock company or corporation, and every such officer and agent who shall re-issue, sell, pledge, or dispose of, or cause to be re-issued, sold or disposed of, any surrendered or cancelled certificate, or other evidence of the ownership or transfer of any such share or shares, or of any right or interest therein, with the intent of defrauding any such corporation or any person or persons, shall be deemed guilty of felony, and shall be punished by a fine not exceeding three thousand dollars, and imprisonment in the state prison not less than three nor more than seven years.—(3 Rev. Stat. 676, sect. 49.)

PENNSYLVANIA.

§ 1921. *Loaning money by public officers.*—If any officer of this commonwealth, or of any city, borough, county or township thereof, shall loan out, with or without interest, or return therefor, any money or valuable security received by him, or which may be in his possession, or under his control by virtue of his office, he shall be guilty of a misdemeanor in office, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and if still in office; be adjudged thereafter incapable of exercising the same, and the said office shall be forthwith declared vacant by the court passing the sentence.—(Rev. Stat. Bill I., sect. 62.)

§ 1921 (*a*). *Depositing money by same for gain.*—If any such officer shall enter into any contract or agreement with any bank, corporation or individual, or association of individuals, by which said officer is to derive any benefit, gain or advantage from the deposit, with such bank, corporation or individual, or association, of any money or valuable security held by him, or which may be in his possession, or under his control by virtue of his said office, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding one year, and if still in office, be adjudged thereafter incapable of exercising the same, and the said office shall be forthwith declared vacant by the court in passing sentence.—(Ibid. sect. 63.)

§ 1922. *Cashier, &c.*—If any cashier of any bank of this commonwealth shall

engage directly or indirectly in the purchase or sale of stock, or in any other profession, occupation or calling, other than that of his duty as cashier, he shall be guilty of a misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars.—(Ibid. sect. 64.)

§ 1923. *Defaulting by public officers,*—If any state, county or township officer of this commonwealth, charged with the collection, safe keeping, transfer or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money entrusted to him for collection, safe keeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the state, county or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor, and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of the money embezzled.—(Ibid. sect. 65.)

§ 1924. *Malversation by corporation officers.*—It shall not be lawful for any councilman, burgess, trustee, manager or director of any corporation, municipality or public institution, to be at the same time a treasurer, secretary or other officer, subordinate to the president and directors, who shall receive a salary therefrom, or be the surety of such officer, nor shall any member of any corporation or public institution, or any officer or agent thereof, be in anywise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to, or for the use of any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and his office or appointment thereunder, and shall be held guilty of a misdemeanor, and on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars: *Provided*, That nothing in this section contained, shall prevent a vice-president of any bank from being a director of such bank, or of receiving a salary as vice-president.—(Ibid. sect. 66.)

§ 1925. *Solicitation to commit said offence.*—Any person who shall contract for the sale, or sell any supplies or materials as aforesaid, and shall cause to be interested in any such contract or sale, any member, officer or agent of any corporation, municipality or institution, or give or offer to give any such person any reward or gratuity, to influence him or them in the discharge of their official duties, shall not be capable of recovering any thing upon any contract or sale, in relation to which he may have so practised or attempted to practice corruptly, but the same shall be void, and such party shall be guilty of misdemeanor, and on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars.—(Ibid. sect. 67.)

§ 1926. *Issuing certificates as currency by corporation officers.*—If any officer of any municipal or other corporation, not authorized by law, shall be instrumental in, or shall consent to or connive at the making or issuing of any note, bill, check, ticket or order, intended to be used as currency, he shall be guilty of a misdemeanor, and on conviction thereof, be sentenced to pay a fine not exceeding one thousand

dollars for each offence, and to undergo an imprisonment not exceeding six months.[s] —(Ibid. sect. 68.)

§ 1927. *Trustees, &c.*—If any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or purpose, or the use or benefit of any other person, or shall, with intent aforesaid, otherwise dispose of or destroy such property, or any part thereof, he shall be guilty of a misdemeanor.—(Rev. Act, Bill I., sect. 113.)

§ 1927 (*a*). *Banker or attorney.*—If any person, being a banker, broker, attorney, merchant or agent, and being entrusted, for safe custody, with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use, or the use of any other person, such property, or any part thereof, he shall be guilty of a misdemeanor.—(Ibid. sect. 114.)

§ 1927 (*b*). *Embezzlement by attorneys in fact.*—If any person intrusted with any power of attorney, for the sale or transfer of any property, shall fraudulently sell or transfer, or otherwise convert such property, or any part thereof, to his own use or benefit, or the use or benefit of any other person, he shall be guilty of a misdemeanor.—(Ibid. sect. 115.)

§ 1927 (*c*). *Embezzlement by officers of bank and other corporations.*—If any person, being an officer, director or member of any bank, or other body corporate or public company, shall fraudulently take, convert or apply to his own use, or the use of any other person, any of the money or other property of such bank, body corporate or company, or belonging to any person or persons, corporation or association, and deposited therein, or in possession thereof, he shall be guilty of a misdemeanor.—(Ibid. sect. 116.)

§ 1927 (*d*). *Keeping fraudulent accounts.*—If any person, being a director, officer or manager of any body corporate or public company, shall, as such, receive or possess himself of any money, or other property of such body corporate or public company, otherwise than in payment to him of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, he shall be guilty of a misdemeanor.—(Ibid. sect. 117.)

§ 1927 (*e*). *Destroying or mutilating books of a corporation.*—If any director, manager, officer or member of any bank, or other body corporate or public com-

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[s] "These sections intended to embrace and punish embezzlements and abuses of public trusts by fiscal officers, State, county or township, and by members of municipal corporations, are either transcripts, amendments or extensions of existing laws. They are generalized, so as to meet cases supposed now not to be within their purview. These laws are the 4th section of the act of the 16th of April, 1840, entitled 'A further supplement to the act entitled "An Act to incorporate the Miners' Bank of Pottsville," passed February 7, 1828.' Pamphlet Laws, 445. Brightly's Digest, 303; Title, Embezzlement, No. 1. The 10th section of the act of 27th May, 1841, entitled 'An Act relating to the election of county treasurers,' &c. Pamphlet Laws, 400. Brightly's Digest, 303, No. 3. The 17th section of the act of the 16th April, 1845, entitled 'An Act to increase the revennes, and diminish the expenses of the Commonwealth.' Pamphlet Laws, 532. Brightly's Digest, 303, No. 2. And the 1st and 2d sections of the act of the 26th day of April, 1855, entitled 'An Act relating to corporations, and to estates held for corporate, religious and charitable uses.' Pamphlet Laws, 328. Brightly's Digest, 1117, Nos. 1 and 2. The 65th section is part of the fifth article of the 10th section of the act 16th April, 1850, entitled 'An Act regulating banks.' Pamphlet Laws, 477. Brightly's Digest, 73, No 22." (Revisor's note.)

pany, shall, with intent to defraud, destroy, alter, mutilate or falsify any of the books, papers, writings or securities belonging to the bank, body corporate or public company, of which he is a director, manager, officer or member, or shall make or concur in the making of any false entry, or any material omission in any book of accounts or other document, he shall be guilty of a misdemeanor.—(Ibid. sect. 118.)

§ 1927 (*f*). *False statements by officers or members of corporations.*—If any director, manager, officer or member of any bank, or other body corporate or public company, shall make, circulate or publish, or concur in making, circulating or publishing any written or printed statement or account, which he shall know to be false in any particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any money or property to such body corporate or public company, or to enter into any security for the benefit thereof, he shall be guilty of a misdemeanor.—(Ibid. sect. 119.)

§ 1927 (*g*). *Receiving property fraudulently disposed of.*—If any person shall receive any money, chattel or valuable security, which shall have been so fraudulently disposed of, as to render the party disposing thereof guilty of a misdemeanor, knowing the same to have been so fraudulently disposed of, he shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the party guilty of the principal misdemeanor shall, or shall not, have been previously convicted.—(Ibid. sect. 120.)

§ 1927 (*h*). *Punishment for the foregoing misdemeanors.*—Every person found guilty of a misdemeanor under either of the preceding sections of this title, wherein the nature and extent of the punishment is not specified, shall be sentenced to an imprisonment not exceeding two years, or be fined in any amount not exceeding one thousand dollars, or both, or either, at the discretion of the court.—(Ibid. sect. 121.)

§ 1927 (*i*). *Construction of the preceding sections.*—Nothing herein contained shall affect any remedy at law or in equity, which any party aggrieved might have heretofore had, nor affect or prejudice any agreement entered into, or security given, by any trustee, having for its object the restoration or repayment of any trust property misappropriated.—(Ibid. sect. 122.)

§ 1927 (*j*). *No person exempt from answering questions in court.*—No such trustee, banker, merchant, broker, attorney, agent, director, officer or member as aforesaid, shall be enabled or entitled to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceedings in any court of law or equity, but no answer to any such bill, question or interrogatory, shall be admissible in evidence against such person charged with any of the said misdemeanors.—(Ibid. sect. 123.)

§ 1927 (*k*). *Definition of the words "trustee" and "property."*—The word "trustee" herein shall mean a trustee on some express trust created by deed, will or instrument in writing, and shall also include the heir, devisee and personal representative of any such trustee, and all executors, administrators and assignees; the word "property" shall include every description of real and personal property, money, debts and legacies, and all deeds and instruments relating or evidencing the title or right to recover or receive any money or goods, and shall also include not only such property as may have been the original subject of a trust, but any property in which the same may have been converted, and the proceeds thereof, respectively, or anything acquired by such proceeds.—(Ibid. sect. 124.)

§ 1927 (*l*). *Embezzlement by consignees and factors.*—If any consignee or factor having the possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt or order for the delivery of merchandise with the like authority, shall deposit, or pledge such merchandise or document, consigned or entrusted to him as aforesaid, as a security for any money borrowed, or negotiable instrument received by such consignee or factor, and shall apply or dispose of the same to his own use, in violation of good faith, with intent to defraud the owner of such merchandise, and if any consignee or factor shall, with like fraudulent intent, apply or dispose of, to his own use, any money or negotiable instrument, raised or acquired by the sale, or other disposition of such merchandise, such consignee or factor, in every such case, shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two thousand dollars, and undergo an imprisonment, not exceeding five years.—(Ibid. sect. 125.)

§ 1927 (*m*). *Embezzlement by transporters, and buying and receiving embezzled goods.*—If any person engaged in carrying or transporting coal, iron, lumber, or other articles of merchandise, or property whatsoever, within this commonwealth, shall fraudulently sell or dispose of, or pledge the same or any part thereof, without the consent of the owner thereof, such offence shall be deemed a misdemeanor, and the offender shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, not exceeding one year; or if any person shall knowingly buy and receive the said merchandise, knowing the same to have been sold, disposed of or pledged fraudulently, he shall, on conviction, be sentenced to the like punishment.—(Ibid. sect. 126.)

§ 1927 (*n*). *Distinct acts of embezzlement may be charged in same indictment.*—It shall be lawful in cases of embezzlement by clerks, servants or other persons in the employ of another, to charge in the indictment, and proceed against an offender for any distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master or employer, within the space of six calendar months, from the first to the last of such acts, and in every such indictment, except where the offence shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.—(Ibid. Bill I., sect. 437.)[h]

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[h] "All these sections, except the 126th, 128th, and 129th, are taken from the act of the 15th April, 1858, entitled 'An Act relating to embezzlement.' Pamphlet Laws, 109. Brightly's Annual Digest, sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13. The 126th section is added to the otherwise excellent provisions of this law, in order that the criminal liabilities created by it may not interfere with the obligations of a defendant to answer civilly to the discovery sought by a bill in equity. The 128th section is taken from the 6th section of the act of 14th April, 1834, entitled 'An Act for the amendment of the law relating to factors.' Pamphlet Laws, 375. Brightly's Digest, 351, No. 6. The 129th section is taken from the 1st and 2d sections of the act of 17th April, 1846, entitled 'A further supplement to the penal laws of this Commonwealth.' Pamphlet Laws, 362. Brightly's Digest, 351, No. 7." (Revisor's note.)

VIRGINIA.

§ 1928. *Embezzlement of director or officer, or officers of public trust, &c.*—If any director or officer of any incorporated bank, or any officer of public trust in this state, or any officer, agent or clerk of any other incorporated company, embezzle or fraudulently convert to his own use bullion, money, bank notes, or other security for money, or any effects or property for another person, which shall have come to his possession, or been placed under his care or management, by virtue of his office, place, or employment, he shall be deemed guilty of larceny thereof.—(Code 1849, chap. 192, sect. 20.)

§ 1929. *Embezzlement of carrier.*—If any carrier or other person, being free, to whom money or other property which may be the subject of larceny, may be delivered to be carried for hire, or any other person who may be intrusted with such property, embezzle or fraudulently convert to his own use, or secrete with intent to do so, any such property, either in mass or otherwise, before delivery thereof at the place at which, or to the person to whom, they were to be delivered, he shall be deemed guilty of larceny thereof.—(Ibid. sect. 21.)

§ 1930. *Altering or omitting to make entry in account, &c.*—If any officer or clerk of any bank or joint stock company make, alter or omit to make any entry in any account kept in such bank or any such company with intent in so doing to conceal the true state of such account, or to defraud the said bank or company, or to enable or assist any person to obtain money to which he was not entitled, such officer or clerk shall be confined in the penitentiary not less than two nor more than ten years.—(Ibid. sect. 22.

OHIO.

§ 1931. *Clerk or servant, &c., embezzling, using, or secreting, &c., money, goods, &c.*—That if any clerk or servant of any private person, or of any copartnership, except apprentices and persons within the age of eighteen years, or if any officer, agent, clerk or servant of any incorporated company, shall embezzle or convert to his own use, or fraudulently take, make way with, or secrete, with intent to embezzle, or fraudulently convert to his own use, without the assent of his master or employers, any money, goods, rights in action, or other valuable security or effects whatever, belonging to any other person, which shall come into his possession, or under his care by virtue of such employment or office, he shall upon conviction, be punished in the manner prescribed by law, for feloniously stealing property of the value of the article so embezzled, taken or secreted, or of the value of any sum of money, payable and due upon any right in action, so embezzled.—(Act of March 18, 1839, Swan's, stat. 1, 283.)

§ 1932. *Embezzlement of evidence of debt, &c.*—Every embezzlement of any evidence of debt, negotiable by delivery only, and actually executed by the master or employer of any such clerk, agent, officer or servant, but not delivered or issued as a valid instrument, shall be deemed an offence within the meaning of the last preceding section.—(Ibid. sect. 2.)

§ 1933. *Buying or receiving embezzled goods, money, &c.*—Every person who shall buy, or in any way receive any money, goods, right in action, or any valuable security or effects whatever, knowing the same to have been embezzled, taken or secreted, contrary to the provisions of the two last sections, shall upon conviction, be punished in the same manner, and to the same extent, as therein prescribed, upon a conviction of a servant for such embezzlement.—(Ibid. sect. 3.)

§ 1934. *Embezzlement, &c., of goods, &c., by a common carrier.*—If any carrier, or other person, to whom any goods, money, right in action or any valuable per-

sonal property or effects, shall have been delivered to be transferred or carried, for hire, or any person employed in such transportation or carrying, shall, without the assent of his employer, take, embezzle or convert to his own use, such goods, money, right in action, property or effects, or any part of them, and before delivery of such article at the place or person entitled to receive them, he shall, upon conviction, be punished in the manner prescribed by law, for feloniously stealing property of the value of the article so taken, embezzled, converted or secreted.—(Ibid. sect. 4.)

§ 1934 (*a*). *Embezzlement of public moneys.*—If any person who shall be entrusted with the custody of public moneys, whether for the safe keeping or transmission of the same, as officer, agent or servant of the state, or of any county, township, city, incorporated village or school district, shall convert, to his own use, or to the use of any corporation, company or copartnership, in which he may have any interest; or shall make way with, or secrete such moneys, or any part thereof, or any security or evidence of debts, of which he shall have the custody, supervision or control, as such officer, agent or servant, he shall, for every such act, be deemed and adjudged guilty of embezzling so much of such moneys, security or evidence of debt, as shall be so converted, made way with or secreted; and he shall be punished therefor in the same manner and to the same extent as is or shall be prescribed by law for the punishment of feloniously stealing property of the same value.—(Act of April 10th, 1856, sect. 1.)

§ 1934 (*b*). *Loan of public moneys.*—If any such officer, agent or servant, shall loan any moneys, securities or other evidence of debt, in his custody or within his control, as such officer, agent or servant, he shall, on conviction thereof, be fined in a sum equal to the sum of money, or to the value of the security or other evidence of debt so loaned, which fine shall enure to the benefit of the state, county, township, city, village or district, owning the money or security so loaned.—(Ibid. sect. 2.)

§ 1934 (*c*). *Depositing public funds under agreement to receive interest or bonus.*—If any such officer, agent or servant, shall deposit or place, or shall order, or (knowingly) permit to be deposited or placed, or to remain placed or deposited, any money, security or other evidence of debt, belonging to the state, or to any county, township, city, incorporated village or school district, in this state, and which shall be in his possession or subject to his control, under any agreement or understanding, or with any expectation on his part that either he, or any other person or persons shall receive therefor, any money or other valuable thing, by way of interest, bonus or gratuity, such officer, agent or servant shall, for every such offence, on conviction thereof, forfeit and pay for the use of the state, county, township, city, incorporated village or school district, to whom the money so deposited belonged, a sum equal to the amount so deposited.—(Ibid. sect. 3.)

All prosecutions under this act shall be by indictment in the court of common pleas; and it shall be the duty of the judge of said court to give this act specially in charge to the grand jury.—(Ibid. sect. 4.)

Act repealed.—The "Act to punish the embezzlement of public moneys, and for other purposes," passed March 2, 1846, shall be, and the same is hereby repealed. But all suits pending and rights accrued under said act are hereby saved. This act shall take effect from and after the 1st day of June next.—(Ibid. sect. 5.)

§ 1934 (*d*). *Fraudulent use or disposition of securities punished as embezzlement.*—If the auditor of state, treasurer of state, or comptroller of the treasury, or any clerk in either of their offices, shall knowingly and purposely, and with intent thereby to cheat or defraud any person or persons, or body corporate, use or other-

wise dispose of any of the securities deposited by any banking company as aforesaid, or any of the circulating notes of any banking company, whether the same be registered or unregistered, and which may have come into his possession or under his control for any of the purposes named in this act, or in the several acts mentioned in the first section of this act, he shall be deemed and held guilty of embezzlement, and prosecuted by indictment in any court having jurisdiction of the offence, and upon conviction thereof shall suffer the same punishment or penalty as is or may be provided by law for the punishment of persons guilty of the embezzlement of the proper securities and moneys of the state; and in all prosecutions for embezzlement under the provisions of this act, the securities and the notes aforesaid, whether registered or unregistered, shall be deemed and held to be of the value denominated on the face thereof.—(Act of April 5th, 1859, sect. 9.)

B.—Offence generally.[f]

§ 1935. "In general," says Mr. Talfourd, in his late edition of Dickenson's Quarter Sessions,[g] "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 intrusted 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, and against surveyors of highways for embezzlement of gravel."

§ 1936. There are several English cases which bear on our own statutes which may be here noticed. It is not necessary, to bring the defendant within the act, so that the employment should be permanent; if it be only occasional, it will be sufficient. Where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was holden to be a servant within the meaning of the act.[h] So, where the defendant was employed as a traveller, to take orders and collect money, was paid by a per centage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as traveller by other persons also;

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[f] See for forms, Wh. Prec. as follows:
(460) Against officer of the United States mint, for embezzling money entrusted to him.
(461) Against same person for same, charging him with being a person employed at the mint.
(462) Against auctioneer for embezzlement, under the Mass. Rev. Stat., ch. 126, § 30.
(463) Second count—larceny.
(464) General form of indictment in New York.
(465) Second count—larceny.
(466) Against the president and cashier of a bank for an embezzlement. Rev. Stats. of Mass., ch. 126, § 27.
(467) Against a clerk for embezzlement. Rev. Stats. of Mass., ch. 126, § 29.
(468) Against a carrier for embezzlement. Rev. Stats. of Mass., ch. 126, § 30.
(469) Embezzlement by clerk or servant, in England.

[g] 6th ed. 363.

[h] R. v. Spencer, R. & R. 299; see; R. v. Smith, Id. 516.

he was holden to be a clerk to the prosecutors within the meaning of the act.[i]

§ 1937. A drover who was employed to drive two cows to a purchaser and receive the purchase money, and embezzled the money, was holden to be a servant within the meaning of the act.[j] But it was determined that where the treasurer of a charitable institution, in his individual capacity, directed the defendant, (who was the schoolmaster of the charity school, appointed by a committee of which the treasurer was a member, and whose sole duty was confined to the instruction of children,) in one single instance to receive a voluntary contribution, for which he was to have no remuneration; the defendant was not a clerk or servant, or person employed for the purpose, or in the capacity of a clerk or servant.[k]

In another case, the defendant was employed as a master of a barge to carry out and sell coals, &c., and was allowed a proportion of the profits, after deducting the price of the coals at the colliery, for his labor. The evidence showed that he took a quantity of coals, sold them, received the price and absconded with the money; it was holden, that he was a servant, within the meaning of the act.[l]

§ 1938. A member of, and secretary to, a society, who fraudulently withheld money received from a member to be paid over to the trustees, was held to be guilty of embezzlement, and to be properly described as the clerk and servant of the trustees, and the money to be properly stated as their property, although the society was not enrolled, and the money ought, in the ordinary course, to have been received by the steward.[m]

§ 1939. It appeared that it was the duty of a servant, authorized to receive money for his employer, to account to his employer on the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for these sums nor paid them over. He never denied the receipt of them, or rendered any written account in which they were admitted; it was held, that if the servant wilfully omitted to account for these sums, and pay them over on the respective days on which he received them, these were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them.[n]

§ 1940. The English statute, according to the settled construction of the courts, is limited in its scope to persons in the ordinary situations of clerks or servants, having masters to whom they were accountable for the discharge of the duties of their situations,[o] and includes female servants,[p] ap-

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[i] R. *v.* Carr, R. & R. 198; R. *v.* Hoggins, Id. 145.
[j] R. *v.* Hughes, 1 Mood. C. C. 370.
[k] R. *v.* Nettleton, 1 Mood. C. C. 259.
[l] R. *v.* Hartley, R. & R. 139,
[m] R. *v.* Hall, 1 Mood, C. C. 474; R. *v.* Carr, R. & R. 198; R. *v.* Hall, 1 Mood. C. C. 474.
[n] R. *v.* Jackson, 1 Car. & Kir. 384.
[o] Per Bayley, B., in Williams *v.* Scott, 1 C. & M. 685.
[p] R. *v.* Smith, R. & R. 267.

prentices,[q] travellers,[r] and of persons employed as treasurers, and accountants by the overseers of a township;[s] in all of which cases it will be found that the party stood in the situation of a plain and ordinary servant to his employers, and that the relation of master and servant existed between them. Since embezzlement necessarily involves secrecy and concealment, if the prisoner, in rendering his account, instead of denying the appropriation of property, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping is no embezzlement.[t] Thus, if a person, whose duty it is to receive money for his employer, receive money and render a true account of all the money he has received, he is not guilty of embezzlement, if he abscond and does not pay over the money; but if he had received the money and had rendered an account in which it was omitted, this would be evidence to show that he had embezzled the amount.[u]

§ 1941. If the evidence would show that the money or goods embezzled were ever, even constructively, in the possession of the master, the offence amounts to larceny at common law; and the defendant should therefore be acquitted upon an indictment on the statute. For this reason it is advisable to add a count for the larceny at common law.[v]

§ 1942. It is necessary, to the constitution of the offence, that the defendant should have received the money, by virtue of his employment,[w] for the embezzlement of money by a servant not authorized to receive it, is not within the statute;[x] although the party paying it to him supposes that he is so authorized.[y] Where a defendant, whose duty it was to receive from his master's partners the money they took in the course of the day, and to pay it over the following day, though it was not considered as included in the course of his employment to receive money from the customers themselves, called upon a customer of his master for the amount of his account, which he received and embezzled, it was holden that he received the money by virtue of his employment; and the judges held that the receiving immediately from the customer, instead of one dealing with the parties, was such a receiving as the statute was meant to protect.[z] So where a servant employed generally to receive sums of one description, and at one place only, is employed by his master in a particular instance to receive a sum of a different description, at a different place; this latter sum is to be considered as received by him by virtue of his employment; he fills the character of servant, and it is by being employed as servant that he receives the money.[a]

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[q] R. *v.* Mellish, R. & R. 80.
[r] R. *v.* Carr, R. & R. 198.
[s] R. *v.* Squire, R. & R. 349; 2 Stark. Rep. 349, S. C.; see R. *v.* Ward, Gow. 168; and see R. *v.* Tyers, R. & R. 402; R. *v.* Beacall, 1 R. & M. 15.
[t] R. *v.* Norman, 1 C. & M. 501.
[u] R. *v.* Creed, 1 C. & K. 63, per Erskine, J.
[v] Archbold's C. P. 266.
[w] See R. *v* Prince, M. & M. 21.
[x] R. *v.* Thornley, 1 Mood. C. C. 343. Ry. & M. 481
[y] R. *v.* Hawtin, 7 C. & P. 281.
[z] R. *v.* Beechey, R. & R. 319.
[a] R. *v.* Smith, R. & R. 516; see R. *v.* Barker, 1 D. & R. N. P. 19; see R. *v.* Mellish, R. & R. 80; R. *v.* Nettleton, 1 Mood. 259; 6 C. & P. 626.

The prisoner was a store-keeper of a county jail. On his appointment he had written instructions as to his duties, in which no mention was made of the receipt of money by him. He had, however, from time to time, received moneys in the absence of the governor, and to the knowledge of some of the justices. Having embezzled money so received, it was held, that it was money received by virtue of his employment, and he was therefore properly convicted of embezzlement.[b]

It had been the duty of the prisoner, who was convicted of embezzlement, to receive remittances from the customers of his masters, to enter them to the credit of such customers, in a day or cash book, and to enter the whole amount received by him on the credit side of a banker's deposit account, and to pay in the amount to the credit of the prosecutors with their bankers; and it was his duty afterwards to post the amounts in a ledger which contained the accounts of the different customers. The prisoner received a remittance which he appropriated to his own use. He made an entry of this in the ledger to the credit of the customer, but he made no other entry of its receipt. It was held that the conviction was right, as the entry made in the ledger did not exempt the prisoner from the operation of sect. 47, of 7 & 8 Geo. 4, c. 29.[c]

The prisoner was indicted, under the statute 2 Will. 4, c. 4, s. 1, for that he, being employed in the public service, and entrusted, by virtue of such employment, with the receipt and custody of money, the property of the queen, did, by virtue of such employment, receive £5,000 on account of the public service of the queen, and the said money, fraudulently and feloniously applied to his own use. The count concluded charging that the said prisoner the said money, in manner and form aforesaid, did steal, take, and carry away against the statute, &c. The prisoner was an officer of inland revenue. It was his duty to receive certain taxes. By his account it appeared that the balance in his hands was much larger than he was entitled to retain. The surveyor-general showed him an extract from his accounts stating a balance against him of £5,214. The prisoner said he knew it was about that sum, but he was not prepared to pay it over. The surveyor then reminded him that there was a balance of excise duties alone of £300 standing against him from the previous Monday, which was a receipt-day at T. The prisoner then took out £281, and said that was all the money he had in the world. On being asked what he had done with the rest, he said he had spent it in an unfortunate speculation. It was held, that there was evidence that he had fraudulently applied to his own use a part of the sum of £300 he had received at T., and was therefore liable to be convicted under the statute. It was doubted whether he could not, upon the evidence stated, have been convicted of fraudulently applying other parts of the £5,000 than the £300. It was held, also, by Pollock, C. B., that the prisoner might have been indicted simply for

[b] R. *v.* Oram, 36 Eng. Law & Eq. 611.
[c] R. *v.* Lister, 37 Eng. Law & Eq. 600.

stealing the money, and that under such an indictment the special facts necessary to bring him within the penal provisions of the statute might have been given in evidence.[d]

CHAPTER VIII.

MALICIOUS MISCHIEF.

A. STATUTES.

UNITED STATES.

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

MASSACHUSETTS.

Mingling poison with food, etc., § 1944.
Maliciously killing or maiming horse, cattle, etc., § 1945.
Breaking down, injuring, removing or destroying dam, reservoir, etc., § 1946.
Destroying, etc., public or toll-bridge, railroad, etc., § 1947.
Maliciously girdling, lopping or destroying trees, breaking glass, etc., § 1948.
Maliciously destroying monument erected for designating boundaries of town, etc., § 1949.
Maliciously committing trespass, § 1950.
Trespassing on grounds of another with intent to destroy or take away trees, etc., § 1951.
Jurisdiction of justice of peace, etc., § 1952.
Beating or torturing horse, ox, or other animal, § 1953.
Maliciously destroying personal property of another, § 1954.
Jurisdiction of justice of peace, etc., § 1955.
Maliciously destroying building by gunpowder or other explosive substance, § 1956.
Maliciously throwing into or against building, dwelling-house, ship, etc., any explosive instrument, § 1957.
Throwing oil of vitriol, coal tar, etc., against dwelling-house, office, shop or vessel, § 1958.
Killing birds in cemetery, § 1978(*a*).

NEW YORK.

Removing dead body, etc., § 1959.
Purchasing dead body, etc., § 1960.
Opening grave, either to remove dead body or to steal coffin or vestments, § 1961.
Administering poison to horse, cattle sheep, etc., § 1962.
Committing trespass, etc., § 1963.
Physician prescribing poison in state of intoxication, § 1964.
Selling poisonous substance with label, without word "poison" thereon, § 1965.
Overloading vessel so that life is endangered, § 1966.
Ignorantly or by gross neglect raising steam in order to excel any boat, etc., § 1967.
Maliciously killing, maiming, etc., horse, ox or other cattle, § 1968.
Reading sealed letter addressed to another, § 1969.
Maliciously publishing any part of such letter, § 1970.
Extent of two last sections, § 1971.
Maliciously destroying public or toll-bridge, § 1972.
Destroying mill-dam, etc., § 1973.
Removing monument erected to designate the extent of any lot, etc., § 1974.

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[d] R. v. Moah, 36 Eng. Law & Eq. 592.

Removing or destroying milestone, obliterating or defacing marks on monument, § 1975.
Mingling poison with food, or poisoning spring or reservoir, § 1976.
Destroying monument or work of art, or ornamental trees, etc., § 1977.
Person liable after conviction to an action in favor of party injured, § 1978.

PENNSYLVANIA.

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

VIRGINIA.

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

OHIO.

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

B. MALICIOUS MISCHIEF AT COMMON LAW, § 2002.

A.—STATUTES.

UNITED STATES.

§ 1943. *Intent to kill, rob, steal, commit a rape, &c., breaking into vessel upon high seas, &c.*—If any person upon the high seas, or in any of the other places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any vessel, boat or raft; or if any person shall wilfully and maliciously cut, spoil or destroy any cordage, cable, buoys, buoy-rope, headfast or other fast, fixed to any anchor or moorings, belonging to any vessel, boat or raft, every person so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence.—(Act 3d March, 1825, sect. 7.)

MASSACHUSETTS.

§ 1944. *Mingling poison with food, &c.*—If any person shall mingle any poison with any food, drink or medicine, with intent to kill or injure any other person, or shall wilfully poison any spring, well or reservoir of water, with such intent, he shall be punished by imprisonment in the state prison for life, or for any term of years.—(Rev. Stat., ch. 124, sect. 22.)

§ 1945. *Maliciously killing or maiming horse, cattle, &c.*—Every person who shall wilfully and maliciously kill, maim or disfigure any horse, cattle, or other beasts of another person, or shall wilfully and maliciously administer poison to any such beasts, or expose any poisonous substance, with intent that the same should be taken or swallowed by them, or shall wilfully and maliciously destroy or injure the personal property of another person, in any manner or by any means, not particularly described or mentioned in this chapter, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than one year.[a]—(Ibid. sect. 39.)

§ 1946. *Breaking down, injuring, removing or destroying dam, reservoir, &c.*—Every person who shall wilfully and maliciously break down, injure, remove or destroy any dam, reservoir, canal or trench, or any gate, flume, flash-boards, or other appurtenances thereof, or any of the wheels, mill-gear, or machinery of any water mill, or shall wilfully and wantonly, without color of right, draw off the water contained in any mill-pond, reservoir, canal or trench, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail, not more than two years.—(Ibid. sect. 40.)

§ 1947. *Destroying, &c., any public or toll-bridge, railroad, &c.*—Every person who shall wilfully and maliciously break down, injure, remove or destroy any public or toll-bridge, or railroad, or any turnpike-gate, or any lock, culvert or embankment of any canal, or shall wilfully and maliciously make any aperture or breach in any such embankment, with intent to destroy or injure the same, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail, not more than two years.—(Ibid. sect. 41.)

§ 1948. *Maliciously girdling, lopping or destroying trees, breaking glass, &c.*—Every person who shall wilfully and maliciously, or wantonly and without cause, cut down or destroy, or by girdling, lopping, or otherwise, shall injure any fruit-tree, or any other tree not his own, standing or growing for shade, ornament, or other useful purpose, or shall maliciously or wantonly break the glass,[aa] or any part of it, in any building not his own, or shall maliciously break down, injure, mar or deface any fence belonging to or enclosing lands not his own, or shall maliciously throw down or open any gate, bars or fence, and leave the same down or open, or shall maliciously and injuriously sever from the freehold of another any produce thereof, or any thing attached thereto, shall be punished by imprisonment in the

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[a] On an indictment, under this section, charging that the defendant wilfully destroyed or injured a cable to which a lobster car was moored and fastened, proof that he cut the cable a few feet from one end, so as to let the car float off, was held sufficient to warrant his conviction. (Com. *v.* Soule, 2 Met. 21.)

[aa] An indictment on this section must aver the glass to be part of a building. An allegation that it was in a certain building, is not sufficient. (Commonwealth *v.* Bean, 11 Cush. (Mass.) 414.)

county jail not more than one year, or by fine not exceeding one hundred dollars. —(Ibid. sect. 42.)[b]

§ 1949. *Maliciously destroying monument erected for designating boundaries of town, &c.*—Every person who shall wilfully and maliciously break down, injure, remove or destroy any monument erected for the purpose of designating the boundaries of any town, or of any tract or lot of land, or any tree marked for that purpose, or shall so break down, injure, move or destroy any mile-stone, mile-board or guide-board, erected upon any highway, or other public way, turnpike or railroad, or shall wilfully or maliciously deface or alter the inscription on any such stone or board, or shall wilfully and maliciously mar or deface any building, or any sign-board, or shall extinguish any lamp, or break, destroy, or remove any lamp, or any lamp-post, or any railing or posts, erected on any bridge, side-walk, street highway, court or passage, shall be punished by imprisonment in the county jail not more than six months, or be fined not exceeding fifty dollars.—(Ibid. sect. 43.)

§ 1950. *Maliciously committing trespass.*—Every person who shall wilfully commit any trespass, by cutting down or destroying any timber or wood standing or growing on the land of another, or by carrying away any kind of timber or wood, cut down or lying on such land, or by digging up or carrying away any stone, ore, gravel, sand, clay, turf or mould from such land, or any roots, fruit or plank there being, or by cutting down or carrying away any sedge, grass, hay, or any kind of corn, standing, growing or being on such land, or by carrying away from any wharf or landing-place any goods whatever, in which he has no interest or property, without the license of the owner thereof, shall be punished by imprisonment in the county jail, not more than sixty days, or by fine not exceeding fifty dollars.—(Ibid. sect. 44.)

§ 1951. *Trespassing on grounds of another with intent to destroy or take away trees, &c.*—Every person who shall wilfully commit any trespass, by entering upon the garden, orchard, or other improved land of another, without permission of the owner thereof, and with intent to cut, take, carry away, destroy or injure the trees, grain, grass, hay, fruit or vegetables there growing or being, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding twenty dollars; and if any of the offences mentioned in this, or in the preceding section, shall be committed on the Lord's day, or in disguise, or secretly in the night-time, between sun-setting and sun-rising, the imprisonment shall not be less than five days, nor the fine less than five dollars.[c]—(Ibid. sect. 45.)

§ 1952. *Jurisdiction of justice of peace, &c.*—Every justice of the peace shall have jurisdiction, concurrent with the Court of Common Pleas, in this county, and

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[b] See for Forms, Wh. Prec. 487.

[c] The Rev. Sts. c. 126, s. 39 to 45, enumerate all the different classes of malicious mischief to property, which are made punishable by law, and provide a specific punishment for each class; sect. 39 further provides, that, for all offences of the same kind, committed "in any manner, or by any means, not particularly described or mentioned" in the same chapter, the punishment shall be "imprisonment in the state prison not more than five years, or by fine," &c. The subsequent statute of 1846, c. 52, s. 1, provides, that in all cases of malicious mischief, committed "in any manner, or by any means, not particularly described or mentioned in the one hundredth and twenty-sixth chapter of the Rev. Sts.," the punishment shall be "by imprisonment in the county jail or house of correction, not more than thirty days, or by fine," &c. It was held that the negative words, in the last mentioned statute, limiting the punishment, operated to repeal so much of the Rev. Sts. c. 126, s. 39, as relates to the punishment, of the offences therein described in the general terms above mentioned. (Britton *v.* Com., 1 Cush. 302; see Com. *v.* Walton, 3 Cush. 558.)

the Police Court of the city of Boston shall have jurisdiction concurrent with the Municipal Court, of all the offences mentioned in the four preceding sections, when the value of the trees, fruit, grain, or other property injured. destroyed, taken or carried away, or the injury occasioned by the trespass, shall not be alleged to exceed the sum of fifteen dollars; and in any such case, the punishment shall be by imprisonment in the county jail not more than thirty days, or a fine not exceeding fifteen dollars, saving to the party convicted before such justice or Police Court, the right to a trial by jury on his appeal, as in other like cases.—(Ibid. sect. 46.)

§ 1953. *Beating or torturing horse, ox, or other animal.*—Every person who shall cruelly beat or torture any horse, ox, or other animal, whether belonging to himself or to another, shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one hundred dollars.—(R. S., c. 130, sect. 22.)

§ 1954. *Maliciously destroying personal property of another.*—Every person who shall wilfully and maliciously destroy or injure the personal property[cc] of another person, in any manner or by any means, not particularly described or mentioned in the one hundred and sixth chapter of the revised statutes, shall, when the value of the property so destroyed or injured, or the injury occasioned to the same, shall not be alleged to exceed the sum of fifteen dollars, be punished by imprisonment in the county jail or house of correction, not more than thirty days, or a fine not exceeding fifteen dollars.—(R. Gen. Laws Mass., Sess. 1846, chap. 52, sect. 1.)

§ 1954 (*a*). *Wilful injury of bank bills punished, possession or altering of injured bill not of itself evidence of the offence.*—Any person who shall be convicted of wilfully or maliciously tearing, cutting, or in any other manner damaging and impairing the usefulness, for circulation, of any bank in this commonwealth, shall be punished by a fine not exceeding ten dollars, for each offence, to be recovered by complaint before any justice of the peace or Police Court: *Provided*, That the possession or altering of any bill so injured, shall not be considered evidence of its having been so injured by the person in whose possession it is found, unless connected with other circumstances tending to prove that the bill was so injured by the person holding or uttering the same.—(March 27, 1852, Stat. of 1852, chap 64.)

§ 1955. *Jurisdiction of justice of peace.*—Every justice of the peace shall have jurisdiction, concurrent with the Court of Common Pleas, in this county, and the Police Court of the city of Boston, shall have jurisdiction concurrent with the Municipal Court of the aforesaid offence: *Provided, however*, That the party convicted before such justice or Police Court, shall have the right to a trial by jury, on his appeal, as in other cases.—(Feb. 21, 1846, Ibid. sect. 2.)

§ 1956. *Maliciously destroying building by gunpowder or other explosive substance.*—1. Every person who shall wilfully and maliciously, by the explosion of gunpowder, or any other explosive substance, unlawfully destroy or injure any dwelling-house, office, shop, or other building, or any vessel within the body of any county, shall be punished by imprisonment in the state prison not more than

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[cc] A complaint, which charges a malicious destruction of cabbages "situated and growing on land," does not sufficiently charge a malicious injury to personal property, within Sts. 1846, c. 52, for want of showing that the cabbages were not part of the realty. (Com. *v.* Dougherty, 6 Gray, Mass. 349.)

twenty years, or by imprisonment in the county jail, or house of correction, not more than five years, or by fine not exceeding one thousand dollars.—(Stat. May 15, 1851, sect. 1, Gen. Laws, 1851, chap. 129.)

§ 1957. *Maliciously throwing into or against building, dwelling-house, ship, &c., any explosive instrument.*—Every person who shall wilfully and maliciously throw into, against, or upon any dwelling-house, office, shop, or other building, or any vessel, within the body of any county, or shall put or place, or explode, or cause to be exploded in, upon, or near such dwelling-house, office, shop, building, or vessel, any gunpowder or other explosive substance, or any bomb-shell torpedo, or other instrument, filled or loaded with any explosive substance, with intent unlawfully to destroy or injure such dwelling-house, office, shop, building, or vessel, or any person or property therein, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding five hundred dollars.—(Ibid. sect. 2.)

§ 1958. *Throwing oil of vitriol, coal tar, &c., against dwelling-house, office, shop, or vessel.*—Every person who shall wilfully and maliciously throw into, against, or upon any dwelling-house, office, shop, or other building, or any vessel, within the body of any county, or shall put or place therein or thereon any oil of vitriol, coal-tar, or any other noxious or filthy substance, with intent unlawfully to injure, deface, or defile such dwelling-house, office, shop, building or vessel, or any property therein, shall be punished by imprisoument in the state prison, not more than five years, or in the county jail or house of correction, not more than three years, or by fine not exceeding three hundred dollars.—(Ibid. sect. 3.)

[*A complaint on St* 1855, *c.* 457, *for the malicious destruction of a tree, shrub or vine on the land of another, must aver an unlawful entry by the defendant on the land.*[d]]

NEW YORK.

§ 1959. *Removing dead body, &c.*—Every person who shall remove the dead body of any human being from the grave or other place of interment, for the purpose of selling the same, or for the purpose of dissection, or from mere wantonness, shall, upon conviction, be punished by imprisonment in the state prison, not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.—(2 R. S. sect. 13, page 688.)

§ 1960. *Purchasing dead body, &c.*—Every person who shall purchase or receive the dead body of any human being, knowing the same to have been disinterred contrary to the provisions of the preceding section, shall, upon conviction, be subject to the punishment in the said section specified.—(Ibid. sect. 14.)

§ 1961. *Opening grave, either to remove dead body, or to steal coffin or vestments.*—Every person who shall open a grave or other place of interment, with intent—1, to remove the dead body of any human being, for the purpose of selling the same, or for the purpose of dissection; or—2, to steal the coffin or any part thereof, or the vestments or other articles interred with the dead body, shall, upon conviction be punished by imprisonment in a state prison, not exceeding two years, or in a county jail, not exceeding six months, or by fine, not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.—(Ibid. sect. 15.)

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[d] Com. *v.* Dougherty, 6 Gray, Mass. 349.

§ 1962. *Administering poison to horse, cattle, sheep, &c.*—Every person who shall wilfully administer any poison to any horse, cattle, or sheep, or shall maliciously expose any poisonous substance, with intent that the same should be taken or swallowed by any horse, cattle, or sheep, shall, upon conviction, be punished by imprisonment in a state prison, not exceeding three years, or in a county jail, not exceeding one year, or by fine, not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.—(Ibid. sect. 16, p. 689)

§ 1963. *Committing trespass, &c.*—Every person who shall wilfully commit any trespass, by—1, cutting down or destroying any kind of wood or timber standing or growing upon the lands of any other, or upon the lands belonging to the people of this state; or—2, carrying away any kind of wood or timber that may have been cut down, and that may be lying on such lands; or—3, maliciously cutting down, lopping, girdling, or otherwise injuring any fruit, or ornamental, or shade tree; or—4, malicious severing from the freehold any produce thereof, or anything attached thereto; or—5, severing and carrying away from any freehold, any property or thing attached thereto, of the value of twenty-five dollars or less, under such circumstances as would render the trespass a larceny if the thing so severed or carried away was personal property, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in a county jail not exceeding six months, or by a fine not exceeding one hundred and fifty dollars, or by both such fine and imprisonment.[d]—(Ibid. sect. 18, p. 693.)

§ 1964. *Physician prescribing poison in a state of intoxication.*—If any physician or other person, while in a state of intoxication, shall prescribe any poison, drug or medicine to another person, which shall endanger the life of such other, he shall, upon conviction, be adjudged guilty of a misdemeanor.—(Ibid. sect. 22, p. 694.)

§ 1965. *Selling poisonous substance, with label without word "poison" thereon.*—Every apothecary, druggist, or other person, who shall sell and deliver any arsenic, corrosive sublimate, prussic acid, or any other substance or liquid usually denominated poisonous, without having the word "poison" written or printed upon a label attached to the phial, box or parcel, in which the same is so sold; or who shall sell and deliver any tartar emetic, without having the true name thereof written or printed upon a label attached to the phial, box or parcel containing the same, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars.—(Ibid. sect. 23.)

§ 1966. *Overloading vessel so that life is endangered.*—Every person navigating any boat or vessel for gain, who shall wilfully receive so many passengers, or such a quantity of other lading, on board such boat or vessel, that by means thereof such boat or vessel shall sink or overset, and the life of any human being shall be endangered thereby, shall, upon conviction, be adjudged guilty of a misdemeanor.—(Ibid. sect. 24.)

§ 1967. *Ignorantly or by gross neglect, raising steam in order to excel any boat, &c.*—If the captain, or any other person having charge of a steamboat used for the conveyance of passengers; or if the engineer or other person, having charge of the boiler of such boat, or of any apparatus therein for the generation of steam, shall,

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[d] Under an indictment for maliciously cutting and girdling certain fruit trees, described in the indictment as the property of one B., it is sufficient proof of the ownership of the property, to show that the premises on which the trees stood were in the possession and occupation of B. at the time of committing the offence.

And evidence that B. was not the sole owner of the premises in question, but was only one of several joint owners who held the legal title in common, will not amount to a variance between the indictment and proof. (People *v.* Horr, 7 Barbour, 9.)

from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create or allow to be created such an undue quantity of steam, as to burst or break the boiler or other apparatus in which such shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking, human life shall be endangered, every such captain, engineer or other person, shall be adjudged guilty of a misdemeanor.—(Ibid. sect. 25.)

§ 1968. *Maliciously killing, maiming, &c., horse, ox, or other cattle.*—Every person who shall maliciously kill, maim or wound any horse, ox, or other cattle, or any sheep, belonging to another, or shall maliciously and cruelly beat or torture any such animal, whether belonging to himself or another, shall, upon conviction, be adjudged guilty of a misdemeanor.—(Ibid. sect. 26.)

§ 1969. *Reading sealed letters addressed to another.*—If any person shall wilfully open, or read, or cause to be read, any sealed letter, not addressed to himself, without being authorized so to do, either by the writer of such letter, or by the person to whom it shall be addressed, he shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment, not exceeding one month.—(Ibid. sect. 27.)

§ 1970. *Maliciously publishing any part of such letter.*—Whoever shall maliciously publish the whole or any part of such letter without the authority of the writer thereof, or of the person to whom the same shall be addressed, knowing the same to have been so opened, shall, upon conviction, be adjudged guilty of a misdemeanor, and punished as prescribed in the last section.—(Ibid sect. 28.)

§ 1971. *Extent of two last sections.*—The two last sections shall not extend to any breaking open of letters which shall be punishable by the laws of the United States.—(Ibid. sect. 29.)

§ 1972. *Maliciously destroying public or toll bridge.*—Every person who shall wilfully or maliciously destroy any public or toll bridge, or any turnpike gate, shall, upon conviction, be adjudged guilty of a misdemeanor.—(Ibid. sect. 30.

§ 1973. *Destroying mill-dam, &c.*—Every person who shall unlawfully and wilfully or maliciously destroy any mill-dam, or other dam erected to create hydraulic power, or any embankment necessary for the support of such dam, or shall wilfully or maliciously make or cause to be made, any aperture in such dam or embankment, with the intent to destroy the same, shall, upon conviction, be adjudged guilty of a misdemeanor.—(Ibid. sect. 31.

§ 1974. *Removing monument erected to designate the extent of any lot, &c.*—Every person who shall, 1. Wilfully or maliciously remove any monuments of stone, wood, or other durable material, erected for the purpose of designating the corner, or any other point, in the boundary of any lot or tract of land; or, 2. Shall wilfully and maliciously deface or alter the marks upon any tree, post or other monument, made for the purpose of designating any point, course or line, in the boundary of any lot or tract of land; or, 3. Shall wilfully and maliciously cut down or remove any tree upon which any such marks shall be made, for such purpose, with the intent to destroy such marks, shall, upon conviction, be adjudged guilty of a misdemeanor.—(Ibid. sect. 32.)

§ 1975. *Removing or destroying mile-stone, obliterating or defacing marks on monument.*—Every person who shall wilfully or maliciously break, destroy or remove any mile-stone, mile-board, or guide-board, erected upon any public highway or turnpike, or shall wilfully or maliciously deface or alter any inscription upon such stone or board, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in a county jail not exceeding three months,

or by a fine not exceeding fifty dollars, or by both such fine and imprisonment.—(Ibid. sect. 33.)

§ 1976. *Mingling poison with food or poisoning spring or reservoir.*—Every person who shall mingle any poison with any food, drink or medicine, with intent to kill or injure any human being; or who shall wilfully poison any spring, well or reservoir of water, shall, upon conviction, be punished by imprisonment in a state prison, not exceeding ten years, or in a county jail, not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.—(Ibid. sect. 38.)

§ 1977. *Destroying monument, or work of art, or ornamental trees, &c.*—Any person who shall maliciously destroy, injure, or deface any monument, or work of art, building, fence, or other structure, or destroy or injure any ornamental tree, shrub or plant, whether situated on any private ground, or on any street, public place, public or private way, or cemetery, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine not exceeding one hundred and fifty dollars, or by imprisonment not exceeding six months, or both.

§ 1978. *Person liable after conviction to an action in favor of party injured.*—Every such person shall, moreover, be liable either before or after conviction to an action in favor of any party injured, in which action damages may be recovered to five times the amount of actual damages sustained.—(Laws of New York, 1853, chap. 573, p. 1055.)

§ 1978 (*a*). *Killing birds in cemetery.*—Any person who shall kill, or wound, or trap, any bird within any cemetery or public burying ground, or who shall destroy any bird's nest, or remove the eggs or the young birds therefrom, shall be deemed guilty of a misdemeanor, punishable by a fine of five dollars for every bird killed, wounded or trapped, and for every bird's nest destroyed, or eggs or young birds removed, recoverable in any justice's court within the county where the offence has been committed, to be sued for by any person making the complaint. The penalty to go towards the support of the poor of the county.—(3 Rev. Stat. 697, sect. 63.)

PENNSYLVANIA.

§ 1979. *Cruelty to animals.*—If any person shall wantonly, maliciously and cruelly beat, torture, kill or maim any horse or other domestic animal, whether belonging to himself or another, every such person so offending shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding two hundred dollars, or undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.—(Rev. Code, Bill I., sect. 46.)

§ 1980. *Violation of sepulchre.*—Any person who shall wilfully and maliciously destroy, mutilate, deface, injure or remove any tomb, monument, grave-stone or other edifice, placed in any cemetery or grave-yard, appropriated to and used for the interment of human beings in this commonwealth, or shall wilfully and maliciously injure, destroy or remove any fence, railing or other work for the protection or ornament of such places of interment, or shall wilfully open any tomb, vault or grave, within the same, and clandestinely remove any body or remains therefrom, shall be guilty of a misdemeanor, and on conviction of either of the said offences, be sentenced to undergo an imprisonment not exceeding one year, and to pay a fine not exceeding one hundred dollars, or both, or either, at the discretion of the court.—(Ibid. sect. 48.)

§ 1981. *Malicious injury to railroad.*—If any person shall wilfully and maliciously put, place, cast or throw upon or across any railroad, any wood, stone or other matter or thing, or shall wilfully and maliciously take up, remove or displace

any rail, sleeper or other matter or thing belonging to any railroad, or shall wilfully and maliciously turn, move or divert any switch, or other machinery belonging to any railroad, or shall wilfully and maliciously make or show, hide or remove any signal or light upon or near any railroad, or shall wilfully and maliciously do, or cause to be done, any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure or destroy, any tender, carriage, car or truck, used on such railroad, or to endanger the safety of any person traveling or being upon such railroad, every such offender shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding ten thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.—(Rev. Act, Bill I., sect. 142.)

§ 1982. *Casting wood, stone, &c., upon a car.*—If any person shall wilfully and maliciously cast, throw, or cause to fall or strike against, into or upon any engine, tender, carriage, car or truck, used upon any railroad, any wood or stone, or other matter or thing, with intent to endanger the safety of any person being in or upon such engine, tender, carriage car or truck, every such offender shall be guilty of misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding three years.—(Ibid. sect. 143.)

§ 1983. *Malicious injury to artificial navigation.*—If any person shall wilfully and maliciously break, throw down, level or destroy the whole or any part of any lock, sluice, flood-gate, bank, waste-wier, dam, aqueduct, culvert, bridge, feeder, guard-wall, towing-path, or berme bank belonging to any artificial navigation, or stop up or obstruct any such feeder, waste-wier, aqueduct or culvert, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment, by separate or solitary confinement, or by simple imprisonment at labor, not exceeding three years.—(Ibid. 144.)

§ 1984. *Wantonly opening or shutting any lock, &c.*—If any person shall wantonly open or shut, or cause to be opened or shut, any lock or safety-gate, or any wicket, paddle or culvert gate, or any waste, feeder or sluice-gate, or drive any nails, spikes, pins or wedges into any such gate or fixtures thereof, or shall take any other means to prevent the perfect and free use of the same, or shall wantonly and maliciously break, throw down, or destroy any fence, wall or timber work, on any canal, pool, feeder or other part of any artificial navigation, or if any person shall wilfully obstruct the navigation of any canal or pool, by throwing into the same, or sinking to the bottom thereof, any vessel, timber, stone, earth or other thing, or by placing any thing whatever upon any towing-paths, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding three calendar months.—(Ibid. sect. 145.)

§ 1984 (*a*). *Destroying any bank or wall.*—If any person shall unlawfully and maliciously break down, or cut down the bank or wall of any river, canal or marsh, whereby any land shall be overflowed or damaged, or be in danger thereof, such person shall be guilty of a misdemeanor, and being thereof convicted, be sentenced to pay a fine not exceeding one hundred dollars, and to undergo an imprisonment not exceeding one year.—(Ibid. sect. 145.)

§ 1985. *Destroying or damaging bridges, buoys, flag-staffs, houses, &c.*—If any person shall unlawfully and maliciously break, injure, or otherwise destroy or damage any part of any locomotive or stationary engine, inclined plane, engine-house, station or depot, bridge, culvert, trussel-work, or other building or structure

belonging to any railroad, or any other part of such railroad; or shall wantonly and maliciously derange or displace the fixtures or machinery of any locomotive or stationary engine, used or employed on any railroad; or shall wilfully and maliciously destroy or injure any fence, wall, or cross-road passing over or under such railroad; or shall unlawfully and maliciously break, injure, or otherwise destroy or damage any of the posts, wires or other materials or fixtures employed in the construction and use in any line of an electrical telegraph, or shall wilfully and maliciously interfere with such structure so erected, or in any way attempt to lead from its uses or make use of the electrical current, or any portion thereof, properly belonging to and in use, or in readiness to be made use of, for the purpose of communicating telegraphically from one station of a telegraph company to another established station of the same, or a connecting telegraph line; or shall unlawfully and maliciously break, injure, or otherwise destroy or damage any bridge, river or meadow bank or mill-dam; or wilfully and maliciously take down, injure, remove, or in any manner damage or destroy any flag, flag-staff beacon, buoy or other way or water-marks, which now are or hereafter may be put, erected or placed, by lawful authority, near or in any streams that are or may be declared public highways; or shall unlawfully and maliciously cut, break, or otherwise destroy any lead, tin, copper or iron spout affixed to any house or other building, public or private; or shall unlawfully and maliciously daub, paint, or otherwise deface any dwelling-house, such offender shall be guilty of a misdemeanor, and upon conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding twelve months, or both, or either, at the discretion of the court.—(Ibid. sect. 147.

§ 1986. *Breaking windows, tearing off knockers, &c.*—If any person shall wilfully and maliciously break, injure, or destroy any window or door belonging to any dwelling-house or out-house, parcel thereof; or shall unlawfully and maliciously break or take off from the door any knocker or bell-pull, or plate inscribed with the name of the occupant, or number of the house; or shall wilfully and maliciously destroy, take down, injure or deface any sign, put up by an inhabitant to denote the place of his abode, occupation, business or employment, such person shall be guilty of a misdemeanor, and upon conviction, shall be sentenced to pay a fine not exceeding one hundred dollars, or suffer an imprisonment not exceeding six months, or both, or either, at the discretion of the court.—(Ibid. sect. 148.)

§ 1987. *Injury to grounds of the Capitol Hill.*—If any person shall wilfully and maliciously break down any tree or shub growing on the public grounds as enclosed on Capitol Hill, or otherwise injure or destroy the same, or shall break or destroy the fences around such enclosure, or any part thereof, or shall maliciously and wilfully injure any part of the public grounds, or the buildings belonging to the state; or if any person shall wilfully and maliciously injure or destroy any fruit or ornamental trees, shrub, plant or grape vines growing or cultivated in any orchard, garden, or close, or upon any public street or square in this commonwealth, he shall be guilty of a misdemeanor, and on conviction, be fined not exceeding one hundred dollars, and undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court.—(Ibid. sect. 149.)

§ 1988. *Drowning any mine or filling up any shaft.*—If any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up or obstruct any airway, waterway, drain, pit, level or shaft of, or belonging to any mine, such offender, his aiders

and abettors, shall, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding two years.—(Ibid. sect. 150.)

§ 1989. *Fire Engines, &c.*—If any person shall wilfully and maliciously cut injure or destroy, or deface any hose or engine, or any apparatus appertaining to the same, belonging to any fire engine or hose company, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.—(Ibid. sect. 151.)

§ 1989 (*a*). *Cutting down timber trees.*—If any person shall cut down or fell any timber tree or trees, knowing the same to be growing upon the lands of another person, without the consent of the owner, or if any person shall purchase or receive any timber tree or trees, knowing the same to have been cut or removed from the lands of another without the consent of the owner thereof, or who shall purchase or receive any planks, boards, staves, shingles or other lumber made from such timber tree or trees, so as aforesaid cut or removed, knowing the same to have been so made, the person so offending shall be guilty of a misdemeanor, and being thereof convicted, shall be sentenced to pay such fine not exceeding one thousand dollars, or to such imprisonment not exceeding one year as the court in their discretion, may think proper to impose.[a]—(Ibid. sect. 152.)

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[a] As to meaning of timber, see 7 Madd. Ch. 140, in note, and 1 John. R. 233.

In an indictment for cutting timber under this act, it was held sufficient to aver that the defendants, the tree in question, (describing it) "did cut down and fell, they, the said, &c., well knowing the said tree to be growing on the land of the said J. H., &c., and that the land on which the said tree was growing did not belong to them, the said defendants, or either of them, or to any person by whom they or either of them, was authorized," &c. Moyer *v.* Com., 7 Barr, 439. See the remarks of a learned correspondent of the Am. L. J., on this point 4 Am. L. J., 130. The form in Wh. Prec. 1st ed., 223, is certainly insufficient, and I am happy to take this opportunity not only of correcting it, but of returning my acknowledgments to the gentleman by whom the error was pointed out. (See, also, Com. *v.* Betchel, 1 Am. L. J., 414.)

"Cutting timber trees," says Judge Lewis, in his excellent treatise on Criminal Laws, (Lewis' Cr. L., 505.) "without permission, on land which the party knows belongs to another, if done maliciously, with a design to injure the owner, is doubtless an offence at common law; but the most extensive depredations of this nature are committed in the sparsely settled portion of the state, by individuals who have no other object than to make profit out of the operation by converting the timber into lumber, shingles, &c. This offence would be larceny if the trees were not parcel of the real estate. An act of assembly has, therefore, been passed, making it an indictable offence to cut timber knowingly on the land of another without permsstion. In an indictment under this statute, it was held to be sufficient to show that the prosecutor was in possession under a claim of title to the land on which the timber was cut, and that it was not necessary to prove his title. And in a case decided in Lancaster Quarter Sessions, in January, 1847, it was held that a tenant in possession under a lease for the term of three years, might be described as the owner within the meaning of the act, and that proof of such possession and claim, and that the occupant under the lease gave no consent to the cutting of the timber, was sufficient to convict, or at least, to throw the burden of proof of a license from the reversioner upon the defendant, without determining whether such license would be a defence in a case where it was known that the premises were held by the tenant for years, and that the reversioner himself would not be authorized to enter and cut timber against the will of the tenant. It was also held, in the same case, that timber trees were such trees as were useful, and used not only for the purposes of building, but in the mechanical arts, in the construction of keels of vessels, chairs, ploughs, axe-handles, rakes, &c., and that in this country a hickory tree was a timber tree. It was likewise decided, that if the rule adopted in some cases in England, requiring the tree to be twenty years old to constitute a tree, was the law with respect to all kinds of timber in this country, proof that a hickory was between eight and ten inches in diameter, was prima facie

§ 1989(*b*.) *Removing or destroying land marks.*—If any person shall knowingly and maliciously cut, fell, alter or remove any certain bounded tree, or other allowed land mark, to the wrong of his neighbor, or any other person, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding one year.—(Ibid. sect. 153.)

§ 1989 (*c*). *Disfiguring cattle, or poisoning same.*—Every person who shall wilfully and maliciously kill, maim or disfigure any horses, cattle, or other domestic animals of another person, or shall wilfully and maliciously administer poison to any such beasts, or expose any poisonous substance, with intent that the same should be taken or swallowed by them, shall be guilty of a misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.—(Rev. Act, Tit. I. sect. 154.)

§ 1989 (*d*). *Works of art, &c.*—If any person shall unlawfully and maliciously destroy or damage anything kept for the purpose of art, science or literature, or as an object of curiosity, in any museum, gallery, cabinet, library or other repository, which museum, gallery, cabinet, library or other repository, is either at all times, or from time to time open for the admission of the public, or any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by payment of money for entering the same, or any picture, statute, monument or painted glass in any church, meeting house or other place of religious worship, or any statute or monument exposed to public view, such person shall be guilty of a misdemeanor, and being convicted thereof, shall, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding six months.—(Ibid. sect. 155.)

VIRGINIA.

§ 1990. *Wilfully destroying ship or vessel.*—If a free person wilfully cast away or otherwise destroy a ship or vessel within any county, with intent to injure or defraud any owner thereof, or of any property on board the same, or any insurer of the ship, vessel, or property, or any part thereof, he shall be confined in the penitentiary not less than one nor more than five years.—(Code, 1849, chap. 192, sect. 31.)

§ 1991. *Administering, or exposing poison for beast.*—If a free person maliciously administer poison to, or expose it with intent that it should be taken by, any horse, cattle or other beast of another person, he shall be confined in the penitentiary not less than one nor more than five years.—(Ibid. sect. 32.)

§ 1992. *Maliciously removing or injuring canal, railroad bridge, &c.*—If any free person maliciously obstruct, remove or injure any part of a canal or railroad, or any bridge or fixture thereof, or obstruct any machinery, work or engine thereof, whereby the life of any traveller, on such canal or road, is put in peril, he shall be confined in the penitentiary not less than three nor more than five years.—(Ibid. sect. 33.)

§ 1993. *Unlawfully but not feloniously defacing or injuring property, real or*

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evidence that it was twenty years old. The age is determined by counting the growths from the heart to the exterior, and most hickory trees will count more than twenty growths in a space of four inches. In an early case, decided soon after the act was passed, it was held to be unnecessary to prove that the defendant knew who was the real owner; it was sufficient that he had no license from any one, and that he knew that he himself was not the owner."

personal.—If a free person, unlawfully, but not feloniously, take and carry away, or destroy, deface or injure any property, real or personal, not his own,[g] or break down, destroy, deface injure or remove any monument erected for the purpose of designating the boundaries, of any town, tract or lot of land, or any tree marked for that purpose, he shall be deemed guilty of a misdemeanor.—(Ibid. sect. 34)

§ 1994. *Torturing beast.*—If a free person cruelly beat or torture any horse or other beast, whether his own or that of another, he shall be fined not exceeding fifty dollars.—(Code, 1849, chap. 196, sect. 14.)

OHIO.

§ 1995. *Burning or setting fire to certain personal property, &c.*—That, if any person shall, wilfully and maliciously set fire to, or burn, or cause to be burned, any barrack or stack of hay, wheat, rye, oats, barley, flax, hemp, fodder, or grain of any kind, or any corn-crib, or place wherein corn may be deposited, or any fence, board, plank, scantling, rails, tanbark or timber, the property of another, every person so offending, shall, upon conviction thereof, be fined in any sum not more than five hundred, nor less than ten dollars, and be imprisoned in the cell or dungeon of the jail of the county, not exceeding thirty days, or both, at the discretion of the court, and shall be answerable to the party injured in double damages.—(Act of March 8, 1831; Swan's Stat. sect. 35, 289.)

§ 1996. *Maliciously setting fire to woods, prairies, &c.*—That if any person shall wilfully and maliciously set on fire, or cause to be set on fire, any woods, prairies, or other grounds, within this state, other than his own, or shall intentionally permit the fire to pass from his own prairie or grounds, to the injury of any other person or persons, every person so offending shall, on conviction thereof, for every such offence, be fined in a sum not exceeding fifty dollars, at the discretion of the court, and stand committed until the sentence of the court is complied with; and shall be liable to an action of the party injured, for the damages which he, she, or they may have sustained in consequence of such fire.—(Ibid. sect. 36.)

§ 1997. *Maliciously destroying animal property of another.*—That if any person shall wilfully and maliciously, kill or destroy any horse, mare, foal, filly, mule or ass, sheep, goat, cow, ox, steer, bull, heifer or swine, the property of another, such person shall, upon conviction thereof, be fined in any sum not more than one hundred nor less than five dollars, and imprisoned in the cell or dungeon of the jail of the county, and fed on bread and water only, not exceeding twenty days, at the discretion of the court; and shall, moreover, be liable to the owner of the property killed or destroyed, in double the value thereof; Provided, that nothing in this section shall be construed to extend to any person who shall kill any of the beforementioned animals trespassing in his or her own enclosure.[h]—(Act of March 8, 1831; Swan's Stat. sect. 37, 289.)

§ 1998. *Maliciously destroying fruit or other trees in nursery, garden, &c.*—That if any person shall wilfully and maliciously, cut down, saw, bark, or otherwise kill or destroy, any fruit, or other tree or trees, standing or growing in any nursery garden, yard or orchard, the property of another, every person so offending shall, upon conviction thereof, be fined in any sum not more than five hundred nor less than five dollars; and the owner of the fruit or other tree or trees, thus killed or destroyed, shall recover not less than double the value of the same from the person or persons killing or destroying said fruit or other tree or trees.[i]—(Act of March 8, 1831; Swan's Stat. sect. 38, 289.)

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[g] See 4 Leigh, 686; 3 Leigh, 809; 5 Grat. 658.
[h] See for form, Wh. Prec. 475.
[i] See for forms, Wh. Prec. 473.

§ 1999. *Felling, boxing, or injuring trees of another.*—That if any person shall wrongfully, and without any lawful authority, cut down, fell, box, bore, or otherwise injure or destroy any living tree or trees, standing or growing on any land owned by or belonging to any other person or persons, body politic or corporate, other than the trees in the preceding section mentioned, every such person so offending shall, on conviction thereof, be fined in any sum not exceeding one hundred dollars nor less than five dollars; and shall, moreover, be liable to the action of the party injured in double damages.—(Ibid. sect. 39.)

§ 2000. *Malicious destruction of ornamental trees in a street, or upon public grounds.*—That if any person shall wantonly, wilfully or maliciously, cut down, injure or destroy any living ornamental tree or trees, either planted or preserved as such, standing or growing on any common or public ground, or on any street, alley, sidewalk, avenue or promenade, every such person so offending shall, on conviction thereof, be fined in any sum not more than one hundred dollars nor less than five dollars; and shall, moreover, be liable to the action of the party injured in double damages.—(Ibid. sect. 40.)[1]

§ 2001. *Demolishing mile-stone, &c., or guide-board.*—That if any person shall, wilfully and maliciously, demolish, throw down, alter or deface any mile-stone, mile-board or guide-board, on or at the fork of any public road, every person so offending shall, upon conviction thereof, be fined in any sum not exceeding fifty dollars, or be imprisoned not exceeding ten days, or both, at the discretion of the court.—(Act of March 8, 1831; Swan's Stat. sect. 41, 290.)

§ 2001 (*a*). *Poisoning domestic animals.*—If any person or persons shall wilfully and maliciously, by administering poison, or causing the same to be administered, kill any horse, mare, foal, filly, jack, mule, or ass, sheep, goat, cow, ox, steer bull, heifer, or swine, the property of another, of the value of thirty-five dollars or upwards, the person or persons so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor, not more than seven years nor less than one year.—(Act of April 8, 1856, sect. 1.)

§ 2001 (*b*). *Same, under thirty-five dollars.*—That if any person or persons, shall wilfully and maliciously, by administering poison, or causing the same to be

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[1] The various offences of injuring and destroying trees, fruits and vegetables, as defined by the several statutes of Ohio, relating to the subject, says Mr. Warren, may, for the purpose of convenience and clearness, be classified into the following eight divisions, viz:

1. Killing or destroying trees standing in any nursery, garden, yard or orchard, the property of another. (Stat. sect. I, p. 153.)
2. Injuries to fruit or ornamental trees standing or growing on the lands of another, other than those above mentioned. (Stat. sects. 4 and 7, p. 154.)
3. Injuries to fruit or ornamental trees or shrubbery, growing on any street, lane, alley or public ground, in any borough, city, town or village. (Stat. sects. 4 and 7.)
4. Injuries to ornamental trees standing on any common, public ground, street, alley, side-walk, avenue or promenade, other than those in cities, towns and villages. (Stat. sect. 3.)
5. Injuries to trees standing on any lands belonging to the State of Ohio, whether canal lands, school lands, or ministerial lands, within this State. (Stat. sect. 9.)
6. Injuries to trees, shrubs or plants within the limits of a cemetery, owned by and belonging to a cemetery association. (Stat. p. 165, sect. 4, post.)
7. Injuries to any other trees not included in any of the foregoing divisions, whether on lands owned by individnals, or by bodies politic or corporate. This division, as also the fifth above mentioned, comprises forest trees. (Stat. sect. 2, p. 153.)
8. Injuries to cultivated roots, plants, fruits and other vegetable productions, standing or growing on or being attached to the lands of another, including cranberry bushes and cranberries. (Stat. sects. 4 and 7.)

administered, kill any horse, mare, foal. filly, jack. mule or ass, sheep, goat, cow, ox, steer, bull, heifer or swine, the property of another, of less value than thirty-five dollars, such person or persons shall, upon conviction thereof, be fined in any sum not more than two hundred nor less than twenty dollars, and imprisoned in the cell or dungeon of the jail of the county not exceeding three months, at the discretion of the court.—(Ibid. sect. 2.)

§ 2001 (*c*). *Intent to poison.*—If any person or persons shall wilfully and maliciously administer, or cause to be administered, poison of any sort whatever, to any horse, mare, foal, filly, jack, mule or ass. sheep, goat, cow, ox, steer, bull, heifer or swine, the property of another, with intent to injure or destroy such horse, mare, foal, filly. jack, mule or ass, sheep, goat, cow, ox, steer, bull, heifer or swine, the person or persons so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in the sum of one hundred dollars, or imprisoned in the jail of the proper county, and fed on bread and water only, for a period not exceeding thirty days, at the discretion of the court.—(Ibid. sect. 3.)

Proviso.—Nothing in this act shall be construed to extend to any person who shall kill, or attempt to kill, in manner herein provided, any of the before-mentioned animals. trespassing in his or her enclosure.—(Ibid. sect. 4.)

Prosecutions.—All offences under this act shall be prosecuted and conducted before the same court, and in the same manner, as is or may be provided by law for the prosecution of offences of the same grade, in the different counties of this state.—(Ibid. sect. 5.)

§ 2001 (*d*). *Killing or injuring animal to the amount of thirty-five dollars.*—That if any person or persons shall wilfully and maliciously kill or destroy any horse, mare, foal, filly, mule, ass, sheep, goat, cow, ox, steer, heifer, or swine, the property of another or others, of the value of thirty-five dollars or upwards, or shall wilfully and maliciously injure any such animal or animals, the property of another or others, to the amount of thirty-five dollars and upwards, the person or persons so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be imprisoned in the penitentiary and kept at hard labor, not more than three years nor less than one year.—(Act April 15, 1857, sect. 1.)

§ 2001 (*e*). *Killing or injuring to amount less than thirty-five dollars.*—That if any person or persons shall wilfully and maliciously kill or destroy any horse, mare, foal, filly, mule or ass, sheep, goat, cow, ox, steer, bull, heifer, or swine, the property of another or others, of less value than thirty-five dollars, or shall wilfully and maliciously injure any such animal or animals, the property of another or others, to an amount less than thirty-five dollars, such person or persons shall, upon conviction thereof, be fined in any sum not more than two hundred dollars, nor less than five dollars, or imprisoned in the jail of the county not exceeding three months, or both fined and imprisoned as aforesaid, at the discretion of the court.—(Ibid. sect. 2.)

§ 2001 (*f*). *Trespassing animals.*—Nothing in this act shall be construed to extend to any person who shall kill or injure any of the before-mentioned animals, trespassing on his or her enclosure, or to any person causing any such injury in endeavoring to prevent any such animal from committing a trespass, nor to any person who shall injure any such animal that has trespassed upon such person or his property, while such person is endeavoring to compel such animal or animals to leave his premises, or driving such animal or animals away from the same.—(Ibid. sect. 3.)

§ 2001 (*g*). *Prosecution.*—All offences under this act shall be prosecuted in the

same manner as is or may be provided by law, for the prosecution of the offences of the same grade in the different counties of this state.—(Ibid. sect. 4.)

That section thirty-seven of an act for the punishment of certain offences therein named, be and the same is hereby repealed; *Provided*, That no prosecutions under said act shall be abated by this repeal, but shall proceed the same as if this were not passed.—(Ibid. sect. 5.)

B.—Malicious mischief at common law.[k]

§ 2002. Malicious mischief in this country, as a common law offence, has received a far more extended interpretation than has been attached to it in England. In the latter country, each object of investment, as it arose into notice, became the subject of legislative protection; and as far back as the reports go, there has scarcely been a single article of property which was likely to prove the subject of mischievous injury, which was not sheltered from such assaults by severe penalties. Thus, for instance, a series of statutes, upwards of twelve in number, beginning with 37 Hen. 8, c. s., and ending with the black act, were provided for the single purpose of preventing wanton mischief to cattle and other tame beasts; and so minute was the particularity of the law-makers that distinct and several penalties were assigned to the cutting out of the tongue of a cow,[l] to the breaking of the fore-legs of a sheep, when attempting to escape enclosures,[m] and to the wounding of cattle, when the injury was only temporary.[n] Upwards of eighteen hundred sections, it is estimated, of acts, running from Henry VIII. to Geo. III., repealed or otherwise, were enacted for the especial purpose of providing against malicious mischief; and as the statutory penalty was both more specific and more certain than that of the common law, the books, in relation to this class of offences, give but few

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[k] See Wharton's Precedents, as follows:
(470) Maliciously wounding a cow.
(471) Giving cantharides to prosecutors.
(472) Tearing up a promissory note.
(473) Cutting down trees the property of another, not being fruit, or cultivated, or ornamental trees, under Ohio statute.
(474) Destroying vegetables, under Ohio statute.
(475) Killing a heifer, under Ohio statute.
(476) Cutting down trees, &c.
(477) Killing a steer at common law.
(478) Altering the mark of a sheep, under the North Carolina statute.
(479) Second count. Defacing mark.
(480) Entering the premises of another, and pulling down a fence.
(481) Destroying two lobster carts, under the Mass. statutes.
(482) Removing a landmark, under the Penn. statutes.
(483) Felling timber in the channel of a particular creek, in a particular county, under the North Carolina statute.
(484) Throwing down fence, under Ohio statnte.
(485) Breaking into house, and frightening a pregnant woman.
(486) Cutting ropes across the ferry.
(487) Breaking glass in a building. Mass. Rev. st., ch. 126, s. 42.
(488) Burning a record.
[For several forms of indictments which might be classed under this head, see 213, &c.]

[l] Stat. 37 Hen. viii., c. 6. [m] 9 Geo. i., 22, sect. 16. [n] Ib. c. 19.

examples of common law indictments. But as the English statutes do not obtain in this country, malicious mischief, as a common law offence, has here been the subject of frequent adjudications.[o] In its general application it may be defined to be any malicious or mischievous injury, either to the rights of another, or to those of the public in general. Thus, it has been considered an offence at common law to destroy a horse belonging to another;[p] or a cow;[q] or a steer;[r] or any beast whatever which may be the property of another,[s] particularly where the effect is to disturb and molest a family;[t] to be guilty of wanton cruelty to animals in general,[u] either publicly, (when the animal belongs to the defendant himself,[v]) or secretly, though specific malice against the owner is necessary, mere wantonness not being sufficient; to cast the carcass of an animal in a well in daily use;[w] to poison chickens, fraudulently tear up a promissory note, or maliciously break windows;[x] to mischievously set fire to a number of barrels of tar belonging to another;[y] to girdle or otherwise maliciously injure trees kept either for use or oranment;[z] to put cow-itch on a towel, with intent to injure a person about to use it;[a] to break up a boat;[b] to cut off the hair of the tail or mane of a horse, when done maliciously;[c] to discharge a gun with the intention of annoying and injuring a sick person in the immediate vicinity;[d] and to break into a room with violence for the same purpose;[e] though it is held not an indictable offence to remove a stone from the boundary line between the premises of A. and B. with intent to injure B.[f] To the first chapter of this work the reader is referred for other cases of the same class.

§ 2003. The recent inclination, however, so far as the common law is concerned, is to restrict the party injured to his civil remedies, except, (1,) where the offence is committed secretly, in the night time, or in such a way as to inflict peculiarly wanton injury; or, (2,) where it is marked with malignant cruelty to animals; or, (3,) where it is accompanied with a

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[o] Loomis *v.* Edgerton, 19 Wendell, 419.

[p] Resp. *v.* Teisher, 1 Dallas, 338; State *v.* Council, 1 Tennessee, 305; though see per contra, Shell *v.* State, 6 Hump. 283; Taylor *v.* State, 6 Hump. 235.

[q] Com. *v.* Leach, 1 Mass. 59; People *v.* Smith, 5 Cowen, 218.

[r] 2 Dev. & Bat., 35; Wh. Prec. 213.

[s] Loomis *v.* Edgerton, 19 Wendell, 420; State *v.* Wheeler, 3 Vermont, 344; Henderson's case, 8 Grattan, 709; though see Illies *v.* Knight, 3 Texas, 316; and see also a learned article in 7 Law Rep. (N. S.) 89, 90.

[t] Henderson's case, 8 Grattan, 70.

[u] State *v.* Briggs, 1 Aiken, 226; U. S. *v.* Logan, 2 Cranch. C. C. R. 259.

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

[w] State *v.* Buckman, 8 New Hamp. 208.

[x] Res. *v.* Teischer, 1 Dallas, 338.

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

[z] Com. *v.* Eckert, 2 Browne, 251; Loomis *v.* Edgerton, 19 Wendell, 320 *per contra*, Brown's case, 3 Greenleaf, 177.

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

[b] Loomis *v.* Edgerton, 19 Wendell, 419.

[c] Boyd *v.* State, 2 Humphrey, 39.

[d] Com. *v.* Wing, 9 Pick. 1.

[e] Com. *v.* Taylor, 5 Binn. 377; Hackett *v.* Com., 3 Harris, 95.

[f] State *v.* Burrough, 2 Halstead, 229.

breach of the peace. Thus, in New York, an indictment charging that the defendant, "with force and arms, unlawfully, wilfully and maliciously, did break in pieces and destroy two windows in the dwelling house of M. C., to the great damage of the said M. C., and against the peace," &c., was held not to set forth an offence indictable by the laws of the state; it being held that an act which would otherwise be only a private trespass, does not become indictable by being charged to be done with force and arms, nor by being alleged to have been committed maliciously, or without claim of right, or without any motive of gain. Whether the breaking of the windows in this case had been charged to have been done secretly, or in the night time, the act would have been indictable, was doubted by Beardsley, C. J., it being generally said that the cases in which indictments have been sustained for maliciously killing or wounding domestic animals, depend upon features peculiar to such offences, as the depravity of mind, and the cruelty of disposition, which such acts evince.[g] So maiming or wounding an animal, without killing it, was held in New Jersey, in 1858, to be not indictable either at common law or under the Statute law of that State.[gg]

§ 2004. So, in North Carolina, Nash, J., said "At common law no trespass to chattels was an indictable offence without a breach of the peace. Not that an actual breach must be committed, but something more must be done than what amounts to a mere civil trespass, expressed by the terms *vi et armis*. The peace must be actually broken, or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will. In the case of Mills, 2 Dev. 420, the court in their opinion use the expression, "in the presence of the party," &c. It is manifest the owner is meant, for in the succeeding sentence they say, "Where they neither put the owner in fear, nor invoke him to an immediate redress of his wrongs, nor excite him to protect the possession of his chattels by personal prowess—and none of these can happen in the absence of the owner and his family—the trespass is not indictable."[h]

On an indictment for malicious mischief, under the Tennessee act of 1803, ch. 9, it is not necessary to prove express malice.[i]

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[g] Kilpatrick *v.* The People, 5 Denio, 277.

[gg] The State *v.* Beekman, 3 Dutch. (N. J.) 124.

[h] State *v.* Phipps, 19 Iredell, 225.

[i] State *v.* Council, 1 Tenn. 305. Per Overton and Powell, Judges. Campbell, J., thought that the expression used in the act made it necessary that there should be a personal dislike to the owner of the property.

[j] "In Wharton's Cr. Law, (ed. 1857) § 2002," said Chief Justice Green, in delivering the opinion of the Court, "it is said that malicious mischief in this country, as a common law offence, has received a far more extended interpretation than has been attached to it in England, and the learned author has defined the common law offence of malicious mischief, as received in this country, to be "any malicious or mischievous injury either to the rights of another or to those of the public in general." This, probably, is law within the commonwealth of Pennsylvania, where the crime of malicious mischief has received a very wide interpretation. But the proposition that any malicious or mischievous injury to the rights of an individual is an indictable

§ 2005. In Massachusetts, it is said that, in order to a conviction of the offence of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge.[j]

§ 2006. Malice, either express or implied, against the owner, and not against the thing injured, is required.[k]

An indictment for malicious mischief will not necessarily be defeated, merely because the acts proved might have supported a charge for larceny.[l]

The manner of describing the property injured,[m] and the owner,[n] has been already stated.

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

If there be a mistake in laying the name of the owner, it will be fatal.[p]

The owner of the property must be alleged.[pp]

§ 2007. An indictment for malicious mischief may conclude at common law; and in such indictment it is not necessary to charge malice against the owner of the property injured.[q]

§ 2008. An indictment charging that the defendant "did unlawfully, maliciously, and secretly, in the night time, with force and arms, break and enter the dwelling-house of A., with intent to disturb the peace of the commonwealth, and unlawfully and vehemently did make a noise, &c., and did thereby greatly frighten the wife of the said A., by means whereof she miscarried," &c., is good at common law, as an indictment for malicious mischief.[r]

§ 2009. In North Carolina, an indictment for malicious mischief must either expressly charge malice against the owner, or otherwise fully describe the offence. It is not sufficient to set forth that the act was done "feloniously, wilfully and maliciously," without averring that it was done "mischievously," or with malice against the owner.[s]

§ 2010. An indictment for malicious trespass alleged that the defendant did "maliciously and mischievously injure, and cause to be injured, a certain house, the property of one A., situate," &c., "of the value of fifty dollars, to the damage of the said A. five dollars, contrary to the form of the statute," &c. It was held, that the offence was insufficiently described,

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offence at the common law, is unwarranted either by principle or authority. It would render every wilful trespass an indictable offence. (State *v.* Beekman, 3 Dutch. N. J. 124.)

[j] Comm'th *v.* Waldon, 3 Cush. 558.
[k] State *v.* Wilcox, 3 Yerger, 278.
[l] State *v.* Leavitt, 32 Maine, (2 Red.) 183.
[m] Ante, § 353–63, 610–5.
[n] Ante, § 233–59, 595.
[o] State *v.* Pearce Peck, 66.
[p] Haworth *v.* State, Peck, 89; see ante, § 595.
[pp] Davis *v.* Commonwealth, 30 Penn. State R. 421.
[q] State *v.* Scott, 2 Dev. & Bat. 35.
[r] Comm. *v.* Taylor, 5 Binney, 281; State *v.* Batchelder, 5 New Hamp. 549.
[s] State *v.* Jackson, 12 Iredell, 329.

and that the indictment should have shown the specific injury done to the house.[t]

A man has a property in a dog, so that an indictment for malicious mischief in killing one will lie.[u]

§ 2011. To support an indictment for malicious mischief in killing an animal, it must be shown that the killing was from malice against the master. It is not sufficient that it was the result of passion, excited against the animal by an injury he had done to the defendant's property.[v]

§ 2012. In Texas it has been ruled, that an injury to personal property, though committed with actual force, is not indictable at common law unless accompanied by a breach of the peace.[w]

CHAPTER IV.

FORCIBLE ENTRY AND DETAINER.

A. OFFENCE GENERALLY.
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IV. WHAT POSSESSION THE PROSECUTOR MUST HAVE, § 2042.
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A.—OFFENCE GENERALLY.

§ 2013 When a man violently takes or keeps possession of lands and tenements of another, with menaces, force and arms, and without the authority of law, he may be indicted, at common law, for forcible entry and detainer.[x] In many of the States, however, through the substitution of statutory remedies giving the injured party summary relief by recourse to a civil tribunal, criminal procedure in such case has fallen into disuse.

§ 2014. The general common law principle is, that though the mere breaking and entering the close of another is not a misdemeanor; yet if

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[t] State *v.* Aydelott, 7 Blackf. 157.
[u] State *v.* Latham, 13 Iredell, 33; though see R. *v.* Spearing, R. & R. 250; and see § 1752-6.
[v] State *v.* Latham, 13 Iredell, 38.
[w] Illies *v.* Knight, 3 Texas, 312.
[x] 4 Bla. Com., 148; Russ. on Cr., 6 Am. ed. 303; Henderson's case, 8 Grattan, 789.

that entry is attended by circumstances constituting a breach of the peace, it will become a misdemeanor, for which an indictment will lie.[b]

§ 2015. In Massachusetts,[c] the person thus forcibly expelled or kept out may take, from any justice of the peace, a writ in the form of an original summons,[d] and the suit thus commenced is subjected to the same incidents as accompany other civil actions before justices of the peace.[e] Under this statute it has been held that a mere refusal to deliver possession, when demanded, will not warrant the process for forcible entry and detainer; but the possession must be attended with such circumstances as might excite terror in the owner, and prevent him from claiming his rights; such as apparent violence offered in deed or word to the person, having unusual offensive weapons, or being attended by a multitude of people.[f] Where a writ of restitution has been executed and the proceedings are afterwards quashed upon certiorari, a new writ of restitution may be awarded.[g] The process, it is said, will not lie against one who has merely entered into land under a levy upon it, as the property of a tenant in possession;[h] nor for the lessor of a tenant at will against a stranger for expelling the tenant.[i]

§ 2016. In New York, though the statutory remedy[j] presents some of the features of a criminal prosecution, it may be properly regarded as a civil suit, and while some of the decisions under it are applicable to forcible entry and detainer at common law, it can scarcely be considered as forming one of the subjects of ordinary criminal jurisdiction. By it is provided that when any person is forcibly put out or kept out of possession, he may be restored by making a complaint to a judge of the county courts, who shall thereupon summon a jury of twenty-four inhabitants of the county, who, on being sworn a true inquisition to make, are to proceed to examine witnesses on oath, to be administered by the judge, and who are to make and sign their inquisition before the said judge, and deliver the same to him. If, in such inquisition it is found that either the entry or the detainer of the defendant was forcible, he may traverse the inquisition; and on such an issue a traverse jury is to be specially convened. The complaint to be made to the judge is to be accompanied with an affidavit of the forcible entry and detainer, and that the complainant has "an estate of freehold or for a term of years in the premises then subsisting, or some other right to the possession thereof, stating the same;" and the judge is thereupon to issue a precept, &c. By the 11th section of the act, it is provided that on the trial of the traverse, the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, "that he was peaceably in the actual possession of the premises at the time of a forcible entry, or was in the constructive possession of the premises at the time of a forcible holding out." The only defence allowed to the defendant on the tra-

[b] Henderson's case, 8 Grattan, 709.
[c] Rev. Stat. ch. 104. [d] Ibid., sect. 4. [e] Ibid., sect. 5.
[f] Com. v. Dudley, 10 Mass. 403.
[g] Com. v. Bigelow, 3 Pick. 31.
[h] Ibid. [i] Ibid. [j] 2 R. S. 507.

verse is the denial of the forcible entry or forcible holding out, or showing that he or his ancestors, or those whose estate he has, have been in the quiet possession of the premises three whole years together next before the inquisition found, and that his interest is not determined.[k] Where it was objected that as the indictment alleged a possession in fee simple in the relator, the complainant was bound to show such an estate on the trial; it was determined that since the revised statutes, the nature of the estate had become immaterial; possession was sufficient; and the allegation of the estate, in addition to the possession, could be rejected as surplusage.[l]

§ 2017. The revised statutes, it was said in the same case, have essentially changed the law from what it was before; the decided cases before had narrowed the remedy to cases where the relator was seised of a freehold, or possessed of a term for years, and the consequence was, that in every other instance of a forcible entry and detainer, so far as this remedy was concerned, the wrong-doer, though he entered by force and without right, was preferred to the quiet occupant thus dispossessed; for if the latter could show on the traverse that the former had no estate within the purview of these acts, as thus construed by the courts, he was entitled to the verdict.[m] The act gives the remedy provided by it, as well to tenants for years, and guardians, as to such as have estates of freehold.[n] Though a lease by parol be for a longer term than three years, and so void for the term, within the statute of frauds, yet the tenant entering has an interest from year to year, regulated in every respect by the parol demise, except as to the term.[o] Proof of actual possession is sufficient to support the allegation in the inquisition, that complainant was possessed in fee simple.[p] The petit jury may find the defendant guilty of the detainer only for a writ of restitution, which will equally go as if the conviction had reached the whole indictment, and the assessment of damages will be in proportion to the degree of guilt or injury.[q]

B.—Statutes.

§ 2018. As the statutes of both Pennsylvania and Virginia are simply declaratory of the common law, as modified by 5 Rich. 2, st. 1, c. 8, and 21 Jac. 1, c. 15, it is unnecessary to do more at present than to give their provisions, referring to another head for the adjudication given to them by the courts.[r]

Pennsylvania.

§ 2019. *Forcible entry.*—If any person shall with violence and a strong hand, enter upon or into any lands or buildings, either by breaking open doors, windows or other parts of a house, or by any kind of violence or other circumstances of

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[k] People *v.* Van Nostrand, 9 Wendell, 52.
[l] Ibid.
[m] People *v.* Van Nostrand, 9 Wendell, 50.
[n] People *v.* Rickert, 8 Cowen, 226.
[o] Ibid.
[p] People *v.* Van Nostrand, 9 Wendell, 50.
[q] People *v.* Anthony, 4 Johnson, 198; People *v.* Rickert, 8 Cowen, 226.
[r] See 2 Pa L. J. 391, for a learned article on the law as obtained in Pennsylvania.

terror, or if any person after entering peaceably, shall turn out by force or by threats, or menacing conduct, the party in possession, every person so offending shall be guilty of a forcible entry, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court, and to make restitution of the lands and tenements entered as aforesaid.—(Rev. Laws, 1860, Bill I., sect. 21.)

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

VIRGINIA.

§ 2020. *Forcible entry.*—None shall enter into any lands or tenements, but in case where entry is given by law, and, in such case, not with strong hand nor with multitude of people, but only in a peaceful and easy manner; and that none who shall have entered in a peaceful manner, shall hold the same afterwards against the consent of the party entitled to the possession thereof.—(R. C., ch. 115, sect. 1.)

5 RIC. 2.

§ 2021. *Entry with strong hand and multitude of people.*—And also the king defendeth, that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will.[1]—(5 Ric. 2, st. 1, c. 8.)

21 JAC. c. 15.

§ 2022. *Restitution to be awarded.*—That such judges, justices, or justices of the peace, as by reason of any act or acts of parliament now in force, are authorized and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth, upon indictment of such forcible entries, or forcible withholdings before them duly found, to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight's services, tenants by *elegit*, statute-merchant, and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force.

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

C.—Forcible entry, etc., at common law.

§ 2023. The violent and forcible taking or keeping of another man's property, is, it is clear, apart from the operation of particular statutes, a breach of the public peace, punishable in a criminal court by indictment. The gist of the offence is the violence; and from the peculiar sanctity attached by the common law to every man's dwelling-house, violence, when offered to it, is distinguished as a substantive offence, and punished with peculiar severity. Forcible entry and detainer, as an indictable offence, continues, it would seem, to be punished in the courts of this country, even in those states where the injured party is furnished with the most summary civil remedies,[u] though it has lately been doubted by an able judge whether forcible detainer as a common law offence, has a distinct existence.[v]

§ 2024. At common law, to support an indictment there must be a breach of the peace.[w] But by the 5 Ric. 2, st. 1, c. 8, and 21 Jac. 1, c. 15, the common law received a modification, which, in many of the states, has been considered as a constituent part of the offence.[x]

§ 2025. There is a distinction to be observed between forcible entry, &c., as it existed and still exists at common law, and forcible entry, &c., under the above given statutes. In the first place, more force is necessary to constitute the former offence than the latter;[y] in the second place, in an indictment for the latter offence, it is necessary to set forth either a freehold or a leasehold in the prosecutor, while, in the former, an averment of mere possession is sufficient.[z] Keeping these distinctions in mind, the construction given by the courts to the statutory offence will apply with equal force to the offence at common law.

I. Who may commit the offence.

§ 2026. Any one who forcibly puts out or keeps out another from possession, may be indicted for forcible entry and detainer, though, as will hereafter be observed, a landlord who violently dispossesses a tenant whose lease has expired, may be guilty of forcible entry; yet where his wife is in possession,[a] or where his mansion is detained by one having a bare charge, a man may break open the doors and forcibly enter without expos' himself to a criminal prosecution.[b]

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[u] R. *v.* Wilson, 8 Tenn. R. 357; Harding's case, 1 Greenleaf, 31; Newton *v.* Harland, 1 Man. & Gran. 644; State *v.* Mills, 2 Dev. 420; State *v.* Spierer 1 Brev. 119; Cruiser *v.* State, 3 Harr. 205; Com. *v.* Taylor, 5 Binney, 281; Langdon *v.* Potter, 3 Mass. 215.

[v] Com. *v.* Toram, 5 Penn Law Jour. 296.

[w] R. *v.* Wilson, 8 T. R. 357; R. *v.* Bake, 3 Bur. 1731; Com. *v.* Dudley, 10 Mass. 403.

[x] Harding's case, 1 Greenleaf, 31; Robert's Digest, 283.

[y] R. *v.* Wilson, 8 T & R. 357; Com. *v.* Dudley, 10 Mass. 403; R. *v.* Bake, 3 Burr. 1731; Archbold's C. P. 569.

[z] R. *v.* Wilson, 8 T. R. 357; State *v.* Spierer, 1 Brevard, 119; State *v.* Mills, 2 Dever, 420; Harding's case, 1 Greenleaf, 31.

[a] Morris *v.* Bowels, 1 Dana, 97. [b] 1 Russ. on Cr., 6th Am. ed. 307.

§ 2027. It seems that though a woman cannot be mulcted in damages for a trespass on her husband's property, she may, "if she comes with a strong hand," "under circumstances of violence amounting to a breach of the public peace," be convicted of a forcible entry.[c]

§ 2028. A joint tenant or tenant in common, may offend against the statutes by forcibly ejecting or holding out his companion.[d]

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

§ 2029. An indictment will lie against a third person, who intrudes himself on land, or enters after judgment against a former intruder, and the sheriff who is in possession of the writ of restitution, may turn him out of possession.[f]

II. What may be the subject of it.

§ 2030. As a general rule, forcibly entry lies to redress an expulsion from any tangible estate, whether corporeal or incorporeal. Sir William Russell considers that an indictment for a forcible detainer would even lie against any one, whether a terre tenant or a stranger, who would forcibly disturb a landlord in the enjoyment of his rent, or a commoner in the use of his common.[g] But a way,[h] ferry,[i] or similar easements, are not the subjects of indictments.

§ 2031. A forcible entry may be made on land, whether woodland or otherwise, within the bounds of a tract possessed by another, although the whole tract be not enclosed by a fence or cultivated.[j]

III. What force is necessary.

§ 2032. In an indictment at common law for forcible entry, it is sufficient to prove that the defendant entered with such force and violence as to exceed a bare trespass.[k] Where a party entering on land in possession of another, either by his behavior or speech, gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible, whether he causes the terror by carrying with him an unusual number of attendants, or arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions, plainly implying a purpose of using force against those who make resistance.[l]

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[c] R. v. Smyth, 1 M. & Rob. 155.
[d] 1 Russ. on Cr., 6th Am. ed. 307; Com. v. Oliver, 2 Par. 420.
[e] Com. v. Oliver, 2 Par. 420.
[f] State v. Gilbert, 2 Bay, 255.
[g] 1 Russ. on Cr., 5th Am. ed. 303.
[h] Ibid.
[i] Kees v. Lawless, Little's Select Ohio cases, 184.
[j] Penna'a v. Robinson, Addison, 14, 17.
[k] State v. Pollock, 4 Iredell, 305.
[l] State v. Pollock, 4 Iredell, 305; Bennett v. State, 2 Rice, 340; 1 Russ. on Crimes, 6th Am. ed. 309.

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

§ 2033. An entry "with strong hand," or "with multitude of people," is the offence described in the statute. It is not necessary, however, to constitute the offence, that it should be committed by a multitude of people; even where the entry is lawful, it must not be made with strong hand, or a multitude of people; where it is not lawful, it must not be made at all.[m]

The jury, from the evidence of a forcible detainer, may find the defendant guilty of a forcible entry.[n]

§ 2034. An entry by breaking the doors or windows, &c., whether any person be in the house or not, especially if it be a dwelling-house, is a forcible entry within the statute.[o] So an entry, where personal violence is done to the prosecutor, or any of his family, or servants, or to any person or persons keeping the possession for him;[p] or even where it is accompanied with such threats of personal violence, (either actual or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like,) as were likely to intimidate the prosecutor or his family, &c., and to deter them from defending their possession,[q] is a forcible entry within the statute.

§ 2035. When the property of the defendant in the execution, is in the house of a third person, or in a smoke-house within the curtilage of said third person, a demand for admittance by the officer holding the execution, and a refusal upon the part of the person holding the property, is necessary to justify the officer in breaking the door, and entering the house, or smoke-house.[r] But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out, and then shutting the door upon him, or the like, without further violence,[s] or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence,[t] is not deemed a forcible entry. Though in New York, where the defendant having entered peaceably, said to the former possessor, "It will not be well for you, if you ever come upon the premises again by day or night," and it was left to the jury whether this was a threat of personal violence, and so a forcible

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[l] State *v.* Caldwell, 2 Jones' Law, (N. C.) 498.
[m] State *v.* Burt, 2 Tr. Conn. 489.
[n] Ibid.
[o] See 1 Hawk. c. 64, s. 26.
[p] Ibid.
[q] Ibid., s. 20, 21, 27; Milner *v.* Maclean, 2 C. & P. 17.
[r] Douglass *v.* State, Yerger, 525.
[s] Com. Dig. Forc. Ent. & D. 3; 1 Hawk. c. 64, s. 26.
[t] 1 Hawk, c. 64, s. 23.

detainer within the statute: they having found it was, on motion for a new trial it was refused.[u]

§ 2036. If, whilst the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the meantime send persons to take possession of it peaceably, this is said to be a forcible entry.[v]

§ 2037. Where a party having a right, and whose right is congeable, enters or makes claim, and the other party afterwards continues to hold possession by force, this is considered a forcible entry in the party so holding: because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry.[w] Where the party entering has in fact no right of entry, all persons in his company, as well those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence,[x] or who actually abet those who do, are guilty.

§ 2038. A landlord has no right to expel even a tenant at will by force, and as will be noticed more fully under another head, should he attempt it, he will be criminally responsible for the intrusion.[y] "If the landlord," said Lord Kenyon," "had entered with a strong hand to dispossess the tenant with force, (after the expiration of the term,) he might have been indicted for a forcible entry."[z] In a case immediately succeeding, the same great judge declared it to be part of the law of the land, that no man should assert his title with violence.[a] It is true, that on a subsequent day of the term, he stated that the court desired that the grounds of their opinion might be understood, so that it should not be considered a precedent for other cases where it did not apply. He then proceeded, "Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title; but without giving any opinion concerning that dictum, one way or the other, but leaving it to be proved or disproved whenever the question shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched." "But now," says Sir William Russell, "there is no doubt that in England a party is indictable for forcible entry into premises in which he has a legal title."[b] While this is the case, by a curious anomaly in the law, the landlord, by three out of six judges in the common pleas, was held not to be responsible for a trespass, at the tenant's suit, for removing the latter, even though such force was used as to subject the landlord to a criminal prose-

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[u] People *v.* Rickert, 8 Cowen, 226; People *v.* Godfrey, 1 Hill, 240; People *v.* Anthony, 4 Johns. 198.

[v] R. *v.* Smith, 5 C. & P. 201.

[w] Id., s. 22, 34; Co. Lit. 251.

[x] 3 Bac. Abr. Foro. Ent. (B.)

[y] 1 Hawk. 274; 4 Blac. Com. 148; Langdon *v.* Potter, 3 Mass. 215; Com. *v.* Kinsey, 5 Penn. Law Jour. 119; Taylor *v.* Cole, 3 Term R. 292; Sampson *v.* Henry, 13 Pick. 36; Newton *v.* Harland, 1 Manning & Granger, 644, 956; though see Overdeer *v.* Lewis, 1 Watts & Serg. 90; State *v.* Elliott, 11 N. Hamp. 540; post § 2044.

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

[a] R. *v.* Wilson, 8 T. R. 361.

[b] 1 Russ. on Cr., 6th Am. ed. 305; see, also, Newton *v.* Harland, 1 Man. & Gr. 664; Butcher *v.* Butcher, 7 B. & C. 399; 1 M. & R. 220; Hilary *v.* Gray, 6 C. & P. 248.

cution.[c] If this distinction be recognized, there can be no difficulty in reconciling with the law of forcible entry, the doctrine of the Supreme Court of Pennsylvania, that when a lease expires, the landlord may forcibly dispossess the tenant whose lease has expired, by night or by day, and for motives of mere caprice; with this limitation only, that he should use no greater force than might be necessary, and do no wanton damage. The plaintiff in such a case, is "entitled to damages only for an injury he had suffered from unnecessary violence to his property." Still, on the distinction above stated, the defendant is liable to a criminal prosecution.[d]

A wife, as has been seen, may be guilty of a forcible entry into the dwelling-house of her husband, and other persons, also, if they assist her in the force, although her entry in itself is lawful.[e]

A mere trespass will not support an indictment for a forcible entry; there must be such force, or show of force, as is calculated to prevent resistance.[f]

§ 2039. To make an entry forcible, there must be acts of violence, or such threats, menaces, signs or gestures, as may give reason to apprehend personal injury or danger, in standing in defence of the possession.[g] An indictment for a forcible entry into the field of the prosecutor, cannot be supported by evidence that the defendant peaceably entered the field, but while there threw stones against the house of the prosecutor, situated adjoining the field, the prosecutor at the time being in the house, and not in the field.[h]

§ 2040. For the purpose of obtaining restitution, it is necessary to prove the expulsion, and that the prosecutor is still kept out of possession;[i] but it is no part of the offence described by the statute, which mentions a forcible entry merely.[j]

There may be a forcible detainer, though the entry is peaceable. And it is sufficient if it appear from the indictment that the party aggrieved was forcibly kept out of possession.[k]

§ 2041. The same circumstances of violence which will make an entry forcible, will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to reenter.[l] But merely refusing to go out of the house,[m] or denying possession, by a tenant at will, to a lessor, or keeping out of land by force a

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[c] Newton *v.* Harland, infra.
[d] Overdeer *v.* Lewis, 1 W. & S. 90.
[e] R. *v.* Smyth, 1 M. & Rob. 156; 5 C. & P. 201.
[f] R. *v.* Smyth, 5 C. & P. 201; Penn'a *v.* Dixon, 1 Smith's Laws, 3; State *v.* Godsey, 13 Iredell, 348.
[g] State *v.* Robinson, Add. 14, 17; State *v.* Conghill, 2 Brevard, 445; Resp. *v.* Devore, 1 Yeates, 501.
[h] Penn'a *v.* Smith, 2 Iredell, 127.
[i] 1 Hawk. c. 64, s. 41.
[j] Burd *v.* Com., 6 Serg. & Rawle. 252.
[k] Com. *v.* Rogers et al., 1 Serg. & R. 24; State *v.* Burt, 2 Tr. Con. Rep. 489.
[l] People *v.* Rickert, 8 Cowen, 226.
[m] 1 Hawk. c. 64, s. 30.

person claiming common upon it,[n] is not a forcible holding within the meaning of the statutes.[o]

Under an indictment for forcible entry and detainer, the defendant may be convicted of both the offences, or either.[p]

IV. What possession the prosecutor must have.

§ 2042. Under 5 Ric. 2, the prosecutor must aver a freehold, and under 21 J. 1, a leasehold; but, it seems, proof that he was in actual occupation of the premises, or in the reception of the rents and profits, is sufficient evidence of seisin.[q] At common law, however, no allegation beyond possession was necessary, and of course mere possession was sufficient to support the prosecution.[r] But a mere scrambling possession will not be enough to sustain an indictment even at common law.[s] Nor is surveying land, building cabins, and leaving them unoccupied, such possession as is necessary.[t]

A man who breaks open the door of his own dwelling-house, which is forcibly detained from him by one who claims the bare custody of it, cannot be guilty of forcible entry.[u]

§ 2043. A party peaceably in the actual possession of lands, at the time of a forcible entry, or in the constructive possession thereof at the time of a forcible holding out, is entitled to proceed under the statute of forcible entry and detainer, although he is neither seised of a freehold, nor possessed of a term of years in the premises.[v]

§ 2044. The defendant can neither go into evidence to disprove the title of the complainant,[w] nor to establish his own, as the question is not one of civil right, but of public mischief.[x] Even where a tenant holds over beyond the period fixed by his lease, and the landlord makes forcible entry for any purpose, though the tenant cannot maintain a trespass, *quare clausum*, the landlord cannot justify a personal injury committed on the tenant in such entry.[y] If he attempts to dispossess his tenant by violence, he is criminally responsible for the consequences, and may be punished for the breach of the peace, though he was at the time merely asserting his civil rights.[z]

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[n] Com. Dig., Forc. Det. b. 2.

[o] See R. *v.* Okely, 4 B. & Ad. 307; R. *v.* J. Wilson, 3 Ad. & Ell. 817.

[p] Burd *v.* Com. 6 S. & R. 252.

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

[r] R. *v.* Wilson, 8 T. R. 357; 2 Dev. 420; 1 Brevard, 119; 1 Greenleaf, 31.

[s] Ex parte Shotwell, 1 Ashm. 140.

[t] Penn'a *v.* Waddle, Add. 43.

[u] Ex parte Shotwell, 1 Ashm. 140.

[v] 4 Blac. Com. 148; 1 Hawk. 274; Langdon *v.* Potter, 3 Mass. 215; Com. *v.* Kinsey, 5 Penn. Law Jour. 119; Taylor *v.* Cole, 3 Term R. 292: Newton *v.* Harland, 1 Man. & Gran. 654, 956.

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

[x] Respublica *v.* Shryber et al., 1 Dal. 68; Bennett *v.* State, 1 Rice, S. C. Digest, 340; People *v.* Rickert, 8 Cowen, 226; People *v.* Godfrey, 1 Hill, 240; People *v.* Anthony, 4 Johns, 198.

[y] Sampson *v.* Henry, 12 Pick. 36; though see Overdeer *v.* Lewis, 1 Watts and S. 90.

[z] Taylor *v.* Cole 2 Term, 292; Taunton *v.* Costar, 7 T. R. 427; Turner *v.* Meymott,

§ 2045. It must be remembered, however, that the possession must be actual and not constructive. Two persons cannot be in possession of the same land at the same time, (*i. e.* adversely,) and whenever the unlawful entry of one necessarily dispossesses the other, an indictment for forcible entry may be maintained.[a]

Where an indictment for forcible entry laid the force against the seisin of A., it was ruled that evidence was not admissible of an entry on land leased by A. and B. to C., and of force against C.[b]

§ 2046. The prosecutor is not a witness to prove anything more than the force used; and he is inadmissible, therefore, to sustain an indictment for the purpose of restitution.[c] The wife, also, of the prosecutor is admissible to prove the force, but only the force.[d]

V. Indictment.[e]

§ 2047. In an indictment for a forcible trespass upon personal property, 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.[f] The words, "and with strong hand," should never be omitted.[g]

§ 2048. It is necessary, as has been stated, under the English statutes, to aver either a leasehold or a freehold in the prosecutor;[h] though, as has been said, proof of actual possession is sufficient to support the allegation in the inquisition that the complainant was possessed in fee simple.[i] At common law, however, mere possession is all that need be laid.[j] In Pennsylvania, under the act of assembly, it has been held that an indictment stating a naked possession merely in the prosecutor, without laying any estate or interest in him, is not sufficient to authorise an award of

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8 Eng. C. L. 280; Newton *v.* Harland, 2 Man. & Gr. 644; 956; Com. *v.* Kinsley, 5 Penns. Law J. 119; see ante, § 2038.

[a] State *v.* Bart, 2 Tr. Con. Rep. 489.

[b] Resp. *v.* Sloane, 2 Yea. 29; Penna. *v.* Grier, 1 Smith's Laws, 3; ante, § 782.

[c] Resp. *v.* Snider, 1 Dallas, 68; State *v.* Fellows, 2 Hay, 340; R. *v.* Beavan, R. & M. N. P. 242; R. *v.* Williams, 4 M. & R. 471; 9 B. & C. 549.

[d] Resp. *v.* Snider, 1 Dall. 68.

[e] See Wharton's Precedents, as follows:

(489) General frame of indictment at common law.
(490) Another form of same.
(491) Against one, &c., at common law, with no averment of either leasehold or freehold possession in the prosecutor.
(492) Forcible entry, &c., into a freehold, on stat. 5 Rich. II. c. 8.
(493) Forcible entry into a leasehold, on stat. 21 Jac. I. c. 15.
(494) Forcible detainer on stat. 8 Hen. VIII. c. 9, or 21 Jac. 1, c. 51.
(495) Forcible entry. Form in use in Philadelphia. First count, at common law.
(496) Second count. Entry upon freehold.
(497) Third count. Entry upon leasehold.
(498) Breaking and entering a close, and cutting down a tree, under the Pennsylvania act.

[f] State *v.* Mills, 2 Dev. 420; but see Harding's case, 1 Greeleaf, 22.

[g] Ante, § 402.

[h] Archbold's C. P. 566.

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

[j] R. *v.* Wilson, 8 T. R. 357; Harding's case, 1 Greenleaf, 27; 2 Dev. 420; 1 Brevard, 119.

restitution.[k] Such an allegation, however, will be sufficient to support an indictment for the forcible entry at common law, as a breach of the peace;[l] though it has been said that a forcible detainer is not an offence at common law, an indictment for that offence should always aver the prosecutor's estate in the premises.[m]

§ 2049. An indictment charging that A. was "peaceably possessed in his demesne, as of fee," of certain lands, "and continued so seised and possessed" until B. "thereof disseised" him, and "him so disseised and expelled" did keep out, &c., was held good on error;[n] and so where the indictment stated that the prosecutor was seised in his demesne as of fee, and that his "peaceable possession thereof, as aforesaid, continued until," &c., the latter words being rejected as surplusage.[o]

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

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

§ 2050. 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.[r]

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

§ 2051. Where the indictment was for forcible entry and detainer of a messuage in possession of A. for a term of years, and the evidence was of forcible entry into a field, and no lease was produced, it was held that the indictment could not be supported.[t]

§ 2052. 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.[u]

§ 2053. It is sufficient to describe the premises, as "a certain close of two acres, of arable land situate in S. Township, in the county of H., being a part of a larger tract of land adjoining lands of A. and B."[v]

§ 2054. Although a forcible entry and forcible detainer are charged in the same indictment, they are nevertheless distinct offences, and the defendant may be acquitted of one and convicted of the other. If one is defectively set out, he may be convicted of that that is well set out.[w] But

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[k] Burn. v. Com. 6 Serg. & R. 252; Resp. v. Campbell, 1 Dallas, 354; Torrence v. Com. 9 Barr, 184; Van Pool v. Com. 1 Harris, 391; Com. v. Toram, 2 Parsons, 411.

[l] Com. v. Taylor, 5 Binney, 281; Com. v. Kinsey, 5 Penn. Law Jour. 119; 2 Pars. 114.

[m] Com. v. Toram, Id. 296; 2 Parsons, 411.

[n] Fitch et al. v. Rempublicam, 3 Yea. 49, S. C.; 4 D. 212.

[o] Respublica v. Schryber et al. 1 Dal. 68. [p] Ibid.

[q] Com. v. Fitch, 4 Dall. 212. [r] M'Naire et al v. Rempublicam, 4 Yea, 326.

[s] Torrence v. Com., 9 Barr, 184. [t] Penn v. Elder, 1 Smith's Laws, 3.

[u] State v. Walker and Davidson, Brev. MSS.

[v] Dean, et al., v. Com., 3 S. & R. 418.

[w] People v. Rickert, 8 Cowen, 226; People v. Godfrey, 1 Hill, 240; People v. Anthony, 4 Johns. 198; Com. v. Rogers, 1 Serg. & R. 124; see ante, § 616-622.

to enable the court to award restitution on a conviction for forcible detainer, it is necessary that there should be an estate either freehold or leasehold, averred in the prosecutor. Thus, when an indictment stated that A. "was lawfully and peaceably seised" of the premises, and that B. son of A., was lawfully in possession of the same," and that "the defendant entered and expelled the said B. from possession of the premises, and forcibly disseised the said A. of the same, and the said B., so expelled and held out," &c., it was held that it was error to award restitution to A.[x]

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

§ 2055. An indictment describing the premises as "all that piece of land containing seventy-six acres, and one hundred and fifty perches, and the allowance of six per cent., it being a part of a large tract known as the Peter Jackson improvement, adjoining lands of David Henderson on the east," is a sufficient description of the premises so as to warrant the court in awarding restitution.[z]

Restitution was first authorized by the 8 Henry VI. chap. 9. This statute was ever ruled to extend and be in force in Pennsylvania.[a]

CHAPTER X.

CHEATS.

A. CHEATS AT COMMON LAW.
B. STATUTORY CHEATS BY FALSE PRETENCES.

A.—Cheats at common law.

§ 2056. Cheats, punishable at common law, may in general be described to be such cheats (not amounting to felony) as affect, or may affect, the

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[x] Burd *v.* Com., 6 Serg. & R. 252; Com. *v.* Toram, 5 Penn. Law Journ. 297; 2 Pars. 411.

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

[z] Van Pool *v.* Com., 1 Harris, 391.

[a] Van Pool *v.* Com., 1 Harris, 393, Burnside, J.

[a] See Wharton's Precedents, as follows:

(499) Selling by false weight or measure.

(500) Against a baker for selling loaves to poor persons under weight, and obtaining pay from them under the pretence that they were of full weight.

(501) Cheating at common law by false cards.

(502) Second count. Cheating at common law, at a game of dice called passage.

(503) Information. Passing a sham bank-note, the offence being charged as a false token.

(504) Obtaining goods by means of a sham bank-note, as a misdemeanor at common law.

(505) Cheat by means of a counterfeit letter.

See "Secreting Goods," &c., "False Personation," "Fraudulent Insolvency," "Factors," "False Pretences." And see, also, 7 Law Rep. (N. S.) 81.

public, and effected by deceitful or illegal practices, against which common prudence could not have guarded.[b]

§ 2057. Cheats, affecting public justice, when thus executed, have always been held misdemeanors. Thus, where a person who, being committed to jail under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and jailer, under which he obtained his discharge, he was held guilty of an offence at common law, in thus effecting an interruption of public justice, although the attachment not being for non-payment, the order was, in itself, a mere nullity, and no warrant to the sheriff for the discharge.[c] Obtaining the Queen's bounty for enlisting as a soldier by an apprentice, reclaimable by his master, is an offence at common law.[d] Where a person pretending that he had power to discharge soldiers, took money of another to discharge him as a soldier, the court held the offence to be a misdemeanor at common law.[e]

Independently, however, of cheats affecting the administration of public justice, frauds effected by any general false devise or token, calculated to affect the public, seem punishable at common law. Thus, selling unwholesome provisions, without notice, has been held a misdemeanor, though, perhaps the reason of this may be that such an act is a nuisance as well as a cheat.[f] So the defendant being indicted for changing corn, and returning bad instead, it was considered maintainable; for, being a cheat in the way of trade, it is deemed an offence against the public.[g]

§ 2058. It is not, however, an offence at common law to sell provisions by short measure, where no false weight or token is used.[h] In an early case in Pennsylvania, it is true 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.[i] But in 1855, the whole subject of selling under weight, even to a public institution, was under consideration before the English Court of Appeals and it was then held that though such a sale was indictable as a false pretence, it was not cognisable at common law unless a false measure was used.[j]

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[b] 2 East, P. C. c. 18, s. 4, p. 821; 2 Hawk. P. C. c. 22, s. 1; 2 Russ. onCr., 6th Am. ed. 275; Com. *v.* Morse, 2 Mass. 139; People *v.* Miller, 14 Johnson, 37; People *v.* Babcock, 7 Johnson, 201; Cross *v.* Peters, 1 Greenleaf, 387; Com. *v.* Warren, 8 Mass. 72; Lambert *v.* People, 9 Cow. 588; People *v.* Stone, 9 Wendell, 187; Com. *v.* Hearsay, 1 Mass. 137; State *v.* Wilson, Rep. Conn. Ct. 135; State *v.* Vaughan, 1 Bay, 282; Hill *v.* State, 1 Yerger, 76; Com. *v.* Spear, 2 Virg. Cas. 65; State *v.* Scroll, 1 Richardson, 244; State *v.* Patillo, 4 Hawks, 348; U. S. *v.* Watkyns, 3 Cranch, C. C. R. 441.

[c] R. *v.* Fawcett, 2 East, P. C. 862; and see O'Meally *v.* Newell, 8 East, 364; 1 Rus C. & M. 275, 3d ed.; and see, as to falsely personating bail, 1 Burns' J. P. 330.

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

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

[f] 4 Blac. Com. 162; 2 East, P. C. 822; post, § 2370.

[g] R. *v.* Wood, 1 Sess. Ca. 217; see post, § 2066.

[h] R. *v.* Wheatley, 2 Burr. 1125; R. *v.* Eagleton, 33 Eng. Law & Eq. 545; R. Young, 3 T. R. 104; Hartman *v.* Com., 5 Barr, 60; State *v.* Justice, 2 Dev. 199.

[i] Resp. *v.* Powell, 1 Dallas, 47; see 3 Rep. Conn. Ct. 139.

[j] R. *v.* Eagleton, 33 Eng. Law & Eq. 540; S. P. Hartman *v.* Com., 5 Barr, 60.

It is not indictable at common law for a miller, receiving good barley to grind at his mill, to deliver a musty and unwholesome mixture of oat and barley meal, differing from the produce of the barley: and Lord Ellenborough, C. J., there said, "The allegation that the quantity (of meal) delivered was musty and unwholesome, if it had alleged that the defendant delivered it as an article for the food of man, might possibly have sustained the indictment; but I cannot say that its being musty and unwholesome, necessarily and *ex vi termini* imports that it was for the food of man; and it is not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley meal. As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; if the case had been, that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that the miller, observing the confidence of this his situation, had made it a color for practising a fraud, this might have presented a different aspect; but as it is, it seems no more than the case of a common tradesman who is guilty of fraud in a matter of trade or dealing."[k] Putting a stone, also, in a single pound of butter, has been held not indictable, the offence not being of such a general character as to make it a common law cheat.[l]

§ 2059. It has been held an indictable offence at common law, for a baker to sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner that would have rendered it harmless.[m] An indictment will lie for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man.[n] Writers of false news are indictable for it, as an offence at common law; and it would, perhaps, be held, at the present day, that the fabrication of false news, calculated to produce any public detriment, would be an offence.[o] Cheating, by means of false dice, is an offence at common law.[p]

§ 2060. In Virginia, it has been held, that the procuring goods, &c., by means of a note purporting to be a bank note of the Ohio Exporting and Importing Company, there being no such bank, or company, is a cheat punishable by indictment at common law, if the defendant knew that it was such a false note. It is necessary in such case, to aver the scienter in the indictment.[q] 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 Tallahassee, in Florida, the blanks of which

[k] R. *v.* Haynes, 4 M. & S. 214; see, also, R. *v.* Eagleton, 33 Eng. Law & Eq. 540.
[l] Wiesbach *v.* Stone, 2 Watts & Serg. 408; Com. *v.* Warren, 6 Mass. 72; see 2 Russ. on Crimes, 6th Am. ed. 276.
[m] R. *v.* Dixton, 4 Camp. 122; 3 M. & Sel. 11 S. C.
[n] Trevis' case, 2 East, P. C. 821; post, § 2370.
[o] See Stark. Libel, 546; 2 Russ. C. & M. 278; see State *v.* Williams, 2 Tenn. 108.
[p] R. Leeser. Cro. Jac. 497; R. *v.* Maddox, 2 Roll. R. 107.
[q] Com. *v.* Speer, 2 Virg. Cas. 65; but see State *v.* Patillo, 4 Hawks, 348.

were filled up except those opposite the words "Cashier" and "President;" but in these blanks an illegible scrawl was written, which, on careless inspection, might have been mistaken for the names of those officers; and the defendants knew, before they passed the instrument, that it was worthless; it was held, in South Carolina, that they were guilty, at common law, of cheating by a false token.[r]

And such is the law in Pennsylvania,[s] in respect to a counterfeit bank note of another State.

§ 2061. To sustain an indictment at common law for cheating by a false token, the instrument or device by which the cheat was effected, must be calculated to deceive the public; that is, it must be the semblance of a public and not a private instrument; it must be such as affects, or may affect the public.[t]

§ 2062. If, however, a cheat is not of such a general character as to affect the public, and is not executed by means of false tokens or weights, it is not indictable at common law, for, as has been seen, if, without false weights, a party sells to another a less quantity than he pretends to sell, it is no public offence.[u] Falsely warranting an unsound horse to be sound, well knowing it to be otherwise, is no offence, unless there be a conspiracy to defraud, and then an indictment might stand for a conspiracy.[v] Nor is it, it seems, an offence, to cause an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it is written, unless there be a conspiracy.[w] Thus, where an indictment was as follows:—"The jurors, &c., that Moses Justice being an evil-disposed person, and designing fraudulently to cheat and impoverish one Anne Fox, &c., did become the security of the said Anne Fox, in a bond then and there executed by her for the faithful performance, &c. And the jurors, &c., that the said Moses Justice, afterwards, to wit, on, &c., did write, and cause to be written, a certain deed of bargain and sale for her, the said Anne, to him, the said Moses Justice, purporting to sell and convey a certain tract of land, belonging to her, the said Anne, situate, &c., to him, the said Moses Justice, in fee simple, &c., and also purporting to be in consideration of the sum of three hundred dollars, then and there well and truly paid by him, the said Moses Justice, to her, the said Anne Fox. And the jurors, &c., that the said Moses Justice did then and there fraudulently, &c., pretend to the said Anne, that the same deed of bargain and sale was nothing but a receipt to him acknowledging that he was the

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[r] State *v.* Stroll, 1 Richardson, 24.

[s] Lewis *v.* Com., 2 S. & R. 551.

[t] State *v.* Stroll, 1 Richardson, 24; U. S. *v.* Porter, 2 Cranch. C. C. R. 60; U. S. *v.* Hale, 4 Ibid. 83; U. S. *v.* Watkins, 3 Ibid. 441.

[u] R. *v.* Young, 3 T. R. 104; Hartman *v.* Com., 5 Barr, 60; State *v.* Justice, 2 Dev. 199; R. *v.* Eagleton, 33 Eng. Law & Eq. 540.

[v] R. *v.* Pywell, 1 Stark. 502, and see R. *v.* Codrington, 1 C. P. 661.

[w] See 2 East, P. C. c. 18, s. 5, p. 823; 1 Hawk. c. 71, s. 1; and see R. *v.* Paris, 1 Sid. 431; Wright *v.* People, 2 Breese, 66; Com. *v.* Sankey, 10 Harris, 390; per contra, Hill *v.* State, 1 Yerger, 76; State *v.* M'Leran, 1 Aikens, 311; see comments on these cases, 1 Bennett & H. Lead. Cas. 16.

security of the said Anne, &c., by means of which false, &c., the said Moses Justice did fraudulently, &c., procure the said Anne to sign, seal, and deliver the said deed of bargain and sale to him, the said Moses Justice, for the said tract of land, containing, &c., and of the value, &c., and so the jurors, &c., that the said Moses Justice, her, the said Anne, of the land, &c., of the value, &c., fraudulently, &c., did cheat, deceive and defraud, to the great damage, &c., and against the peace and dignity of the State:" it was held, an indictable offence was not charged, there having been no false token of deceitful practice affecting the community at large, though undoubtedly a gross fraud had been committed.[x]

§ 2063. Where two persons pretend, the one to be a merchant, the other a broker, and, as such, bartered bad wine for hats, it was considered that they were guilty of the offence of a conspiracy to cheat, but not of the offence of cheating.[y] It has been held, however, indictable, to get a person to lay money on a race, and to prevail with the party to run booty; yet the ground of the declaration appears to have been that the offence amounted to conspiracy.[z]

§ 2064. The deceitful receiving of money from one man to the use of another, upon a false pretence of having a message and order to that purpose, is not an offence at common law in a private transaction, because it is accompanied with no manner of artful contrivance, but only depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischief, against which common prudence and caution may be a sufficient security.[a] 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;[b] 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;[c] nor to obtain, in violation of an agreement, and by false pretences, possessed of a deed lodged in a third person's hands as an escrow;[d] 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;[e] nor to put a stone in a pound of butter so as to increase its weight; nor to obtain money by falsely representing a spurious note of hand to be genuine.[f]

§ 2065. Where a party obtained money of another, by pretending to come by the command of a third person to demand a debt or the like in his name,

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[x] State *v.* Justice, 2 Devereux, 199.
[y] R. *v.* Mackarty, 2 Ld. Raym. 1179, 1184; 3 Ld. Raym. 325; 2 Burr, 1129; 2 East, P. C. 824.
[z] 6 Mod. 42, c.
[a] 1 Hawk. c. 71, s. 2; 2 East, P. C. 818.
[b] People *v.* Miller, 14 Johns. 371.
[c] People *v.* Babcock, 7 Johns. 701.
[d] Com. *v.* Hearsay, 1 Mass. 137; U. S. *v.* Carico, 2 Cranch. C. C. 760.
[e] Com. *v.* Warren, 6 Mass. 72.
[f] Wiesback *v.* Stone, 2 Watts & Serg. 408.
[g] State *v.* Patillo, 4 Hawks, 348; see Com. *v.* Speer, 2 Virg. Cases, 65; State *v.* Stroll, 1 Richardson, 24.

showing no voucher or token for his authority, it was holden not indictable, for it was the party's own fault to trust him; the language of the court being, "We are not to indict one man for making a fool of another; let him bring his actions."[h] It seems the same doctrine will hold good though the defendant made use of an apparent token, which in reality is, upon the very face of it, of no more credit than his own assertion, and is not of a public nature.[i] Where an indictment charged that the defendant, deceitfully intending, by divers crafty means and subtle devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase, and delivered to A. a fictitious order for the payment of money, purporting to be a draft upon a banker for the amount, which he knew he had no authority to draw, and would not be paid, by which he obtained the tickets, and defrauded the prosecutor of the value; and it being objected in arrest of judgment, that the defendant was not charged with having used any false token to accomplish the deceit; for that the banker's check, drawn by the defendant himself, entitled him to no more credit than his bare assertion that the money would be paid; the objection was held good, and judgment arrested.[j] In short, the doctrine is that at common law no indictment lies for a cheat against which common prudence would have guarded.[k]

§ 2066. Where the defendant was indicted and convicted of selling beer short of the due and just measure, to wit, sixteen gallons as and for eighteen, upon a motion in arrest of judgment, it was said by the court, "This is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor when he received it, to see whether it held the just measure or not. Offences that are indictable must be such as affect the public, as if a man use false weights and measures and sell by them to all or to any of his customers, or use them in the general course of his dealing; so if there be any conspiracy to cheat, for these are deceptions that common care and prudence are not sufficient to guard against. These are much more than private injuries; they are public offences. But in the present case it is a mere private imposition or deception. No false weights or measures are used; no conspiracy; only an imposition on the person he was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. It is only a non-performance of contract; for which non-performance the other may bring his action. So the selling an unsound horse for a sound one is not indictable. The buyer should be more upon his guard; and the distinction which is laid down as proper to be attended to in all cases of this kind, is this: that in such impositions or deceits, where common prudence may guard persons against their suffering from them, the offence is

[h] R. *v.* Jones, 2 Ld. Raym. 1013; 1 Stalk. 379; 6 Mod. 105, S. C.; and see R. *v.* Bryan, 2 Strange, 866; R. *v.* Gibbs, 1 East, 185.
[i] 2 East, P. C. c. 18, s. 2; 2 Russ. C. & M. 3d ed. 283.
[j] R. *v.* Lara, 5 T. R. 565; and see R. *v.* Flint, R. & R. 460.
[k] 2 Russ. on Crimes, 6th Am. ed. 286.

not indictable; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary careor prudence be guarded against, then it is an offence indictable."[l] The same position has since been repeatedly reaffirmed.[m]

§ 2067. An indictment for selling by false weights must specify the person to whom the same was made. It is not sufficient to charge, that defendant sold to "divers persons."[n]

§ 2068. Where the fraud has been effected by false tokens, and the offence is so charged, the false tokens must be specified and set forth. It is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences.[o] But it does not seem to be necessary to describe them more particularly than they were shown or described to the party at the time, and in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth show a false token.[p]

B.—Statutory Cheats by False Pretences.

B. STATUTORY CHEATS BY FALSE PRETENCES.

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

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

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

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

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

I. CHARACTER OF THE PRETENCES, § 2085.
1st. As to defendant's means, § 2085.
2d. As to defendant's character and personalty, § 2092.
3d. As to the nature and value of goods or paper, § 2102.
4th. The pretences at the time must have been false, § 2110.
5th. They need not be in words, § 2113.
6th. They need not be by the defendant personally, § 2114.
7th. They must relate to a present state of things, § 2118.
8th. They must have been the operative cause of the transfer, § 2120.

II. POSITION OF PROSECUTOR AT THE TIME, AS TO CARELESSNESS, OR CULPABILITY, § 2138.

III. PROPERTY INCLUDED BY STATUTES, § 2134.

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[l] R. v. Wheatly, 1 Bla. Rep. 273; 2 Bur. 1125, S. C.
[m] Ante, § 2057. 2058, &c.
[n] State v. Woodson, 5 Humph. R. 55.
[o] 2 East, P. C. c. 18, s. 13, p. 837.
[p] Ibid. p. 838.

IV. WHERE THE OFFENCE IS TRIABLE, § 2142.
V. INDICTMENT, § 2144.
1st. "THAT A. B.," ETC., (DEFENDANTS,) DID FALSELY, ETC., PRETEND, § 2144.
2d. "TO A. B.," ETC., § 2145.
3d. "THAT," ETC., (STATEMENT OF PRETENCES,) § 2148.
4th. DESCRIPTION OF PROPERTY, § 2155.
5th. "WHEREAS, IN TRUTH AND FACT," (NEGATION OF PRETENCE,) § 2158.
6th. SCIENTER AND INTENTION, § 2159.
7th. "BY MEANS," ETC., OF WHICH PRETENCES, § 2162.

The 30 Geo. 2, c. 24, after reciting that divers evil-disposed persons, had, by various subtle stratagems, &c., fraudulently obtained divers sums of money, &c., to the great injury of industrious families, and to the manifest prejudice of trade and credit, enacted:

§ 2069. *Obtaining goods, &c., by false pretences.*—"That all persons who, knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandises, with intent to cheat or defraud any person or persons of the same, shall be deemed offenders against law and the public peace," and shall be punished as therein required.

The 7 & 8 Geo. 4, c. 29, s. 53, provides:

§ 2070. *Same, provided if offence amount to larceny, there be no acquittal.*—"That if any person shall by any false pretence obtain from any other person any chattels, money or valuable security, with intent to cheat or defraud any person of the same," such person shall be guilty of a misdemeanor, and punished as therein required; "*Provided always*, That if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by *certiorari*; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny on the same facts."[q]

§ 2071. The distinction between the two statutes, it will be observed, consists in two features, and with these exceptions, the interpretation given by the courts to the one may be considered as equally applying to the other. In the first place, by the 30 Geo. 2, c. 24, the subject matter, the obtaining of which by false pretences is made indictable, is limited to "goods, wares or merchandise;" by the 7 & 8 Geo. 4, c. 29, s. 53, it comprises "any chattels, money, or *valuable security*." In the second place, what constitutes the main point of difference, and what the preamble of the latter statute indicates when it states that a failure of justice frequently arises from the subtle distinction between larceny and fraud, is, that under the 30 Geo. 2, c. 24, whenever the offence on trial, proved to amount to constructive larceny, the common law, by merging the misdemeanor in the felony, worked the acquittal of the defendant; whereas by the 7 & 8 Geo. 4, c. 29, s. 53, it is provided that by reason of such merger he shall not be entitled to acquittal.

MASSACHUSETTS.

§ 2072. *Obtaining by false pretence, or privy or false token, goods, &c., or the*

[q] See 2 Russ. on Cr., 6th Am. ed. 286.

signature to a written instrument, &c.—"If any person shall designedly, by any false pretence, or by any privy or false token, and with intent to defraud, obtain from any other person, any money, or any goods, wares, merchandise, or other property, or shall obtain, with such intent, the signature of any person to any written instrument, the false making whereof would be punishable as forgery, he shall be punished by imprisonment in the state prison, not more than ten years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than two years."[r]—(Rev. Stat. c. 126, 32.)

NEW YORK.

§ 2073. *Obtaining by false token or writing, or false pretence, the signature to a written instrument, or money, personal property, &c.*—Every person who, with intent to cheat and defraud another, shall designedly, by color of any false token or writing, or by any other false pretence, obtain the signature of any person to any written instrument, or obtain from any person, any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in a state prison not exceeding three years, or by a fine not exceeding three times the value of the money, property, or thing so obtained, or by both such fine and imprisonment.—(2 R. S. 677, sect. 53.)

§ 2074. *Same when the thing obtained is a bank note, &c.*—If the false token by which any money, personal property, or valuable thing, shall be obtained as specified in the last section, be a promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any banking company, or moneyed corporation not in existence, the person convicted of such cheat may be punished by imprisonment in a state prison not exceeding seven years.[s]—(Ibid. sect. 54.)

§ 2075. *Same when the pretended purpose is charitable or benevolent.*—"Section fifty-three of article four, or title three of chapter one, of part four of the Revised Statutes, shall be held to apply in addition to those cases to which it is now applicable, to every person who with intent to cheat or defraud another shall designedly, by color of any false token or writing, or by any false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, for any alleged charitable or benevolent purpose whatsoever."—(Statutes, 1851, chap. 144, sect. 1.)

PENNSYLVANIA.

§ 2076. *Obtaining by false token, writing, or pretence, property, &c.*—If any person shall by any false pretence obtain the signature of any person to any written instrument, or shall obtain from any other person, any chattel, money or valuable security, with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceed-

[r] Rev. Stat. ch. 126, sec. 32. In Maine and Vermont, the statute is substantially the same. (Rev. Stat. Vermont, ch. 95, sec. 15; State *v.* Mills, 18 Maine R. 341.) In Connecticut, the statute, (title 21, sect. 114, ed. 1835,) embraces the provisions of 33, Hen. 8, 32 Geo. 2, and 52 Geo. 3; and the English decisions are there adopted. (State *v.* Rowley, 12 Conn. 101.)

[s] In an indictment for obtaining the signature of a person to a written instrument, by false pretences, it need only appear that the instrument, on its face, is one calculated to prejudice the party who has signed it, though on the facts stated in the indictment, it would be void for fraud. (People *v.* Crissie, 4 Denio, 525; see People *v.* Galloway, 17 Wendell, 540.)

ing three years: *Provided always*, That if, upon the trial of any person indicted for such a misdemeanor, it shall be proved that he obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor, shall be liable to be afterwards prosecuted for larceny upon the same facts.[ss]—(Rev. Act, Bill I., sect. 114.)

§ 2077. *Obtaining credit at hotel by same, &c.*—If any person, with intent to cheat or defraud, shall by any false or fraudulent representations, or by any false show of baggage, goods or chattels which are calculated to deceive any hotel, inn or boarding-house keeper, obtain lodging and credit in any hotel, inn or boarding-house, and shall subsequently refuse to pay for his board and lodging, the person so offending shall be guilty of a misdemeanor, and on conviction, he sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding three months, or both or either, at the discretion of the court.—(Ibid. sect. 115.)

VIRGINIA.

§ 2078. *Obtaining by false pretence or token, property, &c., or signature to paper.*—If a free person obtain by any false pretence or token from any person, with intent to defraud, money or other property, which may be the subject of larceny, he shall be deemed guilty of the larceny thereof, or if he obtain, by any false pretence or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years, or at the discretion of the jury, if the accused be a white person, of the court if he be a negro, be confined in jail not more than one year, and be fined not exceeding five hundred dollars.[t]—(Code, 1849, chap. 192, sect. 30.)

[ss] "The proviso is added to meet the case in which property said to have been obtained under false pretences, has been obtained under circumstances really amounting to larceny. Without such a provision as this, in such case the defendant would be entitled to an acquittal of the misdemeanor, though subject afterwards to be tried for the felony." (Note by Revisors.)

[t] The cheats included in the statute which preceded this, as is remarked by Mr. J. A. G. Davis, in his excellent work on Criminal law in Virginia, must be effected by counterfeit letters, or by privy tokens. In respect to the former, the statute appears only to have confirmed the common law, which, as we have seen, rendered indictable all cheats accomplished by counterfeit letters or forgery. In respect to those of the latter description, a new class of cheats was hereby made criminal, the operation of the common law being confined in this respect to such cheats in private transactions as are effected by false tokens of a public nature, claiming public confidence, and calculated to deceive the people in general. A false "privy token" within the statute has generally been taken to denote some real visible mark or thing, as a key, a ring, &c. A mere false affirmation is certainly not such. (2 East, P. C. 826.) The statute is almost in the words of that of 33 Hen. VIII. c. 1, and has received the same interpretation.

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

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

But an indictment was held good which alleged the obtaining from the Bank of Virginia, by similar means, of "fifty dollars in money, current in the commonwealth of Virginia," although it was contended, that, as the preamble of the statute recited a pre-existing evil, &c., as the cause of its enactment, it could not extend to banks

OHIO.

§ 2079. *Obtaining money, &c, by false pretences, making fraudulent transfers of property to cheat creditors.*—That if any person, by any false pretence or pretences, shall obtain from any other person, any money, goods, merchandise or effects whatsoever, with intent to cheat and defraud such person of the same, or shall fraudulently make and transfer any bond, bill, deed of sale, gifts, grants, or other conveyances, to defeat his creditors of their just demands, such person, so offending, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars, or be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding ten days, or both, at the discretion of the court.—(Act of March 8, 1831, Swan's Stat. sect. 12, 286.)

§ 2080. *Selling or conveying land without title.*—That if any person or persons shall knowingly sell or convey any tract of land without having a title to the same, either in law or equity, by descent, devise, or evidence by a written contract, or deed of conveyance, with intent to defraud the purchaser, every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor not more than seven years nor less than one year.—(Act of March 7, 1835; Swan's Stat. sect. 33, 274.)

Before proceeding to an analytical examination of the constituent features of the offence, it may not be out of place to consider the general sentiment which has attended its construction.

§ 2081. In the first case reported on the subject,[a] Lord Kenyon said: "This indictment, being founded on the statute 30 Geo. 2, c. 24, is different from a common law indictment. When it passed it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence which had not happened, to which persons of ordinary caution might give credit. The statute of the 33 Hen. 8, c. 1, requires a false seal or token to be used to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the statute 30 Geo. 2, c. 24, introduced another offence, describing it in terms exceedingly general. It seems difficult to draw the line, and to say to what cases the statute shall

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which did not exist in Virginia until many years after the date of the statute. (Com. *v.* Sivinney, 1 Virg. Cas. 150, 151; see also State *v.* Patillo, 4 Hawks, 348. In Vermont, under a statute not dissimilar from that in Virginia, as given above, it was held that fraudulent and false representations of a man's property and resources, were not indictable; the language of the statute being narrower than that of 30 Geo. 2. (State *v.* Summer, 10 Vermont, 599.) Subsequently, however, the statute was amended by introducing the words "false pretences." The statute 33 Hen. VIII. appears to have been recognised in New York, (12 Johnson, 293; 9 Wend. 188;) in Massachusetts, (Com. *v.* Warren, 6 Mass. 72,) though not in Pennsylvania. (Resp. *v.* Powell, 1 Dall. 47.) Under the South Carolina act of 1791, an indictment was held ill, which merely alleged that the defendant falsely, fraudulently, &c., pretending that a certain mulatto was a slave, did falsely, &c., cheat and defraud one A., by selling said mulatto to him for a slave, when said mulatto was free. (State *v.* Wilson, Rep. Con. Ct. 135.) But it is swindling, within the purview of this statute, to obtain horses from an ignorant man, by threats of a criminal prosecution, and also by threats of his life. (State *v.* Vaughan,) 1 Bay, 282.) The same rule, however, does not apply when a blind horse is sold as a sound one. (State *v.* Delyon, 1 Bay, 353.)

[a] Young, et al., *v.* R., 3 Term R. 98.

extend, and therefore we must see that whether each particular case, as it arises, comes within it. In the present case, four men came to the prosecutor, representing a case as about to take place, that William Lewis should go a certain distance within a limited time; that they betted on the event, and they should probably win; he was perhaps too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit there are certain singularities which are not the subject of criminal law. *But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away.* Now this offence is within the words of the act, for the defendants have by false pretences fraudulently contrived to obtain money from the prosecutor, and I see no reason why it should not be held to be within the meaning of the statute." Ashhurst, J., said: "The statute 30 Geo. 2, c. 24, created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind." Buller, J., remarked, "The ingredients of this offence are the obtaining money by false pretences and with intent to defraud. Barely asking another for a sum of money, is not sufficient, but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within the statute."[v]

§ 2082. In a case of much importance in New York,[w] Walworth, Chancellor, in commenting, in the Court of Errors, on the law as above laid down, said, "I am aware, from numerous cases which have come under my notice, judicially and otherwise, that the rule of morality established by the decisions under these statutes, and by the common law of Scotland, has been deemed too strict for those, who, in 1825, and subsequently, have been engaged in defrauding widows and orphans, and the honest and unsuspecting part of the community, by inducing them to invest their little all, which, in many instances, was their only dependence for the wants and infirmities of age, in the purchase of certain stocks of incorporated companies, which the vendors fraudulently represented as sound and productive, although they at the time knew the institutions to be insolvent, and their stock perfectly worthless. But I am yet to learn that a law which punishes a man for obtaining the property of his unsuspecting neighbor by means of any wilful misrepresentation, or deliberate falsehoood, with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid for the respectable merchants and other fair business men of the city of New York, or any other part of the state. Neither

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[v] See also the very interesting and well-digested opinion of Recorder Vaux, in Hutchinson and Turner's case, which are in fact the first instances in Pennsylvania, in which the law was settled. (Recorder's Decisions, 47, 75; ante, § 1441.)

[w] People *v.* Haynes, 14 Wendell, 559.

do I believe that any honest man will be in danger of becoming a tenant of the state prison, if the statute against money, or other things of value, by false and fraudulent pretences, is carried into full effect, according to the principles of the decisions to which I have referred. But it may indeed limit and restrain the fraudulent speculations and acts of some, whose principles of moral honesty are regulated solely by the denunciations of the penal code. The law on this point, as laid down by the Supreme Court in this and numerous other cases, is unquestionably the settled law of the land, in conformity with both the spirit and the intent of a positive legislative enactment."

§ 2083. "It should be remembered, however," to use the qualification of a judge, to whom criminal law in America is peculiarly indebted for the good sense, clear-headedness, and humanity with which, in the Philadelphia courts, for nearly a quarter of a century, it was administered by him, "that the term false pretence is of great latitude, and may be made to embrace any and every false representation made by a party fraudulently obtaining property from another, which a prosecutor will swear has induced him to part with such property. Is this act to have a range so wide and sweeping as this, or is it to be limited in its operation? and in what does such limitation consist? Although, in ethics, every misrepresentation is morally wrong, yet if so severe a standard of conduct is to be introduced into our criminal code, it is plainly to be seen that breach of contract and crime will scarcely be divided by an appreciable line, and that criminal tribunals will hereafter be employed in punishing infamously, acts which have heretofore been understood as only creating civil liabilities. A rule of such extreme urgency might, in some instances, justly chastise a bad man, but it could not fail to be terribly abused by exasperated or reckless creditors, smarting under losses, and stimulated by the fierce spirit of revenge, for wrongs supposed or real."[x]

§ 2084. To the same effect remarks Rogers, J., in a case of malicious prosecution: "The act is intended to punish a criminal offence, not to be used as a means of collecting debts, however just; and to suffer it to be perverted for that purpose, will necessarily lead to great injustice and oppression. We are not without reason for believing that it has been already used as an instrument to wring money from the sympathy and fear of friends, as well as a means of extortion from the timid on pretended demands. A stranger from another or distant state may or has been compelled to pay unjust, or at least contested demands, rather than encounter the risk, expenses and mortification of attending a prosecution for fraud, knowing that the charge may be supported by the oath of the prosecutor himself. When, therefore, we find that the creditor, instead of pursuing the supposed criminal to judgment, stops short on receiving the amount of his demand, and discharges the accused from any other proceeding, what is the rational inference? What are we to conclude but that his de-

[x] King, J., Com. *v.* Hutchinson, 2 Parsons, 309; 2 Penn. Law Jour. 242.

sign was to collect his debt, rather than punish the offender in promotion (violation ?) of the very object and intention of the act."[y]

I. Character of the pretences.

1st. As to defendant's means.

§ 2085. The rule may be broadly stated, that any designed misrepresentation of the defendant's means, by which he obtains goods of another, is within the statute.

§ 2086. Whether or not the pretence that the defendant was a man of wealth and credit, when unsustained by other allegations, is enough to support an indictment, is a question which does not appear in England to have received an express decision ; though a late case, already cited,[z] certainly goes a great way to establish the affirmative doctrine. In Conger's case, before Colden, mayor of New York,[a] it was held that fraudulently obtaining goods on such a pretence was indictable. In a later case,[b] the defendant representing himself to be in successful business as a merchant in Boston, worth from $9000 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; the truth appearing in evidence that he was at the time wholly insolvent.[c] The case of People *v.* Conger, was there recognized by the court, and Nelson, J., delivering the opinion, said that there was no doubt the case came within the mischief intended to be met by the statute. In a later case, in the same court, it was held that where the defendant, then a minor, fraudulently obtained goods by falsely representing himself to be a joint owner with his father of a number of cows and other stock on a neighboring farm, he was within the statute, and his minority did not avail in a criminal action, although it would have been otherwise in a civil.[d] So, in an indictment in Pennsylvania, the first count averring the pretence to be, "that he, the said J. A. B., possessed a capital of eight thousand dollars, that the said eight thousand dollars had come to him through his wife, it being her estate, and that a part of it had already come into his possession, a part would come into his possession in the month then next ensuing, and that for the remaining part thereof, he would be obliged to wait for a short time;" the second, that he, the said J. A. B., "possessed a capital of eight thousand dollars, which said eight thousand dollars had come to him through his wife, it being her estate;" and the third, "that he, the said J. A. B., was then and there possessed of eight thousand dollars." On demurrer, the pretences were held within the statute, and the court seemed to think that under the Pennsylvania act a construction was to obtain more

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[y] Prough *v.* Entriken, 1 Jones, 84, Rogers, J.
[z] R. *v.* Henderson, 1 C. & M. 328.
[a] People *v.* Conger, 1 Wheeler's Crim. Cases, 449.
[b] People *v.* Haynes, 11 Wend. 565.
[c] Ibid.
[d] People *v.* Kendall, 25 Wend. 399.

liberal than that given by the English authorities. "A professed intent," said the Chief Justice, in stating the English doctrine, "to do an act which the party did not mean to do, as in Rex *v.* Goodall,[e] and Rex *v.* Douglas,[f] is the only species of false pretences to gain property not indictable. These two cases, having been decided by the twelve judges, are eminently entitled to respect; but I think it at least doubtful whether a naked lie, by which credit has been gained, would not in every case be deemed within our statute, which declares it a cheat to obtain money or goods 'by any false pretence 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 statute, and *a fortiori* within our own. In Rex *v.* Jackson,[g] 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.[h] But Regina *v.* Henderson and another,[hh] is still more to the purpose. The prisoners falsely pretended that one of them was possessed of 12*l.*, which he agreed to give for his confederate's horse, for which it was proposed that the prosecutor should exchange his mare; and this was held to be 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 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,[i] a false pretence is within the English statute whenever it has been the efficient cause of obtaining credit, the false pretence before us is within our own."[j]

§ 2087. In a case in Philadelphia, two distinct false pretences were averred; one that the defendant had in the hands of his guardians in New York, an estate equal to two thousand dollars a year; the other, that he would procure and bring on from New York money from his mother to pay the prosecutor. "In considering these pretences," said King, President J., "I will reverse the order, examining the last first. If the indictment rested solely on this, it could not be supported. Like the case of King *v.* Goodall, and King *v.* Clifford, it is merely a promise for future conduct; a representation that the party could or would get the money from his mother, though he knew he could not.[k] But the representation that his guardian was a gentleman of fortune in New York, having property in his hands belonging to him, equal to two thousand a year, is

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[e] Russell & Ryan, 461.
[f] 1 Moody's Crim. Cases, 262.
[g] 3 Camp. 370; Com. *v.* Burdick, *infra*.
[h] 2 Car. & P. 825.
[hh] 1 Car. & Marshm. 183.
[i] 2 East, P. C. 80.
[j] Com. *v.* Burdick, 2 Barr, 163; 5 Penn. Law Journ. 173.
[k] Com. *v.* Hutchinson, 2 Penn. Law Journ. 244; 2 Parsons, 309.

the assertion of the existence of a fact calculated to give him credit, and to impose upon a person of ordinary caution, and consequently within the act. It is quite as strong as the existence of the pretended bet, in the King *v.* Young, or the pretence of Count Villeneuve, in the case by Justice Buller, by which Sir Thomas Broughton was induced to advance. Books of entries and precedents, though not of a direct authority, are still of some value in inquiries like the present, and in the Crown Circuit Comp. 176, a respectable work, we have the precedent of an indictment under the statute 30 Geo. 2, c. 24, where the false pretence consists in the defendant asserting himself to be a merchant of great fortune, who wanted to purchase horses to send abroad, and that he was a house-keeper. This precedent is adopted by Chitty, (C. L. iii. 768,) except that his precedent charges several as being concerned in the cheat with the defendant in falsely representing himself as a wealthy merchant."[l]

§ 2088. Where the pretence was that the defendant owned real estate on Passyunk road, worth seven thousand dollars, and that he had personal property and other means to meet his liabilities, and that he was in good credit at the Philadelphia Bank, the case was held within the statute.[m]

§ 2089. An indictment charging 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, is substantially good under the Missouri Statute.[n]

A false representation that the defendant had money in the hands of a third person, absent at the time, sufficient to take up a note, to which, by means of the representation thus made, the prosecutor's signature was obtained, is within the statute.[o]

§ 2090. Where the defendant falsely represented that he had a capital of two thousand dollars, and by that means obtained the property of the prosecutor, it was held, that the case was within the statute.[p]

§ 2091. In an indictment for cheating by a false pretence, it was alleged, that the defendant represented that he was a partner in trade with another person who had put into the partnership a capital of one thousand dollars, which they (the defendant and his partner) then had invested and employed in their partnership business, and that the co-partners were worth property of the value of fifteen hundred dollars, and did not owe debts amounting to more than three hundred dollars; it was held, that evidence of the individual indebtedness of the defendant and his partner was not

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[l] Com. *v.* Hutchinson, 2 Penn. Law Journ. 244; 2 Parsons, 309.
[m] Com. *v.* Crossin, 3 Penn. Law Journ. 219.
[n] State *v.* Newell, 1 Miss 177.
[o] People *v.* Herrick, 13 Wendell, 87.
[p] Com. *v.* Poulson, 6 Penn. Law Journ. 272.

admissible to prove that the representations as to the solvency of the partnership were false.[q]

2d. As to defendant's character and personality.

§ 2092. It is very clear that a false representation of the *status* of the defendant, brings him within the statute. Thus, where a carrier falsely pretending that he had carried certain goods to A. B., demanded, and thereupon obtained from the consignor sixteen shillings for carriage of them, it was held within the statute.[r] In another case, where the carrier falsely pretended that goods, given by him for carriage, had been delivered, but that he had left at home the receipt, the same rule was repeated.[s]

§ 2093. Where a person obtains goods under the false pretence that he lived with and was employed by A. B., who sent him for them, he is withhin the statute.[t]

§ 2094. A defendant was charged in the first count of an indictment with having falsely pretended that he was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, and thereby obtaining one sovereign, with intent to defraud G. P. of the same. The second count laid the intent to be to defraud G. P. "of the sum of five shillings, parcel of the value of the said last-mentioned piece of the current gold coin." It was proved that the defendant made the pretence, and thereby induced the prosecutor to buy, at the price of 5*s*., a bottle containing something which he said would cure the eye of the prosecutor's child. The prosecutor gave him a sovereign and received 15*s*. in change. It was further proved that the defendant was not Mr. H.; it was held, that this was a false pretence within the statute 7 and 8 Geo. 4, c. 29, s. 53, and that the intent was properly laid in the second count.[u]

§ 2095. The defendant obtained the goods from the prosecutors by pretending that he wanted them for one J. S., whom he represented as living at N., and being a person to whom he would trust £1,000, and who went out twice a year to New Orleans to take goods to his sons. The jury found that all the representations were false, and that the prosecutors, believing that the defendant was connected with the said J. S., and employed by him to obtain the goods, contracted with the defendant and not with the supposed J. S., and delivered the goods to the defendant for himself and not for J. S. It was held that the defendant was, under these circumstances rightly convicted of the offence charged in the indictment.[v]

§ 2096. Where an attorney, who had appeared for J. S., who was fined 2*l*. on a summary conviction, called on the wife of J. S., and told her that he had been with D. L., who was fined 2*l*. for a like offence, to Mr. B. and

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[q] Com. *v*. Davidson, 1 Cush. 33.
[r] R. *v*. Coleman, 2 East, P. C. 34.
[s] R. *v*. Airey, 2 East, R. 34.
[t] People *v*. Johnson, 12 Johns. R. 292; People *v*. Miller, 14 Johns. R. 371.
[u] R. *v*. Bloomfield, 1 C. & Mars. 328.
[v] R. *v*. Archer, 33 Eng. Law & Eq. 528.

Mr. L., and that he had prevailed on Mr. B. and Mr. L. to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.* he would go and do the same for her; and she thereupon gave him a sovereign, and paid him for his trouble; and it was proved that the attorney had never applied to Mr. B. or Mr. L., respecting either of the fines, and that both were paid in full, the defendant was convicted.[w]

§ 2097. Where a man assumed the name of another to whom money was required to be paid by a genuine instrument, this was holden to be a pretence within the meaning of the act.[x]

§ 2098. The assumption of a false name, or false personation generally, is within the statute, when property is thereby obtained.[y] Where the prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she had refused to ratify, in consequence of which he threatened her with an action, and thus obtained money from her; and where, during the whole transaction, it appeared he had a wife, the indictment presented two pretences: 1st, that he was unmarried; 2d, that he was entitled to bring an action against her for a breach of promise; it was held, (Lord Denman, C. J., and Maule J.,) that the case was within the statute, and that the fact of the prisoner paying his addresses to the prosecutrix was sufficient evidence to prove the first pretence.[z]

§ 2099. Where the secretary of an Odd Fellows' Society, falsely pretended to a member of the society, that the sum of 13*s.* 9*d.* was due by him to the society for fines incurred by him as a member, by means of which such secretary fraudulently obtained from him such sum of money, it was held to be a false pretence within the statute 7 & 8 Geo. 4, c. 29.[a]

§ 2100. To extort money by a false statement of an existing prosecution is within the statute. Thus it was held a false pretence to pretend falsely to the prosecutor that his daughter had committed a public offence, that a warrant had been issued for her, and that the defendant had come with the warrant, and thus to extort money.[b]

§ 2101. An indictment, it was said, in New York, will not lie when the money is parted with as a charitable donation, although the pretences moving the gift are false and fraudulent.[c] And it will be seen a statute was passed to cover the supposed deficiency.[cc] In England another view has been taken, it having been very lately expressly held that a begging letter, making false representations as to the condition and character of the writer; by means of which money is obtained, was a false pretence under the statute.[d]

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[w] R. *v.* Asterley, 7 C. & P. 191.
[x] R. *v.* Story, R. & R. 81.
[y] Com. *v.* Drew, 19 Pick. 179; R. *v.* Story, R. & R. 81; R. *v.* Barnard, Ib. 81; R. *v.* Hamilton, 9 Ad. & El. 276; Com. *v.* Daniels, 2 Par. 332; R. *v.* Archer, 1 Dears. C. C. 449.
[z] R. *v.* Copeland, R. & R. 517.
[a] R. *v.* Woolley, 1 Eng. R. 537.
[b] Com. *v.* Henry, 10 Harris, 253.
[c] People *v.* Clough, 17 Wend. 371.
[cc] Ante § 2075.
[d] R. *v.* Jones, 14 Jour. 533; 1 Eng. R. 533.

If the defendant obtain the money by a false pretence, knowing it to be false, it is no answer to show that the party from whom he obtained it laid a plan to entrap him into the commission of the offence.[e]

The unauthorized assumption of the dress of an Oxford student, and the obtaining money thereby is a false pretence under the statute.[f]

3d. As to the nature or value of goods or paper.

2102. An indictment alleging that the defendants falsely pretended to a third person, that a drove of sheep, which they offered to sell him, were free from disease and foot ail, and that a certain lameness, apparent in some of them, was owing to an accidental injury by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words, and an averment negativing the facts represented, is good.[g]

§ 2103. So 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, he was indictable under the statute.[h]

§ 2104. A false sample may be a false pretence. Thus, A. bought cheese of B. at a fair and paid for it. Before he bought it, B. was offering cheese for sale there, bored two of the cheeses with an iron scoop, and produced a piece of cheese, called a taster, at the end of the scoop, for A. to taste: he did so, believing it to have been taken from the cheese, but it had not, and was of a superior kind of cheese, and fraudulently put by B. into the scoop, the cheese bought by A. being very inferior to it:—It was held that B. was indictable for obtaining the price of the cheese from A. by false pretences.[i]

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

The prisoner having contracted to sell and deliver to the prosecutrix a load of coals at 7*d.* per cwt., delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and

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[e] R. *v.* Ady, 1 Mood. C. C. 224; ante, § 1859.
[f] Post, § 2113.
[g] People *v.* Crissie, 4 Denio, 525.
[h] State *v.* Mills, 17 Maine, 211.
[i] R. *v.* Abbott, 2 Car. & Kir. 629; S. C. 1 Den. C. C. 273.
[k] R. *v.* Bryan, 40 Eng. Law & Eq. 589.

he produced a ticket showing such to be the weight, which he said he had made out himself when the coals were weighed. She thereupon paid him the price as for 18 cwt., which was 2*s.* 4*d.* more than was his due. It was held that the prisoner was indictable for obtaining the 2*s.* 4*d.* by false pretences.[ii]

§ 2105. Selling under weight, when a pretence is made that the goods are of full weight, is within the statute. A baker had contracted with the guardians of a parish to deliver loaves of a certain weight to the poor people. The relieving officer gave the poor people tickets, which they were to take to the baker. He was to give them loaves on their presenting the tickets to him, and afterwards return the tickets, as his vouchers, once a week, with a statement of the amount of the loaves, to the relieving officer, who would give him credit in his account for the amount. The baker was to be paid by the gardians some months later; and by a clause in the contract the guardians had the power, in case of a breach of contract by the baker, of deducting any damages caused by such breach from the amount to be ultimately paid. The baker supplied the poor people who presented tickets with loaves short of the contract weight. It was held that though this was not a fraud indictable at common law, the baker, by returning the tickets for these loaves to the relieving officer, was guilty of falsely pretending that the loaves were of full weight; and though he only obtained credit for their amount in the books of the relieving officer, (as the time of payment had not arrived before detection,) yet that the baker might be indicted for attempting to obtain money by the false pretence, as the making the false pretence was an act done with the intent of obtaining the money, and was sufficiently proximate to the obtaining it to be considered an attempt to obtain it, since no other act remained to be done by the baker to entitle him to receive it.[j]

A. applied to B. for a loan upon the security of a piece of land, and falsely and fraudulently represented that a house was built upon it, B. advanced the money upon A.'s signing an agreement for a mortgage, depositing his lease, and executing a bond as collateral security. It was held, that A. was properly convicted of obtaining money by false pretences.[jj]

§ 2106. A false warranty of title, however, has been said in England to be excluded. Thus where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it with the usual covenant for title, Littledale, J., held that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as such, and the party be transported.[k] This case, however, has since been much doubted in

[ii] R. *v.* Sherwood, 40 Eng. Law & Eq. 584.
[j] R. *v.* Eagleton, 33 Eng Law & Eq. R. 540.
[jj] Regina *v.* Burgon, 36 Eng. Law & Eq. 615.
[k] R. *v.* Codrington, 1 C. & P. 661.

England,[l] and in this country is hardly to be considered as law. The only case with us in which it has been expressly affirmed is in Missouri,[m] where it was held that a sale of a slave with a false warranty of title, the seller knowing at the time he had no title, was not within the statute.

§ 2107. Obtaining goods by giving in payment a check upon a banker with whom the party keeps no account, and which he knows will not be paid, was held within the 30 Geo. 2, c. 24.[n] So, where one in 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, he was held liable to indictment for obtaining such agent's goods by false pretences.[o] But where the prisoner passed the note of a country bank which he knew had stopped payment, it appearing that one of the partners were solvent, Gaselee, J., held that he could not be convicted for obtaining money under false pretences.[p]

§ 2108. Where a false allegation of the value of paper is distinctly made, the case is within the statute. Thus, where the prisoner was charged with falsely pretending that a post-dated check, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain; and the jury found that, before the completion of the sale and delivery of the watch by the prosecutor to the prisoner, he represented to the prosecutor that he had an account with the bankers on whom the check was drawn, and that he had a right to draw the check, though he postponed the date for his own convenience, all which was false; and that he represented that the check would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, or that he had the funds to pay it; he was held to be properly convicted.[q] Where a man obtained goods and money for a forged note of hand for ten shillings and sixpence, the judges held it to be a false pretence within the act.[r] In a recent case, however, where the prisoner obtained goods by means of a forged order, Taunton, J., is reported to have held that he could not be indicted for obtaining goods by false pretences, but for forgery.[s] Where, upon an exchange of personal property, one of the parties falsely and fraudulently pretends that the property, which he is parting with belongs to himself and is unincumbered, and at the same time affirms that he will warrant it against incumbrances, an indictment may be sustained against him, if the false pretences and not the warranty was the inducement which operated upon the other party to make the exchange.[t]

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[l] R. *v.* Kendrick, 5 Q. B. 49; Dav. & M. 208; R. *v.* Abbott, *infra*.
[m] State *v.* Chunn, 19 Mo. 233.
[n] R. *v.* Jackson, 3 Campbell, 370; 2 East, P. C. 940; R. *v.* Parker, 2 Mood. C. C. 1; 7 C. & P. 825.
[o] Com. *v.* Wilgus, 4 Pick. 177; post, § 2113.
[p] R. *v.* Spencer, 3 C. & P. 420.
[q] R. *v.* Parker, 7 C. & P. 825.
[r] R. *v.* Freeth, R. & R. 127.
[s] R. *v.* Evans, 5 C. & P. 553.
[t] State *v.* Dow, 3 Redding, 498.

§ 2109. It may now be considered as settled that the passing of a spurious bank note is a cheat within the statute.[u]

Passing off a flash note as a bank of England note, on a person unable to read, and obtaining from him in exchange for it five pigs, of the value of £3 17*s.* 6*d.*, and £1 2*s.* 6*d.* change, is also within the statute.[v]

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

4th. THE PRETENCES AT THE TIME MUST HAVE BEEN FALSE.

§ 2110. Where a promissory note of A. B. & Co. was paid away on pretence it was good and available, it was not sufficient to show that the defendant knew the house of A. B. & Co. to be shut up, and two out of the three partners bankrupt.[x]

§ 2111. In a late case, however, it was held by the Supreme Court of Massachusetts, that where a person pretended that the bill of an insolvent bank was worth its nominal value, it was not necessary, in order to prove that the bill was worthless, to show that none of the stockholders of the bank were solvent, or that each of them had already paid in the whole amount of his stock.[y]

§ 2112. Where the indictment charged the defendant with falsely pretending to the prosecutor, whose mare and gelding had strayed, that he would tell him where they were if he would give him a sovereign down; and the prosecutor gave the sovereign, but the defendant refused to tell: the conviction was held bad; the indictment should have stated that he pretended he knew where they were.[z]

5th. THEY NEED NOT BE IN WORDS.

§ 2113. The conduct and acts of the party will be sufficient, without any verbal assertion. Where a man assumed the name of another to whom money was required to be paid by a genuine instrument, it was held indictable.[a] And where a person at Oxford, who was not a member of the university, went, for the purpose of fraud, wearing a commoner's cap and gown, and obtained goods, it was held within the act, though not a word passed.[b]

6th. THEY NEED NOT BE BY THE DEFENDANT PERSONALLY.

§ 2114. Where two persons are jointly indicted for obtaining goods by

[u] Com. *v.* Hulbert, 12 Metc. 446; Com. *v.* Stone, 4 Metc. 48.
[v] R. *v.* Coulson, 1 Eng. R. 550.
[w] R. *v.* Barnes, 2 Den. C. C. 59.
[x] R. *v.* Spencer, 3 C. & P. 420.
[y] Com. *v.* Stone, 4 Metc. 43.
[z] R. *v.* Douglass, 1 Mood. C. C. 462.
[a] R. *v.* Story R. & R. 81; R. *v.* Barnard, R. & R. 81; see ante, § 2106.
[b] See Com. *v.* Daniel, 2 Parsons, 332; ante, § 2101.

false pretences, made designedly and with intent to defraud, evidence that one of them, with the knowledge, approbation, concurrence and direction of the other, so made the false pretences charged, warrants the conviction of both.[c]

§ 2115. An allegation in the indictment, that the defendant obtained goods of A. B. and C., partners in trade, by false pretences made to them, is supported by proof that the defendant made the alleged false pretences to their clerk and salesmen, who communicated them to B., and that the goods were delivered to the defendant in consequence of those false pretences.[d] And it is not necessary, in order to convict the defendants in such case, to prove that they, or either of them, obtained the goods on their own account, or derived, or expected to derive, personally, any pecuniary benefit therefrom.[e]

§ 2116. An indictment charged the prisoner with attempting, by false pretences, made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial it was proved that the prisoner made the false pretences set forth in the indictment to J. B. only, with intent to defraud J. B. and others, his partners, of property belonging to the firm; it was held that there was no variance between the indictment and the proof, as the words "and others," in the allegation that the false pretence was made "to J. B. and others," might be rejected as surplusage.[f]

§ 2117. On the trial of an indictment for obtaining money by false pretences, the prosecutor cannot prove false pretences made by a third person, alleged to have been made by the procurement of the defendant, without first showing that the defendant instigated such person to make them; and it seems that in such cases the order of producing the evidence is not a matter of discretion.[g]

7th. THEY MUST RELATE TO A PAST OR PRESENT STATE OF THINGS.

§ 2118. A false pretence, under the statute, must relate to a past event or existing fact. Any representation in regard to a future transaction is excluded.[gg] Thus, for instance, a false statement that a draft, which the defendant exhibits to the prosecutor, has been received from a house of good credit abroad, and is for a valuable consideration, on the faith of which he obtains the prosecutor's goods, is within the law; a promise to deposit with him such a draft at some future time, though wilfully and intentionally false, and the means of the prosecutor parting possession with his property, is not. A pretence that the party would do an act that he did

[c] Com. *v.* Hardy, 7 Metc. 462; R. *v.* Moland, 2 Mood. C. C. 271; Cowen *v.* People, 14 Ill. 348, post, § 2143.
[d] Com. *v.* Hardy, 7 Metc. 462; R. *v.* Moland, 2 Mood. C. C. 271; Cowen *v.* People, 14 Ill. 348, post, 2145.
[e] Ibid.
[f] R. *v.* Kealey, 1 Eng. R. 585; 2 Den. C. C. 68.
[g] Per Bronson, C. J., People *v.* Parish, 4 Denio, 153.
[gg] Dillingham *v.* State, 5 Ohio (N. S.) 280.

not mean to do, (as a pretence that he would pay for goods on delivery,) was holden by all the judges not to be a false pretence, within the statute of George 2;[h] and the same rule is distinctly recognised in this country.[i]

§ 2119. Where a person got possession of a promissory note, by pretending he wanted to look at it, and then carried it away, and refused to deliver it to the holder, it was held to be a mere private fraud, and not punishable criminally.[j]

8th. THEY MUST HAVE BEEN THE OPERATIVE CAUSE OF THE TRANSFER.

§ 2120. Where, in Massachusetts, one of the representations proved was, that the defendant gave a false name, and where the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods, it was held to have been the duty of the court, either at the time or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant;[k] and in that State, it is well settled that the pretences, to be good, must have been the *decisive* cause of the transfer.[l]

§ 2121. The New York rule is less stringent.[m] Thus it was held that it is not necessary to a conviction that the false pretences should be the sole inducement by which the property in question is parted with; if they have controlling influence, it is enough, although other minor considerations operate upon the mind of the party. And in Maine, the same law obtains;[n] and so in England.[o]

§ 2122. It must clearly appear, however, that the false pretences were operative in producing the transfer of possession. If they were not made use of until after the bargain was consummated, it cannot be said, with truth, that it was by force of them the property was obtained. Thus, 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

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[h] R. *v.* Goodhall, R. & R., 461; R. *v.* Wakefield, 1bid. 504; R. *v.* Oates, 1 Dears. C. C. 459; 29 Eng. Law & Eq. 552.

[i] Com. *v.* Drew, 19 Pick. 184; Com. *v.* Burdick, 2 Barr, 163; People *v.* Haynes, 11 Wend. 565; 14 Ibid. 550; Burrow *v.* State, 7 Eng. (Ark.) 65, ante, § 2087.

[j] People *v.* Miller, 14 Johns. R. 371.

[k] Com. *v.* Davidson, 1 Cush. 33.

[l] Com *v.* Drew, 19 Pick. 179; see Com. *v.* Herschell, Thacher's C. C. 70.

[m] People *v.* Herrick, 13 Wend. 87; see People *v.* Stetson, 4 Barbour, 151.

[n] State *v.* Mills, 17 Maine R. 211. [o] R. *v.* Hewgill, 24 Eng. Law & Eq. 556.

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.[p] Where a prisoner was charged with obtaining a filly by the false petence that he was a gentleman's servant, and had lived at Bream, and had bought twenty horses at Bream fair; and it appeared that he bought the filly of the prosecutor for eleven pounds, making him this statement, which was false, and telling him also that he would come down to the Cross Keys and pay him: and the prosecutor stated that he parted with the filly, because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, &c.; the prisoner was held to be entitled to an acquittal.[q]

The prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding it withstood the test, he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge. It was held, that if the money had been obtained by the statement made by the prisoner, he might have been convicted of obtaining it by false pretences; but that, as the prosecutor relied entirely upon his own examination, and not upon the false statement, the prisoner was properly found guilty of an attempt to commit that offence.[qq]

The prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. It was held, that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence.[r]

§ 2123. When statements were made on different occasions, it is for the jury to say whether they were so connected as to form one transaction.[rr]

§ 2124. It is wholly unnecessary to aver *how* the false pretence was calculated to do the mischief.[s] Thus, when the indictment merely stated that the defendant, by falsely stating that he was a captain in the army, &c., obtained a security, &c., Lord Denman, C. J., with the concurrence of all the judges, said: "We can easily conceive how a belief that the defendant was a captain in the army, might lead the other party to give the security: but it is a matter to be shown by the evidence."[t]

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[p] People *v.* Haynes, 14 Wend. 546. [q] R. *v.* Dale, 7 C. & P. 352, post § 2162.
[qq] R. *v.* Roebuck, 36 Eng. Law & Eq. 631, post § 2126.
[r] R. *v.* Gardner, 36 Eng. Law & Eq. 640.
[rr] R. *v.* Welman, 20 Eng. Law & Eq. 588.
[s] R. *v.* Hamilton, 9 Ad. & El. (N. S.) 376. [t] Ibid.

§ 2125. Where the foreman of a manufactory, who was in the habit of receiving from his master money to pay the workmen, obtained from him by means of false written accounts, more than he had really paid them, or they had earned, it was held within the act: and all the judges, after much deliberation, agreed, that *if the false pretence created the credit*, the case was within the statute; and they considered that, in this case, the defendant would not have obtained the credit but for the false account which he had delivered, and, therefore, that he was properly convicted.[u]

The prosecutor in a trial for obtaining an endorsement by false pretences, may testify to the influence of the defendant's representations in inducing him to indorse.[uu]

§ 2126. It is an essential ingredient of the offence, that the party alleged to have been defrauded should have believed the false representations to be true, for if he knew them to be false, he cannot claim that he was influenced by them.[v]

§ 2127. An indictment on the Rev. Sts. of Mass. c. 126, s. 32, alleged that G. designedly and unlawfully did pretend to N. that A. wanted to buy cheese of N. and had sent G. to buy it for him, and that a certain paper described, purporting to be a ten dollar bill, of the Globe Bank, in the city of New York, was a good bill and of the value of ten dollars; by means of which false pretence said G. unlawfully obtained from said N. forty pounds of cheese, of the value of four dollars, and sundry bank bills and silver coins amounting to and of the value of six dollars, with intent to cheat and defraud, whereas the said A. did not want to buy cheese of the said N., and had not sent G. to him for that purpose, and the said paper was not a good bill of the Globe Bank, in the city of New York, and was not of the value of ten dollars, but was spurious and worthless. It was held, on motion in arrest of judgment, that the false pretences set forth were such as might have been effectual in accomplishing a fraud on N. in the manner alleged; that neither the omission to allege that G. knowingly made the false pretences, nor the omission to mention any person whom he intended to defraud, rendered the indictment bad, and that there was no objection to the indictment on the ground of duplicity.[w]

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

§ 2128. It must be clear that it was by means of the pretences averred in the indictment that the property was obtained, though it is a subject on which there has been some conflict of opinion whether the pretences should of themselves be of a character which would necessarily impose upon a

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[u] R. *v.* Whitehall, 2 East, P. C. 830.

[uu] People *v.* Miller, 2 Parker C. R. (N. Y.) 197.

[v] People *v.* Stetson, 4 Barbour, 151; R. *v.* Mills, 40 Eng. Law & Eq. 562, ante, § 2122.

[w] Com. *v.* Hurlbert, 12 Metc. 446.

[ww] People *v.* Miller, 2 Parker C. R. (N. Y.,) 197.

man of ordinary caution. In an English case, Lord Denman, C. J., said, in answer to the statement that the false pretences, to become the subject of indictment, should be such as would deceive a man of average intelligence, "I never could see why that should be. Suppose a man has just enough (fraud) to impose upon a very simple person, and defraud him; how is it to be determined whether the degree of fraud is such as will amount to a misdemeanor?"[x] It seems now settled, that as a general rule, want of prudence on the part of the prosecutor is no defence, when the prosecutor was really imposed upon.[y] Thus on an indictment, averring the defendant did falsely pretend that eleven thimbles which he then produced, were silver, and of the value of five shillings, and more, &c., whereas in fact they were of base metal, a conviction was sustained by several of the judges on this very ground.[z]

§ 2129. To this rule, however, some exception has been taken. Thus, in New York, it has been laid down that a representation, though false, is not within the statute unless calculated to deceive persons of ordinary prudence and discretion.[a] So in Pennsylvania, it was said, "Broad, however, as is the phrase for any false pretence whatever, it still has a legal limit beyond which it cannot be carried in this or any other case. It extends no farther than to a case where a party has obtained money or property by falsely representing himself to be in a situation in which he is not, or any occurrence which has not happened, *to which persons of ordinary caution might give credit.* Where the pretence is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act."[b] And the same rule obtains in Arkansas.[c] In Pennsylvania, however, such is no longer the law, it being now held that "it is no less a false pretence that the party imposed upon might, by common prudence, have avoided the imposition."[d] And in New York, the position first taken has been greatly qualified.[e] "Though the language of the statute, 'by any other false pretence,' is exceedingly broad," says Jewett, J., in a late case, "and in its general acceptation would include every kind of false pretence, and though it may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection, still I do not think it should be so interpreted as to exclude cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of detection at hand. The object of the statute, it is true, was to protect the weak and credulous against the wiles and stratagems of the artful and cunning. But this may be accomplished under an interpretation which should require the

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[x] R. *v.* Wickham, 10 Ad. & E. 34.
[y] R. *v.* Woolley, 1 Den. C. C. 559; Com. *v.* Henry, 10 Harris, 256.
[z] R. *v.* Ball, 2 Russ. on Cr. 289; 1 C. & Mars. 240.
[a] People *v.* Williams, 4 Hill, 9.
[b] Com. *v.* Hutchinson, 2 Penn. Law Journ. 243; see, also, Com. *v.* Spring, 3 Penn. Law Journ. 89
[c] Currow *v.* State, 7 Eng. (Ark.) 65.
[d] Com. *v.* Henry, 10 Harris, 256, Woodward, J.
[e] See post, § 2130.

representation to be an artfully contrived story, which would naturally have an effect upon the mind of the person addressed—one which would be equal to a false token or false writing—an ingenious contrivance or unusual artifice, against which common sagacity and the exercise of ordinary caution would not be a sufficient guard."[f]

§ 2131. It is submitted, however, that whether the prosecutor "had the means of detection at hand,[g]" or whether "the pretences were of such a character as to impose upon him, are questions of fact, to be left to the jury, as they must necessarily vary with the particular case.[g]

§ 2132. Where there is any degree of culpability or complicity on part of the prosecutor, he cannot sustain the prosecution. Thus it was held, on a demurrer, that an indictment for obtaining a watch from a person, upon the false representation that the defendant was a constable, and had a warrant against such person, issued by a justice of the peace, for the crime of rape, and that he would settle the same if the person defrauded would give the defendant the watch, could not be sustained. The reasoning of the court seems to have been, that if the prosecutor was guilty of rape, he was in some degree "*particeps criminis*" with the prisoner, and hence could make out no case; and if he was not guilty, the pretences were not sufficiently reasonable to impose upon a prudent man of average intelligence.[h]

§ 2133. It is no defence that the prosecutor made false representations as to the goods obtained.[i]

While a false affirmation is now held to be within the statute,[j] such is not the case with loose talk, or the statement of mere matter of opinion. Thus where a servant went into the prosecutor's store, and said he wanted some money for his master to buy some wheat, and the prosecutor gave him ten pounds, this was held not within the statute.[k] And so where the

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[f] People *v.* Crissie, 4 Denio, 529, Jewett, J.; see People *v.* Stetson, 4 Barbour, 151; ante, § 2129.

[g] See R. *v.* Hamilton, 9 Ad. & El. (N. S.) 270; People *v.* Haines, 14 Wend. 537. Mr. Vaux's collection of "Recorder's Cases," gives an amusing illustration of this kind of false pretence, *i. e.*, the "humbugging." A Col. J. S. Jones seized the opportunity of the presence, in Philadelphia, of the President of the United States and the Governor of Pennsylvania, to announce a concert for the joint benefit of the "Dartmoor prisoners," certain relics of the war of 1812, well known in Philadelphia on all public celebrations, and of a volunteer company of which he was the head. Inflated with the belief of the immensity of the attraction, Jones proceeded to a man named Sutton, who kept an oyster cellar, and communicated to him the most extravagant statements of the crowds who were expected to attend, and of the great advantage to Sutton, if he could secure the situation of refreshment provider. This all might have passed without risk, but Jones went further, and informed Sutton that he, Jones, had already received seventy-five dollars for the refusal of the place. This suggestion was at once effectual, and Sutton paid down seventy-five dollars in cash. The result was, that the concert was wretchedly attended, "only nineteen dollars and fifty cents were received at the door." and Col. J. S. Jones was bound over for obtaining the seventy-five dollars by false pretences.

[h] People *v.* Stetson, 4 Barbour, 151, 152; see ante, for case where the prosecutor sought to entrap the defendant.

[i] Com. *v.* Morrill, 8 Cush. 571.

[j] R. *v.* Hamilton, 9 Ad. & El. (N. S.) 270; Com. *v.* Henry, 10 Harris, 256.

[k] R. *v.* Smith, 2 Russ. on Cr., 312.

indictment alleged that the defendant falsely pretended a sum of money, parcel of a certain larger sum, was "due and owing" to him for work which he had executed for the prosecutors, it was held that this was not an allegation of a false pretence of an existing fact, as the allegation in the indictment might be satisfied by evidence of a mere matter of opinion, either as regarded fact or law; and therefore the indictment was bad.[1]

III. Property included by statutes.

§ 2134. The construction of the New York statute, as to "signatures to a written instrument," has been already noticed, and as has been seen, the law in that state now is, that it is necessary to make up the offence, that the instrument should be of such a character as likely to work a prejudice to the signer, but that the fact that it would have been void for fraud will be no defence.[m]

In Pennsylvania it was held that the obtaining a receipt in discharge of a debt, by means of a worthless note of a broken bank, is not within the 21st section of the act of 12th July, 1842, the reasoning of the court seeming to be that the receipt was a thing of no account, not being an extinguishment of the debt.[n]

§ 2135. G., secretary to a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer in the following form:

"Bolton United Burial Society, No. 23.

Bolton, September 1st, 1853.

Mr. A. Entwistle, Treasurer:—Please pay the bearer £2 10s., Greenhalgh, and charge the same to the above society.

Robert Lord. Benjamin Beswick, President."

It was held that this was a valuable security under the 7 & 8 Geo. IV, c. 29, s. 53, as explained by the 5th section of the same statute.[o]

§ 2136. A railway ticket is a "chattel," and the obtaining it by false pretence from a servant of the company, so as to enable the holder to travel on the line, is an obtaining a chattel by false pretence, within the stat. 7 & 8 Geo. IV, c. 29, s. 53.[p]

§ 2137. A false representation to induce a party to pay an honest debt, is not within the statute, though payment be thereby obtained.[q] Accordingly, where an indictment charged that T., who held a promissory note against J., which was due, called for payment, and with intent to defraud J., falsely represented the note to have been lost or burned up, whereby the latter was induced to pay it; it was held insufficient to sustain a con-

[1] R. *v.* Oates, 29 Eng. Law & Eq. Rep. 552; 1 Dears. C. C. 188.
[m] People *v.* Crissie, 4 Denio, 525.
[n] Moore *v.* Com., 3 Barr, 260.
[o] R. *v.* Greenhalgh, 25 Eng. Law & Eq. 570.
[p] R. *v.* Boulton, 2 Car. & Kir. 917; S. C. 1 Den. C. C. 508.
[q] Com. *v.* Thompson, Lewis' Crim. Law, 197; cited Com. *v.* Henry, 10 Harris, 256.

viction, as not showing any legal injury resulting to J., nor an intent on the part of T. to work such injury.[r]

§ 2138. It would seem also, that the mere obtaining of credit is not within the statute. Thus where, to induce his bankers to pay his checks, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid; in consequence of which the bankers paid money for him, it was holden not to be within the act, because he only obtained credit, and not any specific sum on the bill.[s] But it is with much deference submitted, that when the money or goods ultimately pass on the credit so obtained, the statutory offence is consummated.

§ 2139. In England, it is said,[t] that when the goods have been obtained, an intent to defraud need only be proved, and not an actual defrauding; and the same rule was afterwards adopted in New York,[u] where it was held that it is not necessary to charge loss or damage to the prosecutor; the offence being complete when the goods, &c., are obtained by false pretences, with intent to cheat and defraud; and it not being essential that actual loss or injury should be sustained.

§ 2140. The money must have been obtained for the defendant's use and benefit, and at his wish and desire. Thus, in an English case, tried in 1853, the prisoner, who had a circular letter of credit for £210 from a bank at New York, authorizing him to draw for that sum on the Union Bank of London, in favor of certain named correspondents in foreign countries, went to St. Petersburgh, and having fraudulently altered the figures in the letter of credit, so as to make it appear to be a letter of credit for £5210, presented it so altered to W. & Co., St. Petersburgh, one of the specified correspondents, and drew in their favor on the Union Bank a check for the sum of £1200. This check was cashed for the prisoner by W. & Co., who sent it to London, and had it presented at the Union Bank; but the bank, discovering the fraud, refused to pay it. It was held that the prisoner was not indictable for an attempt to obtain £1200, by false pretences from the Union Bank, since, if W. & Co. had obtained payment, it would not have been in pursuance of the prisoner's wish or desire; and they would have obtained the money for their own and not for the prisoner's use or benefit, and therefore there would have been no obtaining of any money by him. Lord Campbell, C. J., said, "I am of opinion that this conviction cannot be sustained. The question is, whether, supposing the Union Bank had honored the check, the prisoner could have been indicted under this act of Parliament for obtaining money by false pretences. I am clearly of opinion that he could not. I do not proceed on the ground of the offence having been committed beyond the jurisdiction of the criminal courts of this country; for a person abroad may, by the

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[r] People *v.* Thomas, 3 Hill, N. Y. 169.
[s] R. *v.* Wavell, 1 Mood. C. C. 224.
[t] R. *v.* Bloomfield, 1 C. & M. 328.
[u] People *v.* Herring, 11 Wend. 18

employment as well of a conscious as an unconscious agent, render himself amenable to the law of England, when he comes within the jurisdiction of our courts. But I am clearly of opinion that this would not have been an obtaining money by false pretences within the meaning of the statute. I think the act means that the money should be obtained according to the wish, or to gain some object of the party who makes the false pretence. Here the obtaining it, was not to gain any object of the prisoner; no advantage could arise to him from the check being honored. He had gained his full object when he was in St. Petersburgh. It was a matter of perfect indifference to him whether Wilson & Co. did or did not obtain payment from the Union Bank. It would have been much more for his benefit had the check been lost at sea on its passage from St. Petersburgh to London. As has been observed, by my brother Coleridge, the object of the statute was, that in cases where there were nice distinctions between larceny and fraud, the party should not go unpunished; and it is with a view to the case of larceny that this enactment has been adopted by the Legislature. Now, with regard to larceny, we must always see that in the act alleged to constitute the offence, the person committing had some advantage, not necessarily a pecuniary advantage, but the gratification of some wish, otherwise it would not be larceny. We are pressed by the finding of the jury, that the prisoner meant Wilson & Co. to present the check. That merely amounts to this, that the prisoner foresaw and anticipated that the check would be presented for payment at the Union Bank; not that he wished it. In one sense, indeed, he may be said to have meant it; for a man is said to intend what is the natural consequence of what he does; but that is a subtlety of law that cannot be drawn in to show that it was the real wish of the prisoner that the check should be presented. To allow it to have that effect here would be confounding two different classes of offences. There has been a gross fraud, but no obtaining of money by false pretences, within the meaning of the act of Parliament."[v]

IV. Where the offence is triable.

§ 2141. Where money was transmitted in a letter, mailed at the defendant's request at A., and sent to the defendant at B., it was held that the venue was properly laid in A.[w]

Where false pretences were made, and the property delivered in one county, but the note in payment was made and delivered afterwards in another, the former is the proper place of trial.[ww]

§ 2142. Where a party residing in Ohio, and who had never been in the state of New York, fraudulently made receipts acknowledging the delivery

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[v] R. *v.* Garrett, 22 Law & Eq. 607; 6 Cox, R. 260.

[w] R. *v.* Jones, 1 Den. C. C. 551; 1 Temp. & Mew. C. C. 270; 4 Cox, C. C. 198; see also People *v.* Griffin, 2 Barbour, 427.

[ww] Skiff *v.* People, 2 Parker, C. R. (N. Y.) 139.

to him, as a forwarder, of a quantity of produce, for the use of a firm in New York, and subject to their order, when in fact he had not received such produce, and he employed innocent agents to present such receipts to the firm in New York, and obtain money thereon, which they did; it was held that the offence must be considered as committed in New York, where the money was obtained; that the employer was guilty as a principal, and that he was liable to be indicted and tried in New York for the offence.[x] And the same principle of the liability of a non-resident for his agent's criminal act, has been affirmed both in England and in Pennsylvania.[y]

The prisoner wrote and posted, in a county, a letter containing a false pretence, to the prosecutor, who received it in a borough. The prosecutor, in the borough, posted to the prisoner, in the county, a letter containing the money obtained by the false pretence, and which the prisoner received in the county. It was held, that under the stat. 7 Geo. IV. c. 64, s 12, which authorizes the trial in any jurisdiction where the offence is begun or completed, the prisoner might be tried for the offence of obtaining money by false pretences at the borough quarter sessions; part of the offence being making the false pretence, and the false pretence being made to the prosecutor in the borough where the letter containing the false pretence was delivered to him by the post-office authorities, whom the prisoner made his agents for that purpose.[yy]

The offence of "feloniously obtaining money by false pretences," consists in obtaining money with a fraudulent intent; the false pretence employed is only the means by which the offence is perpetrated. Where V. sold and delivered to J. a negro man, in the state of Ohio, representing him to be a slave, and received the purchase money, and executed the bill of sale in Kentucky, and the negro turned out to be a free man, it was held that the Kentucky courts had jurisdiction to try V. for the offence of feloniously obtaining money by false pretences, as the offence of so obtaining the money was committed in Kentucky.[z]

V. Indictment.[a]

1st. "That A. B." etc. (defendants) did "falsely, etc., pretend."

§ 2144. "Though an indictment for perjury," says Gabbett, "and one for

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[x] People *v.* Adams, 3 Denio, 190, 610.

[y] R. *v.* Garrett, 22 Law & Eq. 607; see ante, § 154; Com. *v.* Gillespie, 7 S. & R. 469.

[yy] R. *v.* Leech, 36 Eng. Law & Eq. 589. [z] Com. *v.* Van Suyl, 1 Metcalf's Ky. 1.

[a] For form, see Wh. Prec., as follows:—

(528) General frame of indictment.
(529) Form used in Massachusetts.
(530) Same in New York.
(531) Pretence that defendant was agent of a lottery, &c.
(532) Obtaining money by personating another.
(533) Pretence that defendant was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, whereby he induced the prosecutor to buy a bottle of ointment, &c., for which he received a sovereign, giving 15*s.* in change.

obtaining money, etc., by false pretences, etc., agree, in the manner above mentioned, as to the necessity in each of distinctly negativing the particular matters to be falsified; yet there is a distinction between these offences,

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(534) Against a member of a benefit club or society, for obtaining money belonging to the rest of the members under false pretences.
(535) Another form for same, coupled with a production to the society of a false certificate of burial.
(536) First count. Pretence that a broken bank note was good.
(537) Pretence that a flash note was good.
(538) Pretence that a worthless check or order was good.
(539) Another form for same.
(540) Obtaining goods by cheque on a bank where the defendant had no effects.
(541) Pretence that defendant was the agent of A. B., and as such had been sent by A. B. to C. D., to receive certain money due from the latter to the former.
(542) Pretending to be clerk of a steamboat, and authorized to collect money for the boat.
(543) Pretence made to a tradesman that defendant was a servant to a customer, and was sent for the particular goods obtained.
(544) Another form for same.
(545) Pretence that the defendant was entitled to grant a lease of certain freehold property.
(546) Pretence that the defendant was authorized agent of the Executive Committee of the Exhibition of the Works of Industry of all Nations, and that he had power to allot space to private individuals for the exhibition of their merchandise.
(547) Pretence that prisoner was an unmarried man, and that having been engaged to the prosecutrix, and the engagement broken off, he was entitled to support an action of breach of promise against her, by which means he obtained money from her.
(548) Pretence that defendants were the agents of P. N., who was the owner of certain stock and land, &c., the latter of which was in fact mortgaged.
(549) That defendant possessed a capital of eight thousand dollars, which had come to him through his wife, it being her estate, and that a part of it had already come into his possession, and a part would come into his possession in the month then next ensuing, &c.
(550) Second count. That defendant had a capital of $8000, which came through his wife.
(551) Third count. That defendant had a capital of $8000.
(552) Pretence that defendant was well off and free from debt, &c.
(553) Second count. Setting forth the pretence more fully.
(554) Pretence that certain property of the defendant was unincumbered, and that he himself was free from debts and liabilities.
(555) Pretence that defendant had then purchased certain property, which it was necessary he should immediately pay for.
(556) Pretence that a certain draft for $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.
(557) Pretence that a certain watch sold by defendant to prosecutor was gold.
(558) Obtaining money by means of a false warranty of the weight of goods.
(559) Obtaining money by a false warranty of goods.
(560) Falsely pretending that goods were of a particular quality.
(561) Pretence that a certain horse to be sold, &c., was sound, and was the horse called "Charley."
(562) Pretence, that a horse and phæton were the property of a lady then shortly before deceased, and that the horse was kind, &c.
(563) Second count. Like the first, except that the offering for sale was alleged to have been by T. K., the elder, only.

which is to be here particularly noticed; namely, that though several persons cannot be joined in one indictment for perjury, because the words spoken by one defendant cannot possibly be applied to another as his act in falsely uttering those very words, perjury being, in its nature, a *single* transaction; yet in the case of a cheat, if a number of persons are all present acting a different part in the same transaction, or if all join in the relation of a thing as within their own knowledge, they thus obtain a greater degree of credit, and one alone cannot be said to have obtained the money or goods, etc., or defrauded the prosecutor: and no rule of criminal proceeding is therefore violated by adjudging them guilty of the imposition jointly; and any supposed inconvenience arising from the confounding the evidence as to the several defendants may be obviated; because, if it affects them differently, the judge who tries them may select the evidence which is applicable to each, and leave their cases separately to the jury."[a] And, as has already been seen, evidence under a joint indictment that one of them, with the knowledge, approbation, concurrence, and direction of the other, made the false pretences charged, warrants the conviction of both.[b] All parties who have concurred and assisted in the fraud, may be convicted as principals, though not present at the time of making the pretence and obtaining the money and goods.[c]

An indictment averring that the defendant did "falsely and *feloniously*

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(564) Other pretence as to the value and history of a horse, which the prisoners sold to the prosecutor.

(565) Pretence, that one J. P., of the 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. First count.

(566) Second count. That defendant was requested by one J. P., who kept a large hotel in Washington City, to purchase some brandy for said J. P., and that if prosecutor would sell defendant two half pipes of brandy, defendant would pay prosecutor cash for the same shortly after delivery.

(567) Third count. That defendant had been requested by one J. P., to purchase for him some brandy, that he (the said J. P.), kept a large hotel in Baltimore, &c.

(568) Pretence, that one of the defendants having advanced money to the other on a deposit of certain title deeds, had himself deposited the deeds with a friend, and that he received a sum of money to redeem them; with counts for conspiracy.

(569) For pretending to an attesting justice and a recruiting sergeant that defendant was not an apprentice, and thereby obtaining money to enlist.

(570) For obtaining more than the sum due for carriage of a parcel by producing a false ticket.

(571) Pretence that defendant had no note protested for non-payment, that he was solvent, and worth from nine to ten thousand dollars.

(572) Obtaining acceptances on drafts, by pretence that certain goods had been purchased by defendant and were about to be shipped to prosecutor.

(573) Obtaining acceptances by the pretence that defendants had certain goods in storage subject to prosecutor's order.

(574) Receiving goods obtained by false pretences, under the English statute.

[a] 1 Gabbett, Crim. Law, 214, 215.

[b] Ante, § 2114; Commonwealth *v.* Harley, 7 Metcalf, 462.

[c] R. *v.* Moland, 2 Moody, C. C. 276.

pretend," &c., was held bad.[d] In those states, however, as in New York, where the offence is a felony, the averment is of course essential. "Designedly," should always be inserted.[e]

The word pretend, is indispensable, though the word falsely, according to the English practice[f] is not essential, the pretences being subsequently negatived. It is much safer, however, to insert it.

2d. "To A. B." ETC.

§ 2145. The party injured must be described with the same accuracy as has heretofore been shown to be requisite in larceny.[g] As has been noticed, however, the pretences 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.[h] And it was held that an indictment which substantially averred that the false pretences were practiced on A. B., and his money obtained thereby with intent to defraud C. D., was good.[i]

§ 2146. 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; 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.[j] A false pretence made to A. in B.'s hearing, by which money is obtained from B., may be laid as a pretence made to B.[k] Money paid by an agent is rightfully laid as money paid by a principal.[kk]

§ 2147. 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.[l]

3d. "THAT," ETC., (STATEMENT OF PRETENCES).

§ 2148. It is 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.[m] It is sufficient to state the effect of the

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[d] R. *v.* Walker, 6 C. & P. 657.

[e] In Wharton's Precedents, 239, 1st ed., "designedly" was accidentally omitted. It is important that it should be in all cases supplied.

[f] R. *v.* Airey, 2 East, R. 31.

[g] See ante, § 250–60, 495–9.

[h] Com. *v.* Call, 21 Pick. 515; see also, R. *v.* Lara, 1 Leach, C. C. 647; and ante, § 594–8, 2115.

[i] Com. *v.* Mooare, Thach. C. C. 410; R. *v.* Kealey, 2 Den. C. C. 68.

[j] Com. *v.* Call, 21 Pick. 515; Com. *v.* Harley, 7 Met. 462; see also, Com. *v.* Bagly, 7 Pick. 279; Stoughton *v.* State, 2 Ohio St. R. 562; ante, § 598.

[k] R. *v.* Dent, 1 C. & K. 249.

[kk] Ante, § 594–8.

[l] R. *v.* Dent, 1 C. & K. 249.

[m] 2 East, P. C. c. 18, s. 13, p. 837, 838; see Com *v.* Hulbert, 12 Met. 446.

pretence correctly; the very words need not be used.[n] But a variance between the indictment and the evidence, with regard to the effect of the pretences, will be fatal; and 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.[o]

In North Carolina it is said that an indictment for cheating by false tokens, in obtaining an article of property from a person by means of a counterfeit piece of coin, to wit, a counterfeit quarter of a dollar, need not aver to what currency the coin intended to be counterfeited belonged. Nor is it necessary to aver that the spurious coin used was made like the one alleged to be imitated, the word "counterfeited," being a sufficient allegation of that fact. Where the indictment alleged that the article was obtained by means of a false coin, it was not necessary to aver that this was done by passing it, nor to allege the value of the thing obtained, nor that it was of any value, if it was a thing recognized as property, nor that it was the property of the person from whom it was obtained.[oo]

§ 2149. Under the Massachusetts statute it was held not to be sufficient, in an indictment for the sale of a spurious watch as genuine, to aver merely that S., the defendant, falsely pretended to the prosecutor, "that a certain watch which he, the said S., then and there had, was a gold watch, by means whereof said S., then and there unlawfully, &c., did obtain from said B. (the prosecutor) sundry bank bills, &c., of the value, &c., with intent the said B. then and there to cheat and defraud of the same; whereas in truth and fact said watch was not then and there a gold watch, and said S., then and there well knew that the same was not a gold watch, to the damage, &c."[p] "The indictment," says Dewey, J., "does not allege any bargain, nor any colloquies as to a bargain for a watch; nor any propositions of B. to buy, or of the defendant to sell a watch; nor any delivery of the watch, as to which the false pretences were made, in the possession of B., as a consideration for the money paid the defendant. It seems to us that when money or property is obtained by a sale or exchange of property, effected by means of false pretences, such sale or exchange ought to be set forth in the indictment, and that the false pretence should be alleged to have been with a view to effect such sale or exchange, and that by reason thereof, the party was induced to buy or exchange, as the case may be."[q]

The same view is taken in Maine, where it is ruled that where the case is one of sale or exchange, the indictment should set forth the sale or exchange, and aver that the false pretences were made with a view to effect such sale or exchange, and that by reason thereof the party was

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[n] R. *v.* Scott, cited in R. *v.* Parker, 2 Mood. C. C. R. 1; 7 C. & P. 825.
[o] R. *v.* Brestow, 1 Campb. 494.
[oo] State *v.* Boon, 4 Jones' Law, (N. C.,) 463, but as to last point, see post, § 2157.
[p] Com. *v.* Strain, 10 Met. 522. [q] Ibid.

induced to part with his property.[r] In New York the law seems otherwise.[rr]

§ 2150. In a case already cited, the indictment alleged that G. designedly and unlawfully did pretend to N., that A. wanted to buy cheese of N., and had sent G. to buy it for him, and that a certain paper described, purporting to be a ten dollar bill on the Globe Bank, in the city of New York, was a good bill, and of the value of ten dollars; by means of which false pretences, said G. unlawfully obtained from said N. forty pounds of cheese, of the value of four dollars, and sundry bank bills and silver coins amounting to, and of the value of six dollars, with intent to cheat and defraud; whereas the said A. did not want to buy cheese of said N., and had not sent G. to him for that purpose, and the paper was not a good bill of the Globe Bank, in the city of New York, and was not of the value of ten dollars, but spurious and worthless. It was held, on motion in arrest of judgment, that the false pretences set forth were such as might have been effectual in accomplishing a fraud on N., in the manner alleged; that neither the omission to allege that G. knowingly made the false pretences, nor the omission to mention any person whom he intended to defraud, rendered the indictment bad; and that there was no objection to the indictment on the ground of duplicity.[s]

§ 2151. Where the avermcnt was that the defendant represented a firm of which he was a member, to be then owing not more than three hundred dollars, and evidence was given of a representation by him that the firm did not then owe more than four hundred dollars; this was held to be a fatal variance.[t]

A pretence that the prisoner "had in Macon seven thousand dollars," is not sustained by proof "that he had seven dollars less than seven thousand in a bank in Macon."[tt]

§ 2152. In an indictment setting forth that a flash bank note had been passed by the prisoner on the prosecutor, it is not necessary to set forth the note at large. "When the setting out the instrument in the indictment," said Wilde, C. J., "cannot afford the court information, it is unnecessary that it should be set out. Here it is alleged that a certain piece of paper was unlawfully and falsely represented by the prisoner to be a good and valid promissory note, whereas it was not so. It appears to me that all the cases show that where the instrument has been required to be set out in the indictment, something has turned on the construction of the paper."[u]

§ 2153. It is not necessary to prove that the whole of the pretences charged; proof of part, and that the property was obtained by force of such part, is enough.[v]

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[r] State *v.* Philbrick, 31 Maine, (1 Red.) 401.
[rr] Skiff *v.* People, 2 Parker, C. R. 139.
[s] Com. *v.* Hulbert, 12 Metcalf, 446.
[t] Com. *v.* Davidson, 1 Cush. 33.
[tt] Langtry *v.* State, 30 Alab. 536.
[u] R. *v.* Coulson, 1 Eng. R. 552.
[v] R. *v.* Hill, R. & R. 190; R. *v.* Ady, 7 C. & P. 140; Com. *v.* Daniel, 2 Pars. 333;

The same rule exists in the analogous cases of perjury and blasphemy.[w]

If the *idea* of the pretences be rightly laid, a variance as to expression is immaterial.[ww]

§ 2154. 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 rule, in consequence of the death of his wife; by means of which "last false pretence" he obtained money; it was held good.[x]

4th. Description of property.

§ 2155. To this the rules heretofore generally laid down apply.[y]

In New York it is said that an indictment for obtaining property by false pretences need not allege that the property was of any particular value.[z] Such, however, is not the general rule, which requires that some value should be alleged,[a] a variance as to such value being immaterial.[b]

An indictment need not state all the property which the defendant obtained by the false pretences set forth.[c]

§ 2156. An allegation, that the prosecutor, by means of the false representations, was induced to deliver and did deliver to the defendant certain goods, "as upon a sale upon credit," is sufficiently proved by evidence of a sale of the goods to the defendant, on his promissory note, payable in four months.[d]

Two farms pretended to be owned by the defendant, are definitely described by giving the county and town where situated, and the names by which they commonly went.[dd]

§ 2157. Where an indictment for obtaining the signatures of a person to a deed of land, did not allege that the grantor in the deed owned or claimed any title to the lands conveyed thereby, and the description of which lands was in the most general terms, as certain lands in the state of Texas and United States of America, and the date of the deed was no where averred, so that it would be impossible to identify the instrument; and it did not appear that the deed would tend to the hurt or prejudice of the grantor, and there was no averment that the deed could not be more particularly described, it was held, that in these particulars the indictment was defective.[e]

People *v.* Stone, 3 Wend. 182; State *v.* Mills, 17 Maine, 211; Britt *v.* State, 9 Humphreys, 31; Skiff *v.* People, 3 Parker C. R. (N. Y.) 139; Com. *v.* Merrill, 8 Cush. 571; Cowen *v.* People, 14 Illinois, 348, ante, § 616.

[w] Lord Raym, 886; 2 Campb. 138–9; Cro. C. C. 7th ed. 662; State *v.* Hascall, 6 N. Hamp. 358; Com. *v.* Kneeland, 20 Pick. 206.

[ww] State *v.* Vanderbilt, 3 Dutch. 328.

[x] R. *v.* Dent, 1 C. & K. 249.

[y] See ante, § 354–63, 610–14.

[z] People *v.* Stetson, 4 Barbour, 151–2.

[a] Ante, § 362.

[b] Ante, § 362, 613.

[c] People *v.* Parish, 4 Denio, 153.

[d] Com. *v.* Davidson, 1 Cush. 33.

[dd] Skiff *v.* People, Parker C. R. (N. Y.) 139.

[e] Lord *v.* People, 9 Barb. Sup. Ct. 671.

It is necessary to state whose the property was at the time."[f]

5th. "WHEREAS IN TRUTH AND FACT."—(NEGATION OF PRETENCES.)

§ 2158. It is generally necessary for the pleader to negative specifically the false pretences relied on to sustain the indictment.[g] Thus if the proof be adequate as to the offence, though only coming up to a portion of the pretence averred in the indictment, a conviction is good.[h] 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.[i] 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.[ii] It is difficult to say how a court, on demurrer on 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.

6th. SCIENTER AND INTENTION.

§ 2159. 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.[j]

§ 2160. An intent to defraud the firm necessarily includes an intent to defraud each of its members, and no prejudice can happen to the accused, by a failure to set forth in the indictment the names of all the persons meant to be injured, or that the law would presume it was designed to injure.[k]

§ 2161. It is not necessary, in England, to state, to use the language of Lord Denman, C. J.,[l] "that the false pretence was made with the intention

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[f] Sill *v.* R. 16 Eng. C. L. 375; R. *v.* Parker, 3 A. & E. 292; State *v.* Lathrop, 15 Verm. 297.

[g] Tyler *v.* State, 2 Humph. 37; Amos *v.* State, 10 Humph. 107; R. *v.* Perott, 2 M. & S. 379.

[h] R. *v.* Hill, R. & R. 190.

[i] People *v.* Stone, 9 Wend. 182; People *v.* Haynes, 11 Wend. 563.

[ii] See ante, § 618.

[j] R. *v.* Philpotts, 1 C. & K. 112; see also, Com. *v.* Speer, 2 Virg. Cases, 65; though see Com. *v.* Blumenthal, cited Wharton's Prec. 242; see as to general pleading of scienter, ante, § 297.

[k] Stoughton *v.* State, 22 O. R. 562.

[l] R. *v.* Hamilton, 9 Ad. & El. (N. S.) 276.

of obtaining the thing, if it be proved that in fact the party charged did intend to obtain the thing, made the false pretence, and did thereby obtain it. I am by no means sure that it is necessary even to prove that the representation was made with the particular intent"

An intent to defraud must be specially proved in false pretences.[l]

7th. "BY MEANS," ETC., OF WHICH PRETENCES.

§ 2162. It is said in Missouri that the phrase "by color of said false pretence," is bad.[m]

In Wisconsin, it is said that the allegation in an indictment for obtaining goods by false pretences, that the defendant falsely represented that he was a wholesale grocery dealer in New Orleans, and that he had money on deposit with C. D. & Co. in New York city, to the full amount of the value of the goods or money obtained, is not sufficient to constitute a criminal offence, without an averment that the party defrauded was induced to part with his property by relying upon the truth of such statements.[n]

It is not necessary to state in the indictment whether the money was obtained by sale, bailment, or otherwise, and at the trial the particular mode may be proved.[o]

The indictment need not charge that any false token or counterfeit letter was used.[p]

CHAPTER XI.

SECRETING PROPERTY WITH INTENT TO DEFRAUD. FRAUDULENT INSOLVENCY.

A. STATUTES.
- NEW YORK, § 2165.
- PENNSYLVANIA, § 2166.
- OHIO, § 2079.

B. OFFENCE GENERALLY.
- 1st. THERE MUST BE AN ACTUAL SECRETING, OR ASSIGNING OF THE GOODS, § 2167.
- 2d. AN INTENT MUST BE SHOWN TO PREVENT THE PROPERTY FROM BEING MADE LIABLE FOR THE PAYMENT OF DEBTS; OR, IN CASE OF RECEIVERS, A GUILTY KNOWLEDGE OF SUCH INTENT, § 2168.

§ 2163. By the stat. 13 Eliz., which makes void all conveyances, &c., with intent to defraud *creditors*, it is provided that the parties to any "such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions," &c., "which at any

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[l] People *v.* Getchell, 6 Mich. (2 Cooley) 287.
[m] State *v.* Chunn, 19 Mo. 233; see R. *v.* Airey, 2 East, 30.
[n] State *v.* Green, 7 Wis. 676.
[o] State *v.* Vanderbilt, 3 Dutch. 328.
[p] Skiff *v.* People, Parker C. R. (N. Y.) 139; ante, § 2124.

time shall wittingly and willingly put in use, avow, maintain, justify, or defend the same or any part of them as true, simple, and done, had, or made *bona fide*, and upon good considerations; or shall alien or assign any the lands, tenements, goods, leases, or other things before-mentioned, to him or them conveyed as is aforesaid," besides the civil penalty, "being lawfully convicted thereof, shall suffer imprisonment for one half year without bail or mainprise." By stat. 27 Eliz., the same provision is extended to those concerned in similar devices to defraud *purchasers*.[pp]

§ 2164. But one case is reported under this statute,[q] but in that it was held in arrest of judgment by Maule, J., delivering the opinion of his brethren, that an indictment lies under the act, for a fraudulent alienation of real estate.[qq]

The following statutes fall under the same general head:

NEW YORK.

§ 2165. *Removing goods out of county, to prevent them being levied upon, &c.*—Any person who shall remove any of his property out of any county with intent to prevent the same from being levied upon by execution; or, who shall secrete, assign or 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; and where the property so removed, secreted, concealed, assigned, conveyed, received or otherwise disposed of shall be worth fifty dollars or less, such offence may be tried by a Court of Special Sessions of the Peace, in the manner directed in the Third Title of Chapter Second of the Fourth Part of the Revised Statutes; and in such case, the punishment for such offence shall be limited as prescribed in the said Title.—(Sec. 26 of chap. 300, of 1831, Rev. Stat. N. Y., Part ii., chap. v., Tit. 1, Art. 10, s. 30.)

PENNSYLVANIA.

§ 2166. *Fraudulently destroying any deed or other security.*—If any person shall fraudulently or maliciously tear, burn or in any other way destroy any deed, lease, will, bond, or any bill or note, check, draft or other security for the payment of money, or the delivery of goods, or any certificate of loan or other public security of this commonwealth, or of the United States, or any of them, or any certificate of the stock or debt of any bank, corporation or society, either of this commonwealth or the United States, or either of them, or of any foreign country, or any receipt, acquittance, release or discharge of any debt, suit or other demand, or any transfer of assurance or money, stock, goods, chattels or other property, or any letter of attorney or other power, or any day-book or other book of accounts, or any agreement or contract whatever, with intent to defraud, prejudice or injure any person, bank, body corporate, society or association, the person so offending shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, not exceeding three years, or either, or both, at the discretion of the court.—(Rev. Acts, Bill I., sect. 129.)

[pp] See 2 Russ. on Crimes, 315; Roberts' Digest, Brit. Stat. 294; 1 Chitty's Stat. 385.

[q] R. *v.* Smith, 6 Cox C. C. 36.

[qq] See, for form of indictment, Whar. Prec. 518.

§ 2166 (*a*). *Fraudulently secreting or removing property by debtor.*—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, any person who shall receive such property with such intent, or who shall, with like intent, collude with any debtor for the concealment of any part of his estate or effects, or for giving a false color thereto, or shall conceal any grant, sale, lease, bond or other instrument or proceeding, either in writing or by parol, or shall become a grantee, purchaser, lessee, obligee or other like party in any such instrument or proceeding, with like fraudulent intent, or shall act as broker, scrivener, agent or witness, in regard to such instrument or proceeding, with the like intent, such person or persons, on conviction thereof, shall be guilty of a misdemeanor, and be sentenced to pay a sum not exceeding the value of the property or effects so secreted, assigned, conveyed or otherwise disposed of or concealed, or in respect to which such collusion shall have taken place, and undergo an imprisonment, not exceeding one year.—(Ibid. sect. 130.)

§ 2166 (*b*). *Fraudulent insolvency.*—If it shall appear to the court upon the hearing of any petition in insolvency, either by the examination of the petitioner, or other evidence, that there is just ground to believe either—

I. That the insolvency of the petitioner arose from losses by gambling, or by the purchase of lottery tickets; or,

II. That such petitioner had embezzled or applied to his own use any money, or other property with which he had been intrusted, either as bailee, agent or depositary, and to the prejudice of the opposing creditors; or,

III. That he has concealed any part of his estate or effects, or colluded or contrived with any person for such concealment, or conveyed the same to any person for the use of himself, or any of his family or friends, or with the expectation of receiving any future benefit to himself or them, and with intent to defraud his creditors, in every such case it shall be the duty of the court to commit such person for trial.—(Ibid. sect. 131.)

If such debtor shall, upon trial, be convicted of any of the acts mentioned in the preceding section, he shall be adjudged guilty of a misdemeanor, and shall be sentenced as follows:

I. If found guilty of embezzlement or concealment of property, as foresaid, he shall be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

II. If it shall appear, by the verdict of the jury on such trial, that the insolvency of the petitioner was caused by gambling or the purchase of lottery tickets, as aforesaid, he shall be sentenced to an imprisonment not exceeding three years.—Ibid. sect. 132.)

If no bill shall be presented to the grand jury at the next sessions, or if the bill shall not be found, or if the indictment shall not be tried at the second session after the commitment of such petitioner, unless the postponement of the trial take place at the instance of such petitioner, or if, upon trial, such debtor be acquitted, it shall be the duty of the court of common pleas to discharge him from imprisonment upon his proceeding as is provided by the insolvent laws—(Ibid. sect. 133.)

§ 2166 (*c*). *Collusion with an insolvent, &c.*—If any person, with an intent to defraud the creditors of an insolvent debtor, or any of them, shall collude or contrive with such insolvent debtor for the concealment of any part of his estate or effects, or for giving a false color thereto, or shall contrive or concert any grant,

sale, lease, bond or other instrument or proceeding, either in writing or by parol, or shall become a grantee, purchaser, lessee, obligee or other like party, in any such instrument or proceeding, with the like intent, or shall act as broker, scrivener, agent or witness, in regard to such instrument or proceeding, with the like intent, such person shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars, and to undergo an imprisonment not exceeding two years, and shall forfeit all claim which he may have to any part of the estate of such debtor.—(Ibid. sect. 134.)

Ohio.—See ante, § 2079, 80.

These statutes, so far as concerns the secreting of goods, may be treated as creating a new offence, which though of recent origin, is of frequent occurrence in the courts. To constitute it—and the statutes are throughout so similar as to make the proceedings under them the same—it is necessary that there should be:

1st. An actual secreting, assigning, or conveying of goods, &c., or a reception of the same.

2. An intent to prevent such property from being made liable for the payment of debts, or in case of deception, a guilty knowledge of such intent.

§ 2167. 1st. *There must be an actual secreting, or assigning of the goods.*—It is not enough that the debtor, in his creditor's face, refuses to surrender property which the creditor claims. Thus it was held that a refusal of a defendant to deliver up a watch to the sheriff's deputy was not within the statute.[q] The object of the law is not to make a man indictable who *resists* process, since for this another procedure exists, but to prevent the secret and covinous disposal of property in such a way as to elude the pursuit of the law, and baffle an execution. A pointed illustration of this is the case of a trader, who after obtaining credit by stocking his store with goods, either hides such goods until such time as he may be able, without suspicion or disturbance, to convert their proceeds to his own use, or consigns them to auction under such covers as may enable him to turn them into cash without his creditor's knowledge. It would seem, from analogy to the statutes of Elizabeth, that the offence would continue to be indictable even if a consideration were received, if the intent to defraud was proved.

§ 2168. 2d. *An intent must be shown to prevent the property from being made liable for the payment of debts; or, in case of receivers, a guilty knowledge of such intent.*

It is not enough that it should be that the debtor's object was to give a preference to a particular creditor.[r]

All creditors are protected by the act, and as "creditors," it seems, may be classed, even those whose debts are not yet due.[s] It is clearly unnecessary that the prosecutors should be judgment creditors. Thus in New

[q] People *v.* Morrison, 13 Wend. 399.
[r] Com. *v.* Hickey, 2 Parsons, 317.
[s] Johnes *v.* Potter, 5 S. & R. 519.

York,[t] Bronson, J., said: "The language of the act plainly extends to all creditors, and I can perceive no sufficient reason for restricting its construction to such creditors as have obtained judgments for their demands. The fraudulent removal, assignment, or conveyance of property by a debtor, which the Legislature intended to punish criminally, usually takes place in anticipation of a judgment, and for the very purpose of defeating the creditor of the fruits of his recovery. If there must first be a judgment before the crime can be committed, the statute will be of very little public importance. This is not like the case of a creditor seeking a *civil remedy* against a fraudulent debtor. There the creditor must complete his title by judgment and execution, before he can control the debtor in the disposition of his property; he must have a certain claim upon the goods before he can inquire into any alleged fraud on the part of the debtor."[u] 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."[v]

The fact of indebtedness of some kind, however, on the part of the defendant, must be distinctly averred.[w]

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[t] People *v.* Underwood, 16 Wend. 546. [u] Wiggins *v.* Armstrong, 2 John. Ch. 144.

[v] See generally, Wharton's Precedents, as follows:

(507) Secreting, etc., with intent to defraud, etc.
(508) Second count—Same, with intent to defraud and prevent such property from being made liable for payment of debts.
(509) Third count—Same, not specifying property.
(510) Fourth count—Averring intent to defraud persons unknown.
(511) Fifth count—Same, not specifying goods, with intent to defraud persons unknown.
(512) Sixth count—Same, with intent to prevent property from being levied on.
(513) Another form on the same statute. First count—Intent to defraud, to prevent property from being made liable, etc.
(514) Second count—Same, with intent to defraud another person.
(515) Third count—Secreting, assigning, etc., with intent to defraud two, etc.
(516) Fourth count—Secreting, etc., averring creditors to be judgment creditors.
(517) Fifth count—Same, in another shape.
(518) Fraudulent conveyance under Statute Eliz., ch. 5, § 3.
(519) General form.
(520) Averring collusion with another person.
(521) Same, but averring collusion with another person.
(522) Same, specifying another assignee.
(523) Fraudulent insolvency by a tax collector. First count—Embezzling creditor's property.
(524) Second count—Applying to his own use trust money, etc.
(525) Pledging goods consigned, and applying the proceeds to defendant's use, under the Pennsylvania statute.
(526) Second count—Selling same, and applying to defendant's use the proceeds.
(527) Third count—Selling same for negotiable instrument.

[w] State *v.* Robinson, 9 Foster, 274.

BOOK VI.

OFFENCES AGAINST SOCIETY.

CHAPTER I.

PERJURY.

A. STATUTES.

UNITED STATES.

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

MASSACHUSETTS.

Perjury, § 2175.
Subornation of perjury, § 2176.
Inciting others to commit perjury, § 2177.
When oath of person guilty of perjury, &c., shall subsequently be received, § 2178.
Presumption of perjury, § 2179.
Detaining books by court, in case of perjury, § 2180.

NEW YORK.

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

PENNSYLVANIA.

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

VIRGINIA.

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

OHIO.

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

B. PERJURY AT COMMON LAW.
I. WILFUL, § 2199.
II. FALSE, 2201.
III. OATH, § 2205.
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V. IN A COMPETENT COURT, § 2211.
VI. IN ANY JUDICIAL PROCEEDING, § 2221.
VII. IN A MATTER MATERIAL, § 2228.
VIII. INDICTMENT, § 2233.
1st. WILFUL, § 2234.
2d. SWORN BEFORE A COMPETENT JURISDICTION, § 2236.
3d. IN A JUDICIAL PROCEEDING, § 2248.
4th. HOW AND TO WHAT EXTENT THE ALLEGED FALSE MATTER IS TO BE SET OUT, § 2253.
5th. HOW THE FALSE MATTER IS TO BE NEGATIVED, § 2259.
6th. MATERIALITY, § 2263.
IX. EVIDENCE, § 2266.
X. SUBORNATION OF PERJURY, § 2283.

UNITED STATES.

§ 2169. *Wilfully and corruptly committing perjury.*—If any person shall wilfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against the said offender shall be reversed.—(Act 30th April, 1790, sect. 18.)

§ 2170. *Knowingly and wilfully swearing or affirming falsely.*—If any person in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence. And if any person or persons shall knowingly or willingly procure any such perjury to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labour, not exceeding five years, according to the aggravation of the offence.—(Act 3d March, 1825, sect. 13.)

§ 2171. *Who shall administer oaths.*—The president of the senate, the speaker of the house of representatives, the chairman of the committee of the whole, or of any standing or select committee of either house, shall be empowered to administer oaths or affirmations in any case under their examination; if any person shall wilfully, absolutely, and falsely swear or affirm, touching any matter or thing material to the point in question, whereto he or she shall be thus examined, every person so offending, and being thereof duly convicted, shall be subjected to the pains, penalties and disabilities which, by law, are prescribed for the punishment of the crime of wilful and corrupt perjury.—(Act 3d May, 1798.)

§ 2172. *Where oath or affirmation is required from master of vessel, &c.*—And in all cases where an oath or affirmation is, by act of 1799, required, from a master

or other person having the command of a vessel, or from an owner or consignee of any goods, his or their factor or agent, and generally, whenever an oath or affirmation is required from any person, by virtue of the revenue laws, if the person so swearing or affirming shall swear or affirm falsely, he shall, on indictment and conviction thereof, be liable to the same pains and penalties prescribed for persons convicted of wilful and corrupt perjury.—(Act 2d March, 1789, sect. 88.)

§ 2173. *Falsely taking oath or affirmation.*—If any person shall falsely take an oath or affirmation, authorized by this act or by act of 6th June, 1798, or by Act 2d March, 1831, (Insolvent acts of the U. S.,) such person shall be deemed guilty of felony, and upon conviction thereof, shall suffer the pains and penalties in that case provided. And in case any false oath or affirmation be so taken by the debtor, the court, upon the motion of the creditor, shall re-commit the debtor to the prison from whence he was liberated, there to be detained for the said debt, in the same manner as if such oath or affirmation had not been taken.—(Act 6th Jan. 1800, sect. 4.)

§ 2174. *Falsely swearing in regard to expenditure of public money,*—If any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury.[a]—(Act 1st March, 1813, sect. 3.)

§ 2174 (*a*). *Perjury in reference to the public lands.*—In all cases where any oath, affirmation or affidavit shall be made or taken before any register or receiver, or either or both of them, of any local land office in the United States or any territory thereof, or where any oath, affirmation or affidavit, shall be made or taken before any person authorized by the laws of any state or terriotory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations or affidavits are made, used or filed in any of said local land offices, or in the general land office, as well in cases arising under any or either of the orders, regulations or instructions, concerning any of the public lands of the United States, issued by the commissioner of the general land office, or other proper officer of the government of the United States, as under the laws of the United States, in any wise relating to or affecting any right, claim or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, affirmation or affidavit, knowingly, wilfully or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offence by the laws of the United States.—(March, 1857, sect. 5; 11 Stat. 250.)

MASSACHUSETTS.

§ 2175. *Perjury.*—Every person who, being lawfully required to depose the truth in any proceeding in a court of justice, shall commit perjury, shall be punished, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years; and if committed

[a] This section does not create or punish the crime of perjury, technically considered, but creates a new and substantial offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had jurisdiction, so as to make the false swearing perjury. It would be sufficient, that it might be lawfully administered by the magistrate, and was not in violation of his official duty. (U. S. *v.* Bailey, 9 Peters, 239.)

in any other case, by imprisonment in the state prison, not more than twenty years.—(Chapter 128, sect. 1.)

If any person, of whom an oath shall be required by law, shall wilfully swear falsely, in regard to any matter or thing respecting which such oath is required, such person shall be deemed guilty of perjury.—(Ibid. sect. 2.)

§ 2176. *Subornation of perjury.*—Every person who shall be guilty of subornation of perjury, by procuring another person to commit the crime of perjury, as aforesaid, shall be punished in the same manner as for the crime of perjury.[b]—(Ibid. sect. 3.)

§ 2177. *Inciting others to commit perjury*—If any person shall endeavor to incite or procure any other person to commit the crime of perjury, though no perjury be committed, he shall be punished by imprisonment in the state prison not more than five years, or in the county jail not more than one year.—(Ibid. sect. 4.)

§ 2178. *When oath of person guilty of perjury, &c., shall subsequently be received.*—The oath of any person convicted of perjury, subornation of perjury, or an endeavor to incite or procure any other person to commit such perjury, shall not be received in any proceeding in a court of justice, except in an affidavit in his own cause, or as a poor debtor, unless the judgment given against such person shall be reversed, or unless he shall be pardoned.—(Ibid. sect. 5.)

§ 2179. *Presumption of perjury*—Whenever it shall appear, to any court of record, that any witness or party, who has been legally sworn and examined, or has made an affidavit in any proceeding in a court of justice, has testified in such a manner as to induce a reasonable presumption that he has been guilty of perjury therein, the court may immediately commit such witness or party, by an order or process for that purpose, or may take a recognizance, with sureties, for his appearing to answer to an indictment for perjury; and thereupon the witness to establish such perjury may, if present, be bound over to the proper court, and notice of the proceedings shall forthwith be given to the district attorney.—(Ibid. sect. 6.)

§ 2180. *Detaining books by court, in case of perjury.*—If, in any proceeding in a court of justice, in which perjury shall be reasonably presumed, as aforesaid, any papers, books, or documents shall have been produced, which shall be deemed necessary to be used on any prosecution for such perjury, the court may, by order, detain the same from the person producing them, so long as may be necessary, in order to their being used in such prosecution.—(Ibid. sect. 7.)

NEW YORK.

§ 2181. *Perjury.*—Every person who shall wilfully and corruptly swear, testify, or affirm falsely to any material matter, upon any oath, affirmation or declaration, legally administered:

1. In any matter, cause, or proceeding, depending in any court of law or equity, or before any officer thereof;

2. In any case whereon an oath or affirmation is required by law, or is neces-

[b] An indictment for perjury, in taking the poor prisoner's oath, under Stat. 1787, ch. 29, need not aver that the oath was administered within the prison limits. (Com. *v.* Alden, 14 Mass. 388.) The same statute requires a technical conviction of perjury, in order to avoid the effect of such an oath. (Wellington *v.* Stearns, 1 Pick. 497.)

The Revised Statutes, ch. 128, have not altered the offence at common law; and in every case of perjury, materiality is still an element of the offence. (Com. *v.* Farley, Thacher's C. C. 654.)

sary for the prosecution or defence of any private rights, or for the ends of public justice;

3. In any matter or proceeding before any tribunal or officer created by the constitution or by law, or where any oath may be lawfully required by any judicial, executive, or admininistrative officer;

Shall, upon conviction, be adjudged guilty of perjury; and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed.—(2 Rev. Stat. 681, sect. 1.)

§ 2182. *Punishment.*—Persons convicted of perjury shall be punished by imprisonment in a state prison, as follows:

1. For perjury committed on the trial of an indictment for a capital offence or for any other felony, for a term not less than ten years.

2. For perjury committed on any other judicial trial or inquiry, or in any other case for a term not exceeding ten years.—(Ibid. sect. 2.)

§ 2183. *Procuring witness to commit perjury.*—Every person who shall unlawfully and corruptly procure any witness, by any means whatsoever, to commit any wilful and corrupt perjury, in any cause, matter, or proceeding, in or concerning which such witness shall be legally sworn and examined, shall be deemed guilty of subornation of perjury.—(Ibid. sect. 3.)

§ 2184. *Consequences of conviction for subornation of perjury.*—The consequences of a conviction of subornation of perjury shall be the same as those herein declared upon a conviction of perjury; and every person convicted of subornation of perjury shall be punished by imprisonment in a state prison for the same term as hereinbefore prescribed upon a conviction for the perjury which shall have been so procured.—(Ibid. sect. 4.)

§ 2185. *Reasonable presumption of perjury.*—Whenever it shall appear to any court of record, that any witness or party who have been legally sworn and examined, in any cause, matter, or proceeding, pending before such court, has testified in such matter as to induce a reasonable presumption that he has wilfully and corruptly testified falsely to some material point or matter, such court may immediately commit such party, or witness by an order or process for that purpose, to prison, or take recognizance, with sureties, for his appearing and answering to an indictment for the perjury.—(Ibid. sect. 5.)

§ 2186. *Proceedings in court in regard to perjury.*—Such court shall thereupon bind over the witness to establish such perjury, to appear at the proper court, to testify before the grand jury, and on the trial, in case an indictment be found for such perjury; and shall also cause immediate notice of such commitment or recognizance, with the name of the witness so bound over, to be given to the district attorney of the county.—(Ibid. sect. 6.)

§ 2187. *Detaining documents, &c., necessary to be used in prosecution for perjury.*—If, on the hearing of such cause, matter, or proceeding, in which such perjury shall be suspected to have been committed, any papers or documents, produced by either party, shall be deemed necessary to be used on the prosecution for such perjury, such court may by order detain such papers or documents from the party producing them, and direct them to be delivered to the district attorney.—(Ibid. sect. 7.)

§ 2188. *Bribing another to commit perjury.*—Every person who shall, by the offer of any valuable consideration, attempt unlawfully and corruptly to procure any other to commit wilful and corrupt perjury as a witness, in any cause, matter, or proceeding, in or concerning which such other person might by law be examined

as a witness, shall, upon conviction, be punished by imprisonment in a state prison not exceeding five years.—(Ibid. sect. 8.)

PENNSYLVANIA.

§ 2189. *Perjury and subornation thereof.*—If any person shall wilfully and corruptly commit wilful and corrupt perjury, or shall by any means procure or suborn any person to commit wilful and corrupt perjury, on his or her oath or affirmation, legally administered either before any committee of the Legislature of this commonwealth, or in any judicial proceeding, matter or cause which may be depending in any of the courts thereof, or before any judge, justice, mayor, recorder, alderman or other magistrate, or before any arbitrator, prothonotary, clerk, notary public, commissioner or auditor, appointed by any court of this commonwealth, or in any deposition taken pursuant to the laws of this commonwealth, or the rules, orders and directions of any court, arbitrator or judge thereof, or preparatory and for the purpose of obtaining any rule or order of court, or of a judge or arbitrator, or if any person in taking any other oath or affirmation required, or that may hereafter be required by any act of assembly of this commonwealth, shall be guilty of wilfully and corruptly making a false oath or affirmation; or if any person shall procure or suborn any other person to make any such false oath or affirmation, every person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollers, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years, and shall be forever disqualified from being a witness in any matter in controversy. —(Rev. Act. 1860, Bill I, sect. 14.)[bb]

§ 2190. *Perjury of officer or agent of bank.—Resolved*, That the wilful and deliberate false swearing by any officer or agent of any bank, or any other person, to or in relation to any statement or statements required by law to be made, or other duty enjoined by law, shall be deemed perjury in law, and punishable as such, and the confinement within the penitentiaries of this state, which is hereby required to be part of the sentence in such case on conviction, shall not be less than one nor more than six years.—(Resolution of 3d April, 1840; Pamph. 714, 716; 6th ed. Pur. 870.)

§ 2191. *What is requisite in indictment for perjury.*—In every indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged, and in what court, or before whom the oath or affirmation was taken, averring such court, or person, or body, to have competent authority to administer the same, together with the proper averment, to falsify the matter wherein the perjury is assigned, without setting forth the information, indictment,

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[bb] "This section is an extension of the first section of the act of the 3d of April, 1804, entitled 'An Act for the punishment of perjury or subornation of perjury.' 4 Smith's Laws, 200; Brightly's Digest, 655, No. 1. Its object is to put at rest the nice distinctions that have been raised, whether perjury can only be committed in a *court of justice*, or in the *course of justice*, or whether a given oath has been taken in a judicial proceeding properly so called or otherwise. These captious objections are removed by defining precisely the kind of oath which, if false, shall constitute perjury. The extension of the crime to any person taking an oath required by an act of assembly, who shall be guilty of making a false oath, will supersede much past, and will obviate the necessity of any future legislation on the subject. The extension of the crime to the making a false and corrupt oath before a legislative committee, is taken from the second section of the act of the 23d June, 1842, entitled 'An Act to establish an institution by the name of the Institute for Colored Youth.' Pamphlet Laws, 299. (Note by Revisors.)

declaration or part of any record or proceding, other than as aforesaid, and without setting forth the commission or authority of the court, or person, or body before whom the perjury was committed.—(Rev. Act. 1860, Bill 2, sect. 21.)

In indictment for subornation of perjury.—In every indictment for subornation of perjury, or for corrupt bargaining, or contracting with others, to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence, without setting forth the information, indictment, declaration or part of any record or proceedings, and without setting forth the commission or authority of the court, or person, or body before whom the perjury was committed, or was agreed or promised to be committed.—(Ibid. sect. 22.)

§ 2191 (*a*). *Dissuading witness from testifying.*—If any person shall unlawfully dissuade, hinder or prevent, or attempt to dissuade, hinder or prevent any witness from attending and testifying, who may have been required to attend and testify either before any committee of the Legislature of this state, or before any criminal court, judge, justice or other criminal judicial tribunal thereof, by virtue of any writ of subpœna or other legal process, or who may have been recognized to attend as a witness on behalf of the commonwealth, before any court having criminal jurisdiction, to testify in any criminal case depending or about to be prosecuted in such court, any person so offending shall be guilty of a misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding one year.—(Ibid. sect. 11.)[c]

VIRGINIA.

§ 2192. *Perjury.*—If a person, to whom an oath is lawfully administered, on any occasion, shall, on such occasion, wilfully swear falsely touching any material matter or things, he shall be guilty of perjury.—(Code, 1849, ch. 194, sect. 1.)

§ 2193. *Punishment.*—A free person who commits or procures another person to commit perjury, shall, if the perjury be on a trial for felony, be confined in the penitentiary not less than one nor more than ten years; and if it be on any other occasion, be confined in jail one year, and be fined not exceeding one thousand dollars.—(Ibid. sect. 21.)

§ 2194. *Incapable of being juror or witness.*—He shall, moreover, on conviction thereof, be adjudged forever incapable of holding any post mentioned in the first section of chapter twelve, or of serving as a juror, or giving evidence as a witness. —(Ibid. sect. 3.)

OHIO.

§ 2195. *Perjury.*—That if any person, on his or her oath or affirmation, in any action, plea, suit, bill, petition, answer, complaint, indictment, controversy, matter, or cause, depending, or which may depend, in any of the courts in this state, civil, criminal or military; or in any affidavit or deposition, to establish any account stated, demand, or bill of particulars, to be presented to any executor or administrator for settlement, or before any justice of the peace, referees, or arbitrators, or before any other person having authority by the laws of this state to administer an

[c] "The dissuading, hindering or preventing a witness from testifying in a criminal court, is now an indictable offence, punishable at common law with fine and imprisonment. The importance of affording full and free scope to legislative investigation, and of protecting it from any practices which may tend to limit its extent and effect, have induced the commissioners to place witnesses in such investigations, on the same footing as witnesses for the commonwealth in crimal courts. The entire section is new."

oath; or in or before the Senate or House of Representatives of the Legislature of this state, or any committee thereof, in any deposition or affidavit, or other oath or affirmation, taken or made pursuant to the laws of this state, or any resolution of the senate and house of representatives of the legislature of this state, or of either of them, shall wilfully and corruptly depose, affirm or declare any matter to be fact, knowing the same to be false, or shall in like manner deny any matter to be fact, knowing the same to be true; every person so offending shall be deemed guilty of perjury, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor not more than ten nor less than three years.[c]—(Act of March 7, 1835, sect. 9; Swan's Stat. 270.)

§ 2196. *Subornation of perjury.*—That if any person shall persuade, procure, or suborn any other person to commit wilful and corrupt perjury; every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than ten nor less than three years.—(Ibid. sect. 10,)

§ 2197. That in every indictment for perjury or subornation of perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and before what court or authority the oath or affirmation was taken, averring such court or authority to have full power to administer the same, together with the proper averment or counts to falsify the matter or matters, wherein the perjury is assigned, without setting forth any part of any record or proceeding, in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or other authority before whom the perjury was committed —(Ibid. sect. 11.)

B.—Perjury at common law.

§ 2198. Perjury by the common law is the taking of a wilful false oath, by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely, and falsely, in a matter material to the point in question, whether he believed or not.[d]

I. Wilful.

§ 2199. Perjury consists in swearing falsely and corruptly, contrary to the belief of the witness; not in swearing rashly or inconsiderately,

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[c] In a trial before a Justice of the Peace, 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, 10 Ohio, 2211.)

Perjury cannot be assigned upon an answer in chancery, unless the bill call for the answer under oath (Silver *v.* State, 17 Ohio, 365.)

If, in a prosecution for perjury, a written paper is referred to, the place and time to subscribing it by the accused, being insolvent in the alleged perjury, as set forth in the indictment, such paper is proper evidence in the trial. (Osburn *v.* State, 7 Ohio, 212.

[d] 1 Hawk. c. 69, s. 1; 3 Inst. 164; Bac. Ab., tit. "Perjury;" Burn's Justice, tit. "Perjury;" 2 Russ. on Cr., 6th Am. ed. 596; State *v.* Dodd, 3 Murph. 226; State *v.* Simmons, 3 Murph. 123; Martin *v.* Miller, 4 Mis. 47; Pankey *v.* People, 1 Scam. 80; Com. *v.* Kuntz, 4 Penn. Law Jour. 163; Hopkins *v.* Smith, 3 Barbour, 599; De Bernie *v.* State, 19 Ala. 23; Jackson *v.* State, 1 Carter (Ind.) 184; M'Gragor *v.* State, Ibid. 232; People *v.* Collier, 1 Mann. (Mich.) 137; State *v.* Tappan, 1 Foster (N. Hamp.) 56; Pickering's case, 8 Grat. 628.

according to his belief.[e] The false oath, if taken from inadvertence or mistake, cannot amount to voluntary and corrupt perjury.[f] Therefore, where perjury is assigned on an answer in equity, or an affidavit, &c., the part on which the perjury is assigned may be explained by another part, or even by a subsequent answer.[g]

A witness stating evidence truly to the writer of an affidavit, and swearing to it when drawn up, is not guilty of perjury, if the statements are written erroneously by the amanuensis.[gg]

§ 2200. That the oath is wilful and corrupt, must not only be charged in the indictment, but supported on trial.[h] An oath is wilful when taken with deliberation, and not through surprise or inadvertency, or a mistake of the true state of the question.[i]

II. False.

§ 2201. It is perjury where one swears wilfully, absolutely and falsely, to a matter which he believes, if he has no probable cause for believing.[j] A man is even guilty of perjury if he swears to a particular fact, without knowing at the time whether it is true or false.[k] It is a good assignment of perjury that the defendant swore that he "thought" a certain writing was his, whereas in truth and fact he "thought" it was not his.[l] The oath must be either false in fact, or, if true, the defendant must have known it to be so.[m] As, for instance, if a man swear that J. N. revoked his will in his presence, if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury.[n] An indictment lies against a man for perjury, in swearing that he *believes* a fact to be true, which he must know to be false.[o]

§ 2202. If a person know that a fact exists, but state on oath, knowingly, and with an intention to mislead, "that if the fact is so he does not know it," he will be guilty of perjury; and will be considered equally guilty, as if he swore absolutely that the fact did not exist.[p]

In an action on a contract before a justice of the peace, the making of the contract was in issue. A witness testified that he went to a field with

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[e] U. S. *v.* Passmore, 4 Dallas, 378. This feature of perjury is well set forth, in the opinion of Recorder Vaux, in Griffin's case, (Recorder's Decisions, 43,) a work to which the reader is referred, as containing many cases of historical as well as of professional interest, and into which the amiable and experienced author has thrown a great mass of informantion relative to the duties of a committing magistrate.

[f] 1 Hawk. c. 69, s. 2; 2 Russ. on Cr., 6th Am. ed. 597; See remarks on that point in Steinman *v.* M'Williams, 6 Barr, 178.

[g] 1 Sid. 419; Com. Dig. Just. of Peace, (B.) 102.

[gg] Jesse *v.* State, 20 Geo. 156.

[h] Resp. *v.* Newell, 3 Yeates, 407; Thomas *v.* Com., 2 Robinson, 795; Com. *v.* Cook, 1 Robinson, 729; State *v.* Garland, 3 Dever. 114.

[i] Com. *v.* Cornish, 6 Binney, 349; See Steinman *v.* M'Williams, 6 Barr, 178.

[j] Ibid. [k] Com. *v.* Halstat, 2 Boston Law Rep. 177.

[l] R. *v.* Schlesinger, 10 Ad. & El. N. S. 670.

[m] 1 Hawk. c. 69, s. 6; 3 Inst. 166; Palmer, 294. [n] Hetley, 97.

[o] Per Lord Mansfield, in R. *v.* Pedley, 1 Leach, 327; see 1 Hawk. c. 69, s. 7; 3 Inst. 166; 2 Russ. on Cr., 6 Am. ed. 597; 1 Sid. 419, contra.

[p] Wilson *v.* Nations, 5 Yerger, 211.

the parties to the contract, no other persons than the parties and himself being present, and that he heard the contract agreed to by the parties. In point of fact he did not go to the field, was not present when the contract was made, and had no knowledge of the making. The contract was made nevertheless; but it was held that the prisoner, having wilfully sworn to a thing he did not know to be true, although it was true, was guilty of perjury.[pp]

§ 2203. Upon an indictment against the defendant for a misdemeanor in falsely swearing that he *bona fide* had such an estate in law or equity of the annual value of £300 above reprizes, as qualified him to be a member of parliament for a borough, a surveyor stated that the fair annual value of the property was about £200 a year, but another witness stated that it was badly let, and believed that it was worth more than £300 a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification in point of value was not sufficient. It was held that the jury must be satisfied beyond all doubt, that the property was not of the value of £300 a year, and that at the time the defendant made the statement, he knew that it was not of that value.[q]

§ 2204. A bankrupt who submits the facts in regard to his property fairly to the advice of his counsel, and, acting under the advice thus given, withholds certain items from his schedule, is not guilty of perjury; the fraudulent intent being wanting.[r] But if he makes false statements in regard to it, in answer to interrogatories proposed to him in his examination, it is perjury.[s]

False swearing to a fact, to the best of the opinion of the witness, which the witness, though without any reasonable cause, believes to be true, is not perjury.[ss] But falsely swearing that B. feloniously stole, took, &c., is an oath to facts, and not merely to a conclusion of law.[t]

III. Oath.

§ 2205. The oath must be solemnly administered. But it is immaterial in what form it is given, if the party, at the time, professes such form to be binding on his conscience. When a witness comes to be sworn, it is so presumed that he has settled the point with himself in what way he will be sworn, and he should make it known to the court; and should he be sworn with uplifted hands, though not conscientiously opposed to swearing on the gospel, and depose falsely, he subjects himself to the pains and penalties of perjury.[tt]

[pp] People *v.* M'Kinney, 3 Parker C. R. (N. Y.) 510.
[q] R. *v.* De Beauvoir, 7 C. & P. 17, Lord Denman, C. J.
[r] U. S. *v.* Conner, 3 M'Lean, 573.
[s] U. S. *v.* Dickey, 1 Morris, 412.
[ss] Com. *v.* Brady, 5 Gray, (Mass.) 78.
[t] Hoch *v.* People, 3 Mich. (Gibbs) 552.
[tt] State *v.* Wisenhurst, 2 Hawks. 458; Com *v.* Knight, 12 Mass. 274; Thomas *v.* Com. 2 Rob. 795; Com. *v.* Cook, 1 Rob. 729; Campbell *v.* People, 8 Wend. 636; State *v.* Coffey, N. C. Term R. 272; S. C.; 2 Murphey, 320; State *v.* Witherow, 3 Murphey, 153.

§ 2206. "Corporal oath" and "solemn oath" are equivalent, and either is sustained by proof of swearing with uplifted hands.[u]

§ 2207. Where a party offers himself to prove his books, and wilfully testifies untruly as to matters material to the issue, it is perjury, although he was sworn generally, but without objection, to tell the whole truth, instead of being sworn to make true answers.[v] So, where such oath is administered, and such testimony given, on a trial before referees.[w] An indictment for perjury cannot be maintained upon an answer in chancery, unless the bill called for an answer under oath.[x]

IV. By one.

§ 2208. The crime being distinct, several persons cannot be joined. One alone can be made defendant.[y]

§ 2209. If an incompetent witness is permitted to testify, and testifies falsely, it is perjury.[z] This is even good as to the plaintiff himself.[a]

§ 2210. In the trial of an indictment for perjury in an answer to a bill of discovery, the certificate of the magistrate before whom the answer was sworn to, on proof of the handwriting of his signature, is competent and sufficient prima facie evidence of the administration of the oath to the defendant.[b]

V. In a competent court.

§ 2211. The court must have jurisdiction of the proceedings in which the false oath was taken.[c] If it appear to have been taken before a person who had no lawful authority to administer it,[d] or who had no jurisdiction of the cause,[e] the defendant must be acquitted.[f] The indictment, however, need not show the nature of the authority of the party administering the oath.[g]

§ 2212. Where the court has jurisdiction of the subject matter of inquiry, it is not necessary that the proceedings should be strictly regular in order to convict a witness in a case of perjury.[h]

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[u] Jackson *v.* State, 1 Carter (Ind.) 184.
[v] State *v.* Keene, 26 Maine (13 Shep.) 33.
[w] Ibid. Post § 2221.
[x] Silver *v.* State, 17 Ohio, 365.
[y] R. *v.* Phillips, 2 Strange, 921; R. *v.* Cross, 2 Yeates, 79; see ante, § 429.
[z] Montgomery *v.* State, 10 Ohio, 220.
[a] Ibid. Rich *v.* Newell, 3 Yea. 414; see post § 2224.
[b] Com *v.* Warden, 2 Metcalf, 406.
[c] 2 Rus. on Cr., 6th Am. ed. 599; Pankey *v.* State, 1 Scam. 80; Montgomery *v.* State, 10 Ohio, 220; State *v.* Lounden, 5 Hump. 83; Steinson *v.* State, 6 Yerger, 531; State *v.* Ammond, 16 Conn. 457; State *v.* Gallimere, 2 Ired. 374; State *v.* Alexander, 4 Hawks, 172; State *v.* Hayward, 1 N. & M. 546; State *v.* M'Croskey, 3 M'Cord, 305; State *v.* Hayatt, 2 Hayw. 56; Com. *v.* White, 8 Pick. 453; Jackson *v.* Humphrey, 1 Johns. 498; Com. *v.* Knight, 12 Mass. 274; Arden *v.* State, 11 Conn. 408; Conner *v.* Com. 2 Virg. Cas. 30; U. S. *v.* Bailey, 9 Peters, 238; U. S. *v.* Barton, Gilpin, 439.
[d] 3 Inst. 165, 166.
[e] 3 Inst. 166; Yelv. 111.
[f] See R. *v.* Crossley, 7 T. R, 315; 1 Hawk. c. 69, s. 3. 4; Bac. Abr. Perjury, (A); R. *v.* Dunn, 1 D. & R. 10; R. *v.* Hanks, 3 C. & P. 419.
[g] R. *v.* Callanan, 6 B. & C. 602; State *v.* Ludlow, 2 Southard, 772.
[h] State *v.* Lavalley, 9 Miss. 334.

§ 2213. Perjury cannot be committed by taking a false oath in a case before a justice of the peace, of which the justice has not jurisdiction.[i]

§ 2214. In a celebrated and much contested case in Connecticut, it was held by a majority of the judges, that as Christianity was part of the common law of the land, an ecclesiastical tribunal had the right to administer an oath, and that false swearing before such a tribunal was perjury.[j] The last is certainly a bold position, and when it is considered the license with which ecclesiastical trials are conducted, particularly where the church discipline leaves the matter to the adjudication of the congregation as a body, it is questionable how far sound policy would justify a doctrine which would attach to ecclesiastical sentences, first the incidents and then the consequences of a civil judgment.

§ 2215. Perjury, it seems, may be assigned on a false oath taken before a grand jury.[k] In England doubts seem to have existed as to whether a grand juror was competent to prove the oath, but it is clear that the clerk of the assizes, or any third person, was admissible for that purpose.[l] The inclination now is that the grand juror is competent.[m]

§ 2216. A man cannot be indicted for perjury in swearing before a justice to his attendance in court as a witness, the clerk only being authorized to administer such oath.[n]

§ 2217. It is sufficient, *prima facie*, that the person by whom the oath was administered, was an acting magistrate, and the evidence of the individual himself may be received for that purpose.[o] The rule, however, is inflexible, that the jurisdiction should be *prima facie* competent, and the proceedings judicial.[p] But perjury may be assigned in an oath erroneously taken, especially while the proceedings in which it was taken remain unreversed.[q]

§ 2218. No indictment for perjury will lie in one state for a false oath administered in another. A judge in New York has no authority to administer an oath in Canada.[r]

A commissioner to whom a commission is directed authorizing him to take the deposition of a particular witness, is not authorized to examine a different person, who falsely personates the witness named in the commission.[s]

§ 2219. If a state magistrate administer an oath under an act of congress expressly giving him the power to do so, it would be a lawful oath by one having competent authority; as much so as if he had been

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[i] State *v.* Alexander, 4 Hawks, 182; State *v.* Furlong, 26 Maine (13 Shep.) 69.
[j] Chapman *v.* Gillett, 2 Connect. R. 40.
[k] State *v.* Fassitt, 16 Connect. 457; Thomas *v.* Com. 2 Robin. 795; see ante, § 508-11.
[l] R. *v.* Hughes, 1 Car. & K. 519.
[m] See ante, § 508-11.
[n] State *v.* Wyatt, 2 Haywood, 56.
[o] State *v.* Hascall, 6 New Hamp. 352; see ante § 653, 713.
[p] State *v.* Clark, 2 Tyler, 282; People *v.* Phelps, 5 Wendell, 10.
[q] Van Steenburgh *v.* Kontz, 10 Johnson, 167.
[r] Jackson *v.* Humphrey, 1 Johnson, 498.
[s] Com. *v.* Quimby, 6 Law Rep. N. S. 210.

especially appointed a commissioner under a law of congress for that purpose.[t]

§ 2220. Perjury may be assigned on an oath administered by a justice of the peace, on the investigation of a matter submitted to arbitration by a rule of court, with the consent of parties.[u]

VI. In a judicial proceeding.

§ 2221. It must appear that the false swearing was in a judicial proceeding.[uu]

If the defendant take a false oath when examined as a witness at a trial; or in an answer to a bill in equity:[v] or in depositions in a Court of Equity;[w] or on a motion for continuance;[x] or in an affidavit in the Courts of King's Bench, Common Pleas, Chancery, &c.;[y] or upon a wager of law;[z] or upon a commission for the examination of witnesses;[a] or in justifying bail in any of the courts;[b] or upon an examination before a magistrate; or in a judicial proceeding in a court baron,[c] or ecclesiastical court,[d] or any other court, whether of record or not; in England it is perjury.[e] He may be guilty of perjury at common law, in respect to a false oath taken by him in his own cause, in answer to questions put to him in a court of law, having power to purge him on oath concerning his knowledge of the matters in dispute.[f]

§ 2222. An indictment lies against a juror alleging that he falsely and corruptly swore upon his *voir dire*, that he had not formed or expressed an opinion on the merits of the case, when in fact he had.[g] But a mere voluntary oath cannot amount to perjury. Therefore, false swearing in a voluntary affidavit, made before a justice of the peace, before whom no cause is depending, is not perjury.[h]

Where a man is authorized by statute to support an account by his own oath, if sworn within "twelve months after the first article therein charged shall become due," it must appear affirmatively on the face of the account, that the oath was sworn within the twelve months, or the party is not guilty of perjury if it be false.[hh]

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[t] U. S. *v.* Bailey, 9 Peters, 238.
[u] State *v.* Stephenson, 4 McCord, 165; see Chapman *v.* Gillett, note, 2 Connect. 41.
[uu] State *v.* Chamberlin, 30 Vt. 559; State *v.* Simons, Ibid. 1620.
[v] 5 Mod. 348; 3 Inst 166; Com. *v.* Warden, 11 Met. 406.
[w] 5 Mod. 348.
[x] State *v.* Johnson, 7 Beauf. 49.
[y] 5 Mod. 348; 1 Show. 335, 397; 1 Ro. Rep. 79, per Coke, C. J.
[z] Noy, 128.
[a] Cro. Car. 99; see 1 B. & P. 240.
[b] State *v.* Lavalley, 9 Miss. 834.
[c] 5 Mod. 348; 1 Mod. 55, per Twisden, J.
[d] 5 Mod. 348.
[e] Archbold's C. P. 9th ed. 538; 1 Hawk. c. 69. s. 3.
[f] Respublica *v.* Newell, 3 Yea. 414; see Montgomery *v.* State, 10 Ohio, 220; ante, § 2207.
[g] State *v.* Wall, 9 Yerger, 347; State *v.* Moffot, 7 Humph. 250.
[h] Shaffer *v.* Kentzer, 1 Binney, 542; State *v.* Wyatt, 21 Hay. 56; Pegram *v.* Styrm, 1 Bailey 595; State *v.* Stephenson, 4 McCord, 165; Com. *v.* Knight, 12 Mass. 274; State *v.* Dayton, 3 Zabriskie, 49.
[hh] Warner *v.* Fowler, 8 Md. 25.

§ 2223. One making a false affidavit before a justice of the peace of a state, in order to establish a claim against the United States, is indictable under the act of Congress passed March 1, 1823, to prevent false swearing touching public money, though such affidavit was not expressly authorized by act of Congress, but allowed by the secretary of the treasury to be made before a justice of the peace, under the act of July, 1832, liquidating Virginia claims.[i]

§ 2224. In a trial before a justice of the peace, if the plaintiff offer himself as a witness, is sworn and testifies falsely, perjury may be assigned on the oath thus taken.[j]

§ 2225. An indictment for perjury cannot be sustained on the 7th and 8th sections of the act of the 29th of July, 1813, c. 34, granting a bounty to vessels engaged in the fisheries, unless the certificates, required by the 7th section, be sworn to by the same person, whether owner of the vessel or his agent or representative, who signs the certificate. If the owner signs the certificate and the agent swears to it, the case is not within the statute.[k]

§ 2226. In Connecticut, in an action for slanderously charging the plaintiff with perjury, it was held, as has been seen, that a false oath taken before a justice of the peace, before a church called for the purpose of administering discipline, was perjury at common law.[l]

In New Jersey, it is said that perjury cannot be committed in an official oath [m]

§ 2227. Perjury may be assigned upon an oath or affidavit which is insufficient to effect the purpose for which it was taken without additional proof, and it is not necessary to show or aver that such additional proof was made.[n]

It is not necessary that an affidavit required by statute should be in the words of the act: if the substantial requirements of the act are embodied in it, it will be sufficient, and perjury may be assigned upon it.[o]

False swearing in a naturalization case is perjury at the common law, and, though it may also be an offence against the federal government, the offender may be indicted and punished in a state court.[oo]

VII. In a matter material.

§ 2228. The assignment of perjury on which a conviction is asked must be in a manner which was material to the issue.[p] Thus, in a common case

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[i] U. S. *v.* Bailey, 9 Pet. 238. [j] Montgomery *v.* State, 10 Ohio, 226; ante, § 2209.

[k] U. S. *v.* Kendrick, 2 Mason, 69. It is doubted if perjury can be assigned upon the oath made for the purpose of obtaining a marriage license; R. *v.* Alexander, 1 Leach, 63; but see 1 Vent. 370; and in R. *v.* Foster, R. & R. 459, a false oath taken before a surrogate to procure a marriage license, was holden not sufficient to support a prosecution for perjury. In such a case, it is usual to indict as for a mere misdemeanor at common law. (Archbold, C. P., 9th ed. 538.)

[l] Chapman *v.* Gillett, 2 Connect. 41; ante, § 2214.

[m] State *v.* Dayton, 3 Zab. 49. [n] Ibid. [o] Ibid.

[oo] Rump *v.* Commonwealth, 30 Penn. State R. 475.

[p] 2 Russ, on Crimes, 6 Am. ed. 600; State *v.* Hattaway, 2 N. & M. 118; Hinch *v.*

if a witness be asked whether goods were paid for "*on a particular day*," and he answer in the affirmative; if the goods were really paid for, though not on that particular day, it will not be perjury,[q] unless the day be material. So, if a person swear that J. S. beat another with his sword, and it turn out that he beat him with a stick, this is not perjury; for all that was material was the battery.[r] So it must be shown that the testimony given before the grand jury, related to an offence committed within the jurisdiction.[s]

So, superfluous and immaterial matter, stated in affidavit for a writ of *habeas corpus*, although false, is not perjury.[t]

§ 2229. But perjury may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point,[u] but such collateral matter must be material to the point in dispute; if it be a point, the existence or non-existence of which cannot effect the question in dispute, it does not tend to prevent the due administration of justice, and therefore it is not perjury.[v]

§ 2230. Perjury may be assigned upon a man's testimony as to the credit of a witness.[w] Or he may be perjured in his answer to a bill in equity, though it be in a matter not charged by the bill.[x]

§ 2231. Where three or more persons were alleged to be jointly concerned in an assault, and it was contended to be immaterial, if all participated in it, by which of them certain acts were done, the contrary was held, and it was ruled that evidence as to the acts of either, if wilfully and falsely given, constituted perjury.[y]

§ 2232. Where a party is indicted for perjury in giving testimony on the trial of an issue in court, proof that his testimony was admitted on that trial, is not sufficient to warrant a jury, upon the trial of an indictment, to infer that such testimony was material to the issue.[z]

Under the act of congress of March 3, 1825, an intentional omission by one applying for the benefit of the bankrupt law, to place any portion of his property upon a schedule sworn to by him as containing a true account of all his effects, is perjury.[a]

VIII. Indictment.

§ 2233. Indictments for perjury in Virginia, must be according to common law.[b]

State, 2 Miss. 158; Com. *v.* Knight, 12 Mass. 274; Campbell *v.* People, 8 Wend. 636; Conner *v.* Com., 2 Virg. Cases, 30.

[q] 2 Ro. Rep. 41, 42.
[r] Hetley, 97; see 1 Hawk. c. 69, s. 8.
[s] 8 Gratt. 628.
[t] White *v.* State, 1 Sm. & Marsh, 149.
[u] Com. *v.* Pollard, 12 Metc. 225.
[v] Studdard *v.* Linville, 3 Hawks, 474.
[w] 2 Salk. 514; State *v.* Street, 1 Murphey, 124.
[x] 5 Mod. 348; Semb. 1 Sid. 106, 274.
[y] State *v.* Norris, 9 New Hamp. 90.
[z] Com. *v.* Pollard, 12 Met. 225.
[a] U. S. *v.* Nichols, 4 McLean, 23.
[b] Lodge's Cases, 2 Gratt. 579.

Each point in the definition of perjury must be distinctly shown on the indictment. Thus, it must appear that the oath was

1st. Wilful.[c]

§ 2234. An indictment charging that the defendant "being a wicked and evil person, and unlawfully and unjustly contriving, &c., deposed, &c.," and concluding that the defendant "of his wicked and corrupt mind did commit wilful and corrupt perjury," is defective even at common law, for not alleging that the defendant wilfully and corruptly swore falsely.[d] But in another case, an indictment which stated that the defendant "did voluntarily, and of his own free will and accord, propose to purge himself upon oath of the said contempt," negativing by express 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.[e]

§ 2235. 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.[f]

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[c] For forms of indictment, see Wharton's Precedents, as follows:
(577) General frame of indictment. Perjury in swearing an alibi for a felon.
(578) Swearing as to age in procuring money of the United States in enlisting in the navy of the United States.
(579) At custom-house, in swearing to an entry of invoice, intending to defraud the United States, etc., under act of March 1st, 1823.
(580) In justifying to bail for a party after indictment found, etc.
(581) In giving evidence on the trial of an issue on an indictment for perjury.
(582) On a trial in the Supreme Judicial Court of Massachusetts, on a civil action.
(583) For perjury committed in an examination before a commissioner of bankrupts.
(584) Against an insolvent in New York, for a false return of his creditors and estate.
(585) Against an insolvent in Pennsylvania, for a false account of his estate.
(586) False swearing in answering interrogatories on a rule to show cause why an attachment should not issue for a contempt in speaking opprobrious words of the court in a civil suit.
(587) In charging J. K. with larceny before a justice of the peace.
(588) In charging A. N. with assault and battery before a justice.
(589) In false swearing by a person offering to vote, as to his qualifications when challenged.
(590) In an affidavit to hold to bail, in falsely swearing to a debt.
(591) False swearing to an affidavit in a civil cause in which the defendant swore that the arrest was illegal, etc. The perjury in this case is for swearing to what the defendant did not know to be true.
(592) Perjury, in an answer sworn to before a master in chancery.
(593) Perjury before a grand jury.
(594) In answer to interrogatories exhibited in chancery.
(595) Committed at a writ of trial.
(596) Falsely charging the prosecutor with bestiality at a hearing before a justice of the peace.

[d] State *v.* Carland, 3 Dev. 114.

[e] Resp. *v.* Newell, 3 Yea. 407.

[f] Com. *v.* Cook, 1 Robin. 729.

It is clear that at common law the words "knowingly, wilfully and corruptly," cannot be omitted with safety.[g]

2d. Sworn before a competent jurisdiction.

§ 2236. In an indictment for perjury, it is not necessary to allege in what particular form the defendant was sworn to testify. It is sufficient to allege, that he was "duly sworn."[gg]

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.[h]

§ 2237. When 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.[i]

2238. In an indictment for perjury in taking a false oath before a Regimental Court of Inquiry, the indictment ought to set forth 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.[j]

§ 2239. An indictment for perjury, alleged to have been committed on a writ of trial, stated the trial to have taken place before the high sheriff. It was proved, that when the defendant gave evidence on the writ of trial, neither the high sheriff nor the under sheriff were present, but that the writ of trial was executed before M. S., the sheriff's assessor, who was proved to have been in the constant practice of acting as the sheriff's assessor and deputy; but the writ of trial was directed to the sheriff, and it was stated in the postea, that the trial took place before him; it was held, by the judges, that the allegation in the indictment was supported, and that it sufficiently appeared that M. S. had authority to execute the writ of trial.[k]

§ 2240. Though false swearing in depositions taken by consent before unauthorized persons, or person out of the state, is not perjury; yet the contrary is the case where such false swearing takes place before a commissioner appointed by the court under the common rule.[l]

§ 2241. 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.[m]

§ 2242. It is not necessary, in averring the authority of an officer to

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[g] R. *v.* Stephens, 5 B. & C. 246; R. *v.* Richards, 7 D. & R. 665; U. S. *v.* Babcock, 4 McLean, 113.

[gg] Dodge *v.* State, 4 ZabrN. J. 455; State *v.* Farron, 10 Rich. Law S. C. 165.

[h] Resp. *v.* Newell, 3 Yeates, 807; see State *v.* Freeman, 15 Vermont, 723.

[i] Steinson *v.* State, 6 Yerger, 531.

[j] Com. *v.* Conner, 2 Virg. C. 30.

[k] R. *v.* Dunn, 1 C. & K. 730.

[l] Phillippi *v.* Bowen, 2 Barr, 20.

[m] Campbell *v.* People, 8 Wend. 636.

administer an oath in an indictment for perjury, to aver that he then and there had authority, if time and place had been added to the act of taking the oath before him.[n]

§ 2243. On a conviction for perjury in Rutherford county, North Carolina, two reasons were assigned in arrest of judgment: 1st. That the indictment did not charge that the oath was taken in Rutherford county; 2d. That the evidence was not given to the court and jury, but to the jury only. The first reason was overruled, the indictment charging that "he, the said A B., on the sixteenth of April, in the year aforesaid, in the county aforesaid, came before the said C. D., judge as aforesaid, and then and there, before the said C. D., did take his corporal oath." The part of the indictment immediately preceding stated that C. D. held the court as judge at that term in Rutherford county; the same county was inserted in the caption of the indictment, and there was none other mentioned in any part of it: the words "then and there," refer to the 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.[o]

§ 2244. The right of the officer to administer the oath must be shown by specific averment, it not being enough generally to state that he was competent for that purpose.[p]

§ 2245. The style of the court must be legally set out,[q] but it is sufficiently described by words, which cannot apply to any other court.[r]

In an indictment for perjury, committed by a petitioner in bankruptcy, it is unnecessary to set forth the petition substantially, or otherwise; such a reference to it as will show its character and object is sufficient.[s]

§ 2246. Where the defendant is indicted for a perjury, committed on trial of an issue in a former indictment, the indictment must set forth the finding of the former indictment, in the proper court of the proper county, and should also set forth that indictment, or so much thereof as to show that it charged an offence committed in that county, and of which said court had cognizance, and also the traverse or plea of the defendant in that indictment, whereon the issue was joined. Judgment on an indictment, defective in these particulars, must be arrested.[t]

§ 2247. If the facts be stated, as to time or place, with uncertainty or repugnancy, the indictment will be bad.[u] But where the indictment charged the defendant with having committed perjury by swearing at a court in July, that he had witnessed a transaction in October of the same year, it was held not to be such a repugnancy as to afford cause for arresting judgment.[v]

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[n] State *v.* Dayton, 3 Zabriskie, 49.
[o] State *v.* Witherow, 3 Murphey, 153.
[p] McGragor *v.* State, 1 Carter, (Ind.) 232.
[q] State *v.* Street, 1 Murphey, 156.
[r] U. S. *v.* Denning, 4 McLean, 3.
[s] Ibid.
[t] State *v.* Gallimore, 2 Iredell, 374.
[u] State *v.* Hardwick, 2 Missouri, 185.
[v] State *v.* McKennan, Harp. 302.

3d. In a judicial proceeding.

§ 2248. An indictment for perjury, which does not show on its face that the affidavit was made in a judicial proceeding is bad.[vv]

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.[w]

§ 2249. Where it becomes necessary, in charging the commission of the offence, to allege that a certain term of county court was duly holden, it is not sufficient to allege that it was 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.[x]

§ 2250. To constitute perjury in Tennessee, in swearing to the plea of *non est factum*, upon a trial before a magistrate, it is necessary that the plea should be in writing and be signed by the party who pleads it, as required by the acts of 1817, c. 86, s. 2, and 1819, c. 27, sec. 4. If the indictment omit to charge that the plea is in writing, and signed by the party, it is fatal on demurrer.[y]

In an indictment for perjury, assigned on the testimony contained in a deposition, it was alleged that the oath was administered by the commissioner on a day specified, he "then being a justice of the peace, and duly authorized to administer said oath;" and that the commissioner was appointed by the court at a term thereof subsequent to the day specified as that on which the oath was administered. It was held, that the latter allegation was not descriptive, and might be rejected as surplusage.[yy]

§ 2251. 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 a previous trial, the verdict, the judgment, the writ of *fieri facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the interpleader act: it was held, that the indictment was bad, as the affidavit did not appear to have been made in a judicial proceeding.[z]

§ 2252. In another case, the indictment, as stated by the learned and able judge who tried the cause, (Judge Gaston,) averred, that at a court of Pleas and Quarter Sessions, held for the county of Cabarrus, on the third Monday of April, 1841, before John Stile, junior, B. W. Allison, William Barringer, and James Young, Esquires, justices qualified by law to hold the said court, "a certain issue, in due manner joined in said court,

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[vv] State *v.* Lamont, 2 Wis. 437.
[w] Steinson *v.* State, 6 Yerger, 581.
[x] State *v.* Freeman, 15 Vermont, 723.
[y] State *v.* Steel, 1 Yerger, 394.
[yy] State *v.* Langley, 34 N. H. 529
[z] R. *v.* Bishop, 1 Car. & Mars. 302.

between the State of North Carolina and one Benjamin Erwin, upon a certain indictment depending against the said Benjamin Erwin, for assaulting and beating one Michael Holbrook, and for making an affray, came on to be tried by a jury of the county, in due manner sworn and taken for that purpose," and that "upon the trial of the said issue, James Gallimore did then and there appear, and was produced as a witness in behalf of the said State against the defendant, Benjamin Erwin," and proceeded to charge that the said James then and there took his corporal oath to testify the truth, the whole truth, and nothing but the truth, upon the said issue, "they the said John Stile, junior, B. W. Allison, William Barringer, and James Young, Esquires, justices aforesaid, then and there having competent authority to administer the said oath;" that a certain inquiry became material on the trial of the said issue, and that thereupon the said Gallimore did corruptly, maliciously, and falsely depose, swear, and give in evidence as is therein particularly stated; and then it proceeded to falsify the testimony so given, and to aver that therein the said James did commit wilful and corrupt perjury. "The objection to the indictment," to use the language of the judge, "is, that it does not distinctly and certainly set forth the facts which show that the alleged false oath was taken in a judicial proceeding before a court having jurisdiction thereof. It is a general rule that every indictment should charge explicitly all the facts and circumstances which constitute the crime, so that, on the face of the indictment, the court can with certainty see that the indictors have proceeded upon sufficient premises, and afterwards, when these facts and circumstances are confessed or found to be true, can behold upon the record an undoubted warrant for awarding the judgment of the law. According to this rule, the indictment in this case should have averred, as a fact, the finding of an indictment in the county court of Cabarrus, against Benjamin Erwin, and should have set forth that indictment, or so much thereof as to show that it charged an offence committed within that county, and of which said court had cognizance; and also have set forth the traverse or plea of the said Benjamin, whereon the issue was joined. Had it done so, it would then have appeared upon the face of the indictment, whether the alleged false oath was taken in a judicial proceeding before a court having jurisdiction thereof. Nor on common law principles is the want of precision in this matter helped by the averment in the indictment, that the justices, before whom the oath was taken, had competent authority to administer said oath, for this is but the averment of a legal inference and not of a distinct fact, and an averment by the indictors, whose province it is to state facts, and who must leave legal inference to be drawn by the court."[a]

In an indictment for perjury, committed by the defendant upon an examination under oath as to his sufficiency as a surety for another in a bond executed under the 4th subdivision of the 10th section of the New

[a] State *v.* Gallimore, 2 Iredell, 374, 375.

York "act to abolish imprisonment for debt," &c., after a conviction of the debtor, and an order for his commitment under that act, it is not necessary, under the special character of that act, to set forth facts sufficient to show that the officer who entertained the proceedings had jurisdiction to administer the oath.[b]

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

§ 2253. The same rigor has not been required in this country in the setting forth of the alleged false oath of the defendant, as, under the statute of Elizabeth, was considered essential in England.[c] Thus, it is said, that at common law, it is only necessary to set forth the substance of the oath, and when that is done, an exact recital is not necessary; and accordingly, when the article "an" was substituted for the article "the," the variance was held immaterial.[d]

The indictment may embrace in a single count all the particulars in which the defendant is alleged to have sworn falsely.[dd]

§ 2254. 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.[e] 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.[f] Where the charge was in swearing to an affidavit "to the substance and effect following;" a variance, which consisted in using the word "suit" instead of "case," was deemed immaterial.[g]

§ 2255. It is not necessary to set out the whole of what the defendant had sworn: only that part alleged to be false need be stated.[h] The questions by which the alleged false answers were elicited are also unnecessary.[i] It is not necessary that it should appear whether the witness was compelled to attend court by a subpœna, or whether he attended voluntarily; nor whether the false testimony was given in answer to 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.[j]

§ 2256. In an indictment for perjury, under the bankrupt law, in not

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[b] People *v.* Treadway, 3 Barb. Sup. Ct. R. 470, decided on the strength of People *v.* Phelps, 5 Wend. 10, and People *v.* Warner, 5 Wend. 271; which decisions, however, were disapproved.

[c] See ante, § 351–2, 606–9; Wh. Prec. in loco.

[d] People *v.* Warner, 5 Wendell, 271; State *v.* Ammond, 3 Murphey, 123.

[dd] Com. *v.* Johns, 6 Gray, (Mass.) 274.

[e] Ante, § 306–7. [f] Ibid.

[g] State *v.* Coffee, N. C. Term R. 272; S. C. 2 Murphey, 320; ante, § 306–7.

[h] Campbell *v.* People, 8 Wend. 636; Ingram *v.* Watkins, 1 Dev. & Bat. 442.

[i] 1 Chipman's Ver. R. 120; Com. *v.* Knight, 12 Mass. 274. [j] Ibid.

giving a full and true account of the property of the petitioners, the items on the schedule need not be stated in the indictment. The allegation that the property was omitted, with intent to defraud A. and the other creditors, is sufficient.[k]

§ 2257. Where the indictment for perjury alleged that the false testimony was as to whether the books testified to were witness's books of original entries, and whether the account had not been settled on his book of original entries, it was held to be no objection that the items of the account to which the testimony related were not specified. Nor is it necessary to allege, in such an indictment, that there was a final determination of the controversy before referees; it is sufficient that it alleges that the referees proceeded to hear the parties, and that the false testimony was given in due course of proceedings.[l]

§ 2258. In Virginia, an indictment for perjury in swearing to an answer in chancery, should set out the whole bill and answer.[m]

5th. How the false matter is to be negatived.

§ 2259. 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.[mm] 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.[n]

§ 2260. All the several particulars, in which the prisoner swore falsely, may be embraced in one count,[o] and proof of the falsity of any one will sustain the count.[p]

§ 2261. In negativing the defendant's oath, where he has sworn only to his belief, it will be 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.[q]

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[k] U. S. *v.* Chapman, 3 McLean, 390.
[l] State *v.* Keene, 26 Maine, 33.
[m] Com. *v.* Lodge, 2 Grattan, 579.
[mm] Though see State *v.* Lindenburg, 13 Texas, 27.
[n] See Wh. Prec. 577, etc.
[o] State *v.* Bishop, 1 Chip. 120.
[p] Bernie *v.* State, 19 Ala. 23; R. *v.* Hill, R. & R. 199; State *v.* Hascall, 6 New Hamp. 358; Dodge *v.* State, 4 Zabr. (N. J.) 456; ante, § 618.
[q] State *v.* Lea, 3 Ala. 602; see, as to whether scienter is generally to be averred, ante, § 631–6.

§ 2262. The assignment of perjury may, in some instances, be more full than the statement of the defendant which it is intended to contradict. When there is any doubt on the words of the oath, which can be made more clear and precise by a reference to some other matter, it may be supplied by an innuendo; the use of which is, by reference to preceding matter, to explain and fix its meaning more precisely;[r] but it is not allowed to add to, extend, or change the sense.[s] In a case where an objection was made to an indictment that it added, by way of innuendo, to the defendant's oath, "his house, situate in the Haymarket, in St. Mart-in-the-Fields;" without stating by any averment, recital or introductory matter, that he had a house in the Haymarket: or, even admitting him to have such a house, that his oath was of and concerning the said house, so situated; the objection was overruled, on the ground that the innuendo was only a more particular description of the same house which had been previously mentioned.[t] In the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an innuendo that it was the outer door was held good. In a case of perjury committed in an affidavit, it was holden that a word which had been omitted by accident in the original document, was improperly stated in the indictment, as though it had been in the original document, and that such word ought to have been inserted and explained by an innuendo.[u] If an innuendo is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it cannot be rejected as surplusage, and it will be bad after verdict.[v]

6th. Materiality.

§ 2263. It must appear on the face of the indictment that the matter alleged to be false was material;[w] but such materiality need not be expressly averred when it appears on record.[x] It is sufficient to charge generally that the false oath was material on the trial of the issue upon which it was taken; it is not necessary to show particularly how it was material.[y] And this is the case though the record does not itself show that the false oath was material.[z]

An indictment sufficiently charges perjury on the trial of a material question, by averring that upon a certain trial it became and was a material question whether certain chattels sold by the defendant to another per-

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[r] R. *v.* Taylor, 1 Camp. 404.
[s] R. *v.* Griepe, 1 Ld. Raym. 256.
[t] R. *v.* Aylett, 1 T. R. 70.
[u] R. *v.* Taylor, 1 Camp. 404.
[v] R. *v.* Griepe, 1 Ld. Raym. 260.
[w] Pickering's case, 8 Gratt, 629; People *v.* Collier, 1 Mann, (Mich.) 137; State *v.* Beard, 1 Dutch. (N. J.) 384; State *v.* Kennerly, 10 Rich. Law, S. C. 152.
[x] Campbell *v.* People, 8 Wend. 636; State *v.* Hall, 7 Blackf. 25; State *v.* Johnson, Ib. 49; Com. *v.* Knight, 12 Mass. 274; State *v.* Dodd, 3 Murphey, 226; 2 Stark. N. P. C. 423, n.; Hinch *v.* State, 2 Missouri, 8; Wethers *v.* State, 2 Blackf. 279; R. *v.* Thornhill, 8 C. & P. 575; R. *v.* Goodfellow, 1 C. & M. 569; State *v.* Dayton, 3 Zabriskie, 49; State *v.* Chamberlain, 30 Vt. 559.
[y] State *v.* Mumford, 1 Dev. 519. For a very elaborate and full statement of the English pleading in perjury, see 2 Russ. on Cr. 6 Am. ed. 621, &c.
[z] People *v.* Burroughs, 1 Parker, C. C. 211.

son, were so sold "in part payment for" a certain debt, "or in part payment for" a certain other debt; and that the defendant falsely swore that they were so sold in part payment of the debt first named; without adding anything about the other debt.[z]

An indictment averring that upon a certain trial "it became and was a material question whether" a certain fact was as stated, "whether" a certain other fact was as stated, "whether" a certain third fact was as stated, sufficiently states that each of the three questions is material, although neither the word "and" nor "also" is inserted between them.[zz]

§ 2264. An indictment against a person summoned as a juror, for having falsely sworn as to his having formed or expressed an opinion as to the guilt or innocence of a person on trial, must state that it became material to ascertain whether the juror had formed and expressed an opinion of the guilt or innocence of the defendant, and that an issue as to the qualifications of the jurors generally, or of the juror in particular, had been made by the parties, and submitted to the court.[a]

§ 2265. Where, in an indictment for perjury, it appeared that the defence set up to a criminal complaint amounted to an *alibi;* that the testimony of a particular witness who was examined thereon, and whose evidence was alleged to be false, tended to establish this defence; and it was averred, that each and every part of the testimony became and was material to the defence; it was held, that the materiality of the alleged false testimony was sufficiently stated in the indictment.[b]

IX Evidence.

§ 2266. An indictment for perjury, alleging that the respondent was sworn, and took her *corporal oath* to speak the truth, the whole truth, &c., was holden to be sustained by evidence of the oath taken in the usual form.[c] But if it be stated that the defendant was sworn on the Gospels, and it be proved that he was sworn in a different manner, according to the custom of his country, the variance will be fatal.[d] But if it be not proved that he was sworn in any other manner, proof that he was sworn generally, and was examined, will support this allegation.[e]

It is necessary to prove in substance the whole of what was set out in the indictment, as having been sworn by the defendant; proving a part only, it seems, is not sufficient.[f]

But it is not necessary that the whole of the testimony given by the prisoner, at the time of the alleged perjury, should be given in evidence. So far, however, as it is given, it should be considered together by the jury.[ff]

The proof must substantially support the indictment;[g] any variance in

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[z] Com. *v.* Johns, 6 Gray, (Mass.) 274.
[zz] Com. *v.* Johns, 6 Gray, (Mass.) 274.
[a] State *v.* Maffat, 7 Hump. 250.
[b] Com. *v.* Flynn, 3 Cush. 525.
[c] State *v.* Norris, 9 New Hamp. 96; Resp. *v.* Newell, 3 Yeates, 407.
[d] R. *v.* M'Arthur, Peake, 155.
[e] R. *v.* Rowley, R. & M. N. P. 302.
[f] R. *v.* Jones, Peake, 37.
[ff] Dodge *v.* State, 4 Zabr. (N. J.) 455.
[g] R. *v.* Leefe, 2 Camp. 134.

substance in this respect will be fatal.[h] Thus, where the indictment charged that the defendant swore "that one G. did not interrupt a constable in driving certain cattle to G.'s house," and the evidence was, that the defendant swore "that G. did not assist in driving the cattle from the officer," it was held that the evidence did not support the charge of perjury in the indictment.[i]

§ 2267. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or a copy of it,[j] to produce the answer, and prove either that the defendant was sworn to it, or that the signature to it is of the defendant's hand-writing, and that the name subscribed to the jurat is the name and hand-writing of a master or other person having authority for that purpose.[k] The same practice applies as to depositions in equity, and other similar cases, so at least as to throw upon the defendant the *onus* of proving that he was personated.[l]

§ 2268. In the trial of an indictment for perjury in an answer to a bill of discovery, the certificate of the magistrate before whom the answer was sworn to, on proof of the hand-writing of his signature, is competent and sufficient *prima facie* evidence of the administration of the oath to the defendant.[m]

An allegation to an indictment for perjury, that A. and four others committed an assault on B., is not proved by the production of a record which sets forth a bill of indictment charging A. and five others with an assault on B.[mm]

§ 2269. Any variance, as has been already said, in the setting forth of a record is fatal.[n] Thus, an indictment for perjury charged that, at a certain court, &c., a certain issue duly joined in said court between A. and B., &c., came on to be tried, and that the alleged perjury was committed by the witness on the trial of said issue. The transcript of the record of the suit offered in evidence upon the trial of the indictment, did not show that any issue had been joined. The defendant being convicted, a new trial was granted upon the ground that the transcript of the record did not support the charge in the indictment.[o]

Where an indictment charged the defendant with perjury, committed in testifying in a certain suit between one John Bailey and the trustees of Colebrook Academy, a corporation duly established by law in this state, in a plea of the case, in which said John Bailey was plaintiff and the trustees of the Colebrook academy aforesaid was defendant, it was held that the word Colebrook might be rejected as surplusage.[oo]

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[h] See R. *v.* Taylor, 1 Camp. 404; and see 2 Id. 509; 1 Sark. N. P. C. 518; 1 T. R. 327, 240, n.; 14 East, 218, n.; ante, § 610-13.

[i] State *v.* Bradley, 1 Hay. 403, and 1 Hay. 463.

[j] See R. *v.* Laycock, 4 C. & P. 326.

[k] R. *v.* Morris, 2 Bur. 1189; R. *v.* Benson, 2 Camp. 508.

[l] 2 Bur. 1189.

[m] Com. *v.* Warden, 11 Met. 406.

[mm] State *v.* Harvell, 4 Jones' Law, (N. C.) 55.

[n] See ante, § 308, 609.

[o] State *v.* Ammond, 3 Murphey, 123.

[oo] State *v.* Bailey, 11 Foster, (N. H.) 521.

§ 2270. An indictment for perjury alleged that the perjury was committed in making oath to a replication to a plea of usury, that the sum of $20 above the legal interest was not received for the loan of $400. The evidence was, that the respondent delivered to one Sargent, who borrowed the money of him, the sum of $380, and received therefor of him a note for $400. It was held, that the unlawful interest was received upon the sum of $380, and not upon the sum of $400, and that the indictment could not be maintained.[p]

§ 2271. The day on which the offence occurred, being matter of record, must be correctly laid; and if there be a variance between the record on this point, the indictment will be bad.[q]

§ 2272. It is not necessary to prove the appointment of the officer who administered the oath, it being only requisite to prove that he performed the duties of a certain office, without showing his appointment,[r] and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath in such a case.[s] And the officer himself may be called to prove that he was acting as such.[t] In an indictment for perjury, the oath said to be false was charged to have been administered in the circuit court by the deputy clerk; it was held, that no proof of the appointment of the deputy clerk was necessary; that in administering the oath, the deputy clerk acted under the superintendence of the court; and that the oath was as obligatory as if it had been administered by one of the judges.[u]

§ 2273. Where an indictment for perjury, committed in swearing to an answer in chancery, the attorney who drew the bill testified that it was "his belief" that the bill called for an answer on oath, it was held, that this testimony was not sufficient to establish the fact, and without further proof of the fact the defendant could not be convicted.[v]

§ 2274. Some one or more of the assignments of perjury must be met by the proper evidence, and the assignments proved must be upon a part of the matter sworn which was material to the matter before the court at the time the oath was taken. It is not necessary, therefore, to support all the assignments in any given count. The proper course of pleading is to negative specially each part of the defendant's testimony which is alleged to be false; and if any material assignment is adequately proved, it is enough to support the indictment.[w] So in an indictment for obtain-

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[p] State *v.* Tappan, 1 Foster, 56.

[q] U. S. *v.* Bowman, 2 Washington, 326; U. S. *v.* M'Neal, 1 Gallison, 387; contra, People *v.* Hoag, 2 Parker, C. R. (N. Y.) 9; see ante, § 275–9.

[r] R. *v.* Verelst, 3 Camp. 432; ante, § 713, 1041.

[s] State *v.* Gregory, 2 Murphey, 69; State *v.* Hascall, 6 New Hamp. 352; see ante, § 713, 1041.

[t] Ibid.

[u] Server *v.* State, 2 Blackf. 35.

[v] Silver *v.* State, 17 Ohio, 365.

[w] Ld. Raymond, 886; 2 Camp. 138–9; Cro. C. C., 7th ed. 622; State *v.* Hascall, 6 New Hamp. R. 358; Com. *v.* Johns, 6 Gray (Mass.) 274; Dodge *v.* State, 4 Zabr. 455; see ante, § 618.

ing goods on false pretences, it is sufficient to prove, on trial, any one of the several assignments of fraud which a given count may contain.[z]

One material averment being charged in a variety of forms, such several statements do not constitute one assignment of perjury; but if either one is proved false, it is sufficient to warrant a conviction.[zz]

§ 2275. When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove *the other* to be false. Upon an indictment for perjury in giving evidence before the quarter sessions, the prosecutor produced the examination of the defendant before a magistrate, in which he deposed in the direct negative to every thing he had sworn before the court; but Gurney, B., held this not sufficient *per se*, without other evidence to show that the statement before the court was true, and that before the magistrate false.[y] On trial upon an indictment for perjury in swearing falsely to a deposition, the facts stated in the deposition appeared to be true, but after making the deposition, the deponent had testified on the stand that they were not true; it was held, that the prisoner was not estopped by his *viva voce* testimony from showing the verity of the facts stated in the deposition in his defence.[z]

§ 2276. Evidence is admissible to show that the motives which actuated the defendant were corrupt; as, for instance, that his object in making the oath was to coerce the settlement of a civil claim.[a]

The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction.[b] Thus where perjury was assigned upon a statement made by the prisoner on oath, on a trial at *Nisi Prius*, that in June, 1851, he owed no more than one quarter's rent to his landlord, and the prosecutor swore that the prisoner owed five quarters' rent at that day, and to corroborate this a witness was called who proved that in August, 1850, the prisoner admitted to him that he owed his landlord three or four quarters' rent, it was held that this was not a sufficient corroboration.[c] Two witnesses, however, are not essentially requisite to disprove the particular fact sworn to, for if any material circumstance, such as the defendant's own letters and declarations,[d] be proved most clearly,[e] by other witnesses, in confirma-

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[z] R. *v.* Hill, Russ. & Ry. 190; R. *v.* Ady, 7 Car. & Payne, 140; People *v.* Haynes, 11 Wend. 557; see also Com. *v.* Kneeland, 20 Pick. 206.

[zz] Dodge *v.* State, 4 Zabr. (N. J.) 455; ante, § 618.

[y] R. *v.* Wheatland, 6 C. & P. 238.

[z] State *v.* J. B., 1 Tyler, 260.

[a] State *v.* Hascall, 6 New Hamp. 352.

[b] R. *v.* Yeates, 1 Car. & Mars. 132; 2 Rus. on Cr., 6 Am. ed. 650; see ante, § 802.

[c] R. *v.* Boulter, 9 Eng. Law & Eq. 537; 5 Cox C. C. 543; 2 Den. C. C. 396.

[d] State *v.* Moliere, 1 Dev. 213; U. S. *v.* Wood, 14 Peters, 430; Dodge *v.* State, 4 Zabr. (N. J.) 455.

[e] R. *v.* Champney, 2 Lew. 258; U. S. *v.* Wood, 14 Peters, 430.

tion of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction.[f]

When falsity is proved, the burden is on the defendant to show that it arose from surprise, inadvertency, or mistake, and not from a corrupt motive.[ff]

§ 2277. The cases in which a living witness to the corpus delicti of the defendant, in a prosecution for perjury, may be dispensed with, are; in cases where a person is charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only being proved to have been taken; in cases where the party has been charged with taking an oath contrary to what he must necessarily have known to have been the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it.[g]

§ 2278. Where an indictment contains several assignments of perjury, it is not sufficient to disprove each of them, by one witness; since, in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence to negative the truth of the matter contained in such assignment.[h]

§ 2279. It is not necessary, however, that *every* fact which goes to make up the assignment of perjury should be so disproved.[i]

The testimony of a single witness is sufficient to prove that the defendant swore as is alleged in the indictment.[j]

§ 2280. It should not be forgotten, that as the policy of the law forbids a witness in a civil suit from being made infamous, so far as respects that suit, through a conviction for perjury obtained upon the testimony of a party to such suit, the English courts will not permit a witness, under such circumstances to be excluded from the witness-box by an intermediate conviction for perjury.[k] On the same principle, and in order to repress the same evil, it has been held in Pennsylvania, that an indictment for false swearing to an affidavit of defence, does not lie until the case in which the affidavit is filed is terminated.[l] In England the present practice is to post-

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[f] R. *v.* Lee, 2 Russell on C. 545; R. *v.* Gardiner, 2 Moo, C. C. 95; R. *v.* Mayhew, 6 C. & P. 315; R. *v.* Virrier, 6 C. & P. 315; per Sutherland, J., 9 Cowen, 118; State *v.* Hayward, 1 Nott & M'C. 546; Com. *v* Pollard, 12 Metcalf, 225; R. *v.* Boulter, 9 Eng. Law & Eq. 537; Com *v.* Parker, 2 Cushing, 222.

[ff] State *v.* Chamberlain, 30 Vt. 559.

[g] U. S. *v.* Wood, 14 Peters, 430.

[h] 2 Russ. on Cr., 6 Am. ed. 653; 3 Greenl. on Ev. § 198; R. *v.* Roberts, 2 C. & K. 607.

[i] R. *v.* Parker, C. & M. 639; R. *v.* Verrier, 12 Ad. & El. 317; R. *v.* Yeates, C. & M. 132; R. *v.* Mudie, 1 M. & R. 128.

[j] Com. *v.* Pollard, 12 Met. 225.

[k] See 2 Rus. on Cr., 6 Am. ed. 654; post, § 3188.

[l] Com. *v.* Dickinson, 5 P. L. J. 164.

pone the trial for perjury until the cause out of which it arises is determined,[m] in order to keep the testimony of the witness intact.

§ 2281. Where, in a prosecution for perjury, a written paper is referred to, the place and time of subscribing it by the accused being involved in the alleged perjury as set forth in the indictment, such paper is proper evidence at the trial.[n]

§ 2282. In an indictment for perjury on a trial at *nisi prius*, the *postea* must be produced by the plaintiff.[o]

X. Subornation of perjury.[p]

[*The statutes on subornation of perjury are to be found ante*, § 2169, *&c.*]

§ 2283. To constitute subornation of perjury, which is an offence at common law, the party charged must procure the commission of the perjury, by inciting, instigating, or persuading the witness to commit the crime.[q] Though a party, who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged.[r] On the trial of A. for suborning B. to commit perjury on a former trial of A. for another offence, where a witness testified that B on the former trial, swore that he came from L., as a witness on that trial, in consequence of a letter written to him by A., it was held, that although this was not evidence that A. wrote such letter to B., yet it was evidence that B. so testified in the presence of A., and as A. thereby had an opportunity to prove, but did not prove, on the trial for suborning B., in what manner or by whose agency B. came from L., such testimony of B. might be considered by the jury, in connection with the other evidence in the case.[s]

§ 2284. Although in order to constitute the technical offence of suborna-

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[m] R. *v.* Simmons, 1 C. & P. 50; 1 Strange, 162.

[n] Osburn *v.* State, 7 Ham. (Part 1st,) 212. [o] Respublica *v.* Goss, 2 Yeates, 479.

[p] For forms of indictment, see Wh. Prec., as follows:

(597) Subornation of perjury in a prosecution for fornication, &c.

(598) Subornation of perjury, on a trial for robbery, where the prisoner set up an alibi.

(599) Subornation of perjury in an action of trespass.

(600) Corruptly endeavoring to influence a witness in the U. S. Courts.

(601) Endeavoring to entice a witness to withdraw himself from the prosecution of a felon.

(602) Persuading a witness not to give evidence against a person charged with an offence before the grand jury.

(603) Inducing a witness to withhold his evidence as to the execution of a deed of trust, in Virginia.

(604) Endeavoring to suborn a person to give evidence on the trial of an action of trespass, issued in the Supreme Judicial Court of Mass.

(605) Soliciting a woman to commit perjury, by swearing a child to an innocent person, the attempt being unsuccessful,

(606) Soliciting a witness to disobey a subpœna to give evidence before the grand jury.

[q] 1 Hawk. c. 69, s. 10; 2 Rus. on Cr., 6 Am. ed. 596; Com. *v.* Douglass, 5 Metcalf, 341; R. *v.* Reilley, 1 Leach, 154.

[r] Com. *v.* Douglass, 5 Metcalf, 241. [s] Com. *v.* Douglass, 5 Metcalf, 241.

tion the person cited must actually take the false oath, yet it is plain that attempts, though unsuccessful, to induce a witness to give particular testimony, irrespective of the truth,[t] and to dissuade a witness from attending the trial of a cause,[u] even though such witness had not been served with a subpœna, are indictable.[v]

§ 2285. It is not necessary in an indictment for attempting to suborn a witness, that the fact which the defendant attempted to procure the witness to swear to, should be stated specifically: as that fact would only be evidence to show *quo animo* the bribe was offered, it may be shown by other circumstances.[w]

§ 2286. In an indictment for spiriting away a witness, it seems not to be important to prove the materiality of his testimony.[x]

§ 2287. In an indictment against one, for endeavoring to prevent a witness recognized to appear and testify before a grand jury, from appearing and testifying, the indictment in the original case, in which the witness was recognized to appear, need not be recited, nor does the guilt or innocence of the respondent depend upon the sufficiency of that indictment, or of the guilt or innocence of the respondent in the first case.[y]

CHAPTER II.

CONSPIRACY.

A. STATUTES.
- NEW YORK.
  - Conspiracy to falsely indict or sue another, or cheat, or commit an act injurious to public morals, § 2288.
  - When overt acts are necessary, § 2289.
  - When overt acts are to be averred, § 2290.
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  - Conspiracy to indict, § 2290(*a*).
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B. CONSPIRACIES AT COMMON LAW.

I. CONSPIRACIES TO COMMIT AN INDICTABLE OFFENCE, § 2292.
- 1st. CONSPIRACIES TO COMMIT FELONIES, 2292.
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II. CONSPIRACIES TO MAKE USE OF MEANS THEMSELVES THE SUBJECT OF INDICTMENT, TO EFFECT AN INDIFFERENT OBJECT, § 2113.

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[t] 2 Rus. on Cr., 6 Am. ed. 595.
[u] 1 Ibid. 182; State *v.* Carpenter, 20 Vermont, 9.
[v] State *v.* Keyes, 8 Vermont, 57.
[w] State *v.* Holding, 1 M'Cord, 31.
[x] State *v.* Early, 3 Harrington, 562.
[y] State *v.* Carpenter, 20 Vt. (5 Washb.) 9.

III. CONSPIRACIES TO DO AN ACT, THE COMMISSION OF WHICH BY AN INDIVIDUAL MAY NOT BE INDICTABLE, BUT THE COMMISSION OF WHICH BY TWO OR MORE IN PURSUANCE OF A PREVIOUS COMBINATION, IS CALCULATED TO EFFECT THE COMMUNITY INJURIOUSLY, § 2314.

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

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

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A.—Statutes.

New York.

§ 2288. *Conspiracy to falsely indict or sue another, or cheat, or commit an act injurious to public morals, &c.*—If two or more persons shall conspire, either,

1. To commit any offence: or,

2. Falsely and maliciously to indict another for any offence, or procure another to be charged or arrested for any such offence: or,

3. Falsely move or maintain any suit: or,

4. To cheat and defraud any person of any property, by any means which are in themselves criminal: or,

5. To cheat and defraud any person of any property, by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretences: or,

6. To commit any act injurious to the public health, to public morals, or to trade or commerce; or for the perversion or obstruction of justice, or the due administration of the laws:

They shall be deemed guilty of misdemeanor.—(2 R. S., sect. 8, p. 691.)

No conspiracies, other than such as are enumerated in the last section, are punishable criminally.—(Ibid., sect. 9, p. 692.

§ 2289. *When overt acts are necessary.*—No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.[a]—(Ibid. sect. 10, p. 692.)

[a] An indictment for conspiracy, in all cases except agreements to commit arson or burglary, must contain a charge of one or more overt acts, one or more of which must be proved at the trial; but where an indictment alleged that the conspirators hired a witness to withdraw from the State, and withhold her attendance from the grand jury

§ 2290. *When overt acts to be averred.*—In trials for conspiracy, in those cases where an overt act is required by law to consummate the offence, no conviction shall be had, unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts so alleged be proved on the trial; but other overt acts not alleged in the indictment may be given in evidence on the part of the prosecution.[b]—Ibid. sect. 17, p. 735.)

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§ 2290(*a*). *Conspiracy to indict.*—If any two or more persons shall conspire or agree falsely and maliciously, to charge or indict any other person, or cause or procure him to be charged or indicted, in any court of criminal jurisdiction, the person so offending shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, either at labor by separate or solitary confinement, or to simple imprisonment, not exceeding three years, at the discretion of the court.—Rev. Act, 1860, Bill I., sect. 127.)

§ 2290(*b*). *Conspiracy to defraud.*—If any two or more persons shall falsely and maliciously conspire, and agree to cheat and defraud any person, or body corporate, of his or their moneys, goods, chattels, or other property, or to do any other dishonest, malicious and unlawful act, to the prejudice of another, they shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding two years. —(Ibid. sect. 128.)

B.—CONSPIRACY AT COMMON LAW.[c]

§ 2291. The difficulties attending the subject of conspiracy have been principally in respect to pleading. Great as has been the vacillation of judicial sentiment on the latter point, there has been a concurrence of opinion as to the general definition of the offence. It has been on all sides

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in a certain case, it was held that it was not necessary that the object of the conspiracy should be effected. (People *v.* Chase, 16 Barb. 495.)

[b] Under this statute, the particular means intended to be used should be alleged, in order that the court may see whether they are in themselves criminal, or amount to a cheat, or obtaining goods by false pretences. So an indictment for a cheat must set forth the means by which the cheat was effected. (2 T. R. 586; East's C. P. 837; 3 Chit. Cr. L. 999; 2 Strange, 1127; 9 Cowen, 595.) It would, therefore, seem to follow, that when the charge is a conspiracy to commit those crimes, the indictment should be equally explicit; and such was the decision of the court for the correction of errors in Lambert *v.* The People, 9 Cowen, 578. In that case the decision was made by a bare majority, but the dissenting opinions were based upon the assumption that a conspiracy to defraud any one of his property, by any means, constituted a crime, But the revised statutes have put that question at rest, by defining the crime, in accordance with the decision of the majority of the court on that case; and thus restricting the offence, to much narrower limits than the dissenting members of the court assumed the law to restrict it. (Rev. notes, 3 R. S. 825; 2 R. S. 692, and note to case above cited. March *v.* People, 7 Barbour, 393, Pratt, J.)

[c] See Wharton's Precedents, as follows:

(607) General form. Unexecuted conspiracy.
(608) Conspiracy with overt act.
(609) Conspiracy to rob.
(610) Conspiracy to murder, with an attempt to induce a third party to take part in the same.
(611) Conspiracy to cheat prosecutor by divers false pretences and subtle means.
(612) Conspiracy to defraud by means of false pretences and false writings in the

conceded that combinations of two or more persons are indictable when directed either to the accomplishment of an illegal object, or of an indifferent

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form and similitude of bank-notes; the overt act being the uttering a note purporting to be a promissory note, etc., and to have been signed, etc.

(613) Conspiracy to cheat prosecutor by inducing him to buy a bad note.

(614) To cheat by indirect means, etc., with overt acts charging false pretences, etc.

(615) Conspiracy to cheat by false pretences. Conspiracy "by divers false pretences and subtle means and contrivances," to obtain goods, etc., from prosecutors. Overt acts charging a fraudulent carrying on business by a fictitious name, receiving goods on that basis, and fraudulently concealing the same.

(616) 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.

(617) Conspiracy to get prosecutor's goods by false pretences, etc.

(618) Against the officers of a bank for a conspiracy to obtain, by fraudulent means, discounts on State stock to a large amount.

(619) 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.

(620) Against same for conspiring to appropriate several bills of exchange, etc.

(621) Against same for obtaining money from the bank by means of false entries and a fictitious draft.

(622) Conspiracy by the maker of two promissory notes and two other persons, fraudulently to obtain the said notes from the holder.

(623) Conspiracy to cheat, under pretence of being a merchant, with overt act.

(624) Conspiracy to sell lottery tickets.

(625) Conspiracy to entice a person to play at unlawful games, etc.

(626) Conspiracy to make a great riot and to demolish walls, buildings and fences, with overt acts.

(627) Second count—Without overt acts.

(628) 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.

(629) Conspiracy to produce an abortion on a woman not quick.

(630) Second count—With overt act.

(631) Conspiracy by persons confined in prison, to effect their own escape and that of others.

(632) By prisoners to escape, with overt act, attempting to blow up the wall of a prison with gunpowder.

(633) By prisoners to effect their escape, with overt act, breaking down part of the wall of a prison.

(634) 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.

(635) Conspiracy to publish fraudulent bank-notes with intent to cheat the public.

(636) Conspiracy to defraud intending emigrants of their passage-money by pretending to have an interest in certain ships.

(637) Conspiracy by false representation, to induce a party to forego a claim.

(638) Conspiracy to defraud the queen by fraudulently removing goods subject to duties.

(639) Conspiracy to cast away a vessel with intent to defraud the underwriters, at common law. First count—Conspiracy to cast away, etc.

(640) 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, etc.

(641) 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.

(642) Fourth count—Conspiracy to procure the insurance in a particular

object by illegal means.[cc] As, however, there are many classes of combinations not falling within either of these heads, which seem to derive their

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.

(643) Conspiracy to defraud a ra lway company by travelling without a ticket on some portion of the line, obtaining a ticket at an intermediate station, and then delivering it up at the terminus, as if no greater distance had been travelled over by the passenger than from such intermediate station to the terminus.

(644) 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, etc.

(645) Conspiracy to defraud a party in the possession of his lands, and to deprive him of them.

Second count—Exactly similar, without overt acts.

Third count—To cut down timber trees.

Fourth count—Exactly the same, without overt acts.

(646) Fifth count—To cheat tenants of rent, by a false claim as landlord.

Sixth count—Exactly similar, but without overt acts.

(647) Seventh count—To molest tenants by distress, etc.

Eighth count—Exactly similar. without overt acts.

(648) Conspiracy to obtain goods upon credit, and then to abscond and defraud the vendor thereof.

(649) Conspiracy to defraud an illiterate person, by falsely reading to him a deed of bargain and sale, as and for a bond of indemnity.

(650) Conspiracy to induce a person of unsound mind to sign a paper authorizing the defendants to take possession of his goods.

(651) 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.

(652) 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 defendant, etc.

(653) Conspiracy to inveigle a daughter from the custody of her parents, for the purpose of marrying her (in substance.)

(654) Conspiracy to procure the defilement of a female.

(655) Conspiracy to incite J. N. to lay wagers, etc.; overt act, actually cheating.

(656) Conspiracy at common law, among workmen, to raise their wages and lessen the time of labor.

(657) Conspiracy by workmen, etc., in the employ of A. and B., to prevent their masters from retaining any person as an apprentice.

(658) Conspiracy by parties engaged on the public works, to increase the rate of passage money and freight.

(659) Conspiracy to charge a man with crime.

(660) Conspiracy to charge a man with receiving stolen goods, knowing them to be stolen, and obtaining money for compounding the same.

(661) 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.

(662) Conspiracy to charge a man with an unnatural crime, and thereby to obtain money.

(663) Conspiracy to extort money generally by criminal prosecution. First count, charging a conspiracy to extort by commencing and continuing a prosecution.

(664) Second count—charging a prosecution already commenced, and a conspiracy to extort money by proposing to suppress it.

(665) Third count—charging a conspiracy to extort, by promising to compromise a then pending prosecution.

[cc] See Alderman v. People, 4 Mich. 414.

indictability not from any specific unlawfulness, but from the idea that the policy of the law forbids the reaching of the attempted object by a confederacy,[d] it will be here attempted, instead of defining the offence, *first*, to classify the cases which have been considered as belonging to it; and

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(666) Conspiracy to impoverish the prosecutor and hindering him from exercising his lawful trade as a tailor, with an overt act, setting forth the consummation of the conspiracy.

(667) Conspiracy to defame a public officer. First count, conspiracy to defame by charging corrupt conduct.

(668) Second count—Same, setting out the matter charged.

(669) Third count—By charging the prosecutor with having been guilty of corruption in a particular case.

(670) Conspiracy to defeat public justice by giving false evidence and suppressing facts, on a charge of felony.

(671) Conspiracy to indict a person for a capital offence, who was acquitted on the trial.

(672) Conspiracy to induce a material witness to suppress his testimony.

(673) Same as last, in another shape.

[d] "The offence of conspiracy," says Mr. Serjeant 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 and 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, h. 348, n. *(k.)*; as to R. *v.* Gill, see R. *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. 2 Heck, 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 state, that "according to the conspiracy" the defendants did afterwards falsely indict him, it was held unnecessary to lay a conspiracy to indict falsely, and 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 the 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, when 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 Abbot, 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 con-

second, to notice such general points of pleading and evidence as relate to them all jointly.

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cert 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 at 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 favorite 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 the sensation 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 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 grounds, 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. Gray 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, 4 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 the 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. 609. "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 b. 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."

"A combination is criminal wherever 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 confederates, 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

I. Conspiracies to commit an indictable offence, § 2292.
- 1st. Conspiracies to commit felonies, § 2292.
- 2d. Conspiracies to commit misdemeanors, § 2295.
  - (a.) Conspiracies to cheat, § 2297.
  - (b.) Conspiracies to violate the lottery laws, § 2310.
  - (c.) Conspiracies to commit breaches of the peace and seditious conspiracies, § 2311.
  - (d.) Conspiracies to make or to utter forged or illegal notes, or to destroy or deface genuine notes, § 2312.

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

II. Conspiracies to do an act the commission of which by an individual may not be, *per se*, indictable, but the commission of which by two or more in pursuance of a previous combination, is calaulated to affect the community injuriously, § 2314.
- 1st. To commit an immoral act, such, for instance, as the seduction of a young woman, or the production of an abortion, § 2317.
- 2d. 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 endeavoring to defraud the revenue, or to impoverish and defraud an individual or class of men by combinations among workmen, &c., § 2322.
- 3d. To falsely accuse another of crime, or use other improper means to injure his reputation or to extort money from him, § 2327.
- 4th. To prevent the due course of justice, § 2333.

IV. General requisites of indictment, § 2334.
- 1st. Executed conspiracies, and herein of overt acts, § 2334.
- 2d. Unexecuted conspiracies, § 2337.
- 3d. Joinder of counts, § 2339.
- 4th. Joinder of defendants, § 2339.
- 5th. Enumeration of parties injured, § 2349.
- 6th. Venue, § 2350.

V. Evidence, § 2351.
- 1st. Proof of conspiracy, § 2351.
- 2d. Declarations of co-conspirators, § 2361.

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to depress the wages of journeyman, below what they would be if there was no recurrence to artificial means on either side, is criminal." (Com'th *v.* Carlisle, Brightly, R. 40, Gibson, J.)

"Where the act is lawful, for an individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the subject is to benefit the conspirators to the prejudice of the public, or the oppression of individuals, as where such prejudice or oppression is the natural and necessary consequence." Ibid.

I. Conspiracies to commit an indictable offence.

1st. Conspiracies to commit felonies.

§ 2292. Such conspiracies are undoubtedly indictable. Two questions of interest, however, have arisen concerning them: first, whether it is necessary for the indictment to set forth the *means* by which the conspiracy was to have been executed; and secondly, whether, if the act is consummated, the conspiracy merges.

§ 2293. As to the first question, it is not disputed that if the indictment sets forth the object of the conspiracy in the language used to charge the commission of the offence itself, no 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 with the value and character of which it would be irrational to suppose the defendants to have been beforehand acquainted. It is enough, therefore, for the pleader to set out the offence aimed at by such apt words as will describe it as a conclusion of law.[e] 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 weapons to have been used;[f] 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.[g] 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.[h] It is advised, however, wherever the means by which the conspiracy was to have been executed are not sufficiently known to enable them to be specified, the fact that the reason why they are not set forth being the ignorance of the grand jury in the premises, should be averred.[i]

§ 2294. As to the second question, viz., of merger. The technical rule of the old common law pleaders, that a misdemeanor always sinks into a felony, when the two meet, has in some instances been recognized in this country, and perhaps may be considered in Massachusetts, New York, Michigan and Pennsylvania, as the settled law, though with very little substantial reason.[j] In England, as has been already noticed, the inconvenience

[e] See State *v.* Bartlett, 30 Maine, 232; State *v.* Ripley, 1 Red. 386; Hazen *v.* Com. 11 Harris, 355; State *v.* Noyes, 25 Vt. (2 Deane,) 418.

[f] State *v.* Dent, 3 Gill. & Johns. 8.

[g] Com. *v.* Rogers, 5 S. & R. 463; see R. *v.* Higgins, 2 East, 5.

[h] Archb., C. P., 5th Am. ed. 262, 458, 485, 487; People *v.* Bush, 4 Hill N. Y. R. 133; ante, § 290; post, § 2358.

[i] For parallel cases, see ante, § 290, 311; see also, § 242.

[j] See Com. *v.* Kingsbury, 5 Mass. 106; People *v.* Mathers, 4 Wend. 265; Com. *v.*

of the principle, as well as its absurdity, has lately attracted grave judicial scrutiny,[k] and eminent judges have declared they felt no disposition to extend a rule by which a man, when indicted for a misdemeanor, was acquitted because the offence was a felony, and when then put on trial for the felony, often got off because there were doubts whether the felony was completed. This has led, if not to a repudiation of the doctrine, at least to its restriction within narrow limits. Thus, it has been said, that even when the felony is executed there may be cases where the conspiracy may still be pursued as an independent offence. Thus, in 1848, the defendants, who were the workmen of L., a dyer, were charged with conspiring to use his vats and dye in preparing for market goods not belonging to him, and without his assent, overt acts being set out in detail; and it appeared on the trial that L. permitted the defendants to use his dye, &c., for their own use, and such as he intrusted them with, but that they made a profit by using them for other materials without his knowledge; there being no proof of a conspiracy besides the concurrence of the act. The indictment having been removed to the Queen's Bench by certiorari, where a conviction was had, a motion in arrest of judgment was urged by very eminent counsel, on the ground that as larceny in abstracting the prosecutor's materials, was proved, the conspiracy merged. But the court of Queen's Bench were unanimous in entering judgment on the verdict. "A misdemeanor which is part of a felony," declared Lord Denman, C. J., in summing up the cases, "may be prosecuted as a misdemeanor though the felony has been completed; and the attempt, upon the argument, to make a distinction between misdemeanors by statute and those by common law, was not successful, as the incidents to a misdemeanor are not affected by the origin in law from whence it is derived. It was further urged by the defendants that unless the defence was sustained they might be twice punished for the same offence; but this is not so, the two offences being different in the eye of the law. If, however, a prosecution for felony should occur after a conviction for conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction."[l] On the same reasoning it was decided by the fifteen judges that a conviction for the misdemeanor of carnally knowing a girl under twelve years old would stand notwithstanding the felony of rape was proved on trial.[m] So far as the authority of the English courts goes, therefore, the doctrine of merger, if not entirely exploded, is confined to that small class of cases where the felony was the first step in the commission of the misdemeanor, the misdemeanor being a corollary thereto.[n] And in one state court, at least that of Mississippi, the disposition has been exhibited to stop its further progress among us.[o]

Parr, 5 Watts & Serg. 245; Com. *v.* M'Gowan, 2 Parsons, 341; People *v.* Richards, 1 Mann. (Mich.) 216; ante, § 264, 564. As to Pennsylvania. see Rev. Acts., ante, § 264, 564.

[k] See ante, § 264.

[l] R. *v.* Button, 11 Ad. & El. N. S. 929.

[m] R. *v.* Neale, 1 Denison, C. C. 36.

[n] This was the case in R. *v.* Evans, 5 C. & P. 553; R. *v.* Anderson, 2 M. & Rob. 469.

[o] Laura *v.* State, 26 Mississippi, 174.

In New Jersey, a charge of conspiring to procure an indictment by perjury does not charge a felony which merges the conspiracy.[oo]

2d. Conspiracies to commit misdemeanors.

§ 2295. The observations made on the last head, as to the setting out of the means of the conspiracy, apply with equal force to this. The comparative simplicity of such an indictment, has made it a favourite practice in this country, in preparing a prosecution for misdemeanor, the description of which is attended with any difficulties, to insert a count for a conspiracy. When the evidence 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 the management of his defence. Where he is shown to have acted conjointly with others, he cannot justly complain if he is charged with having conspired with them in producing the particular 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.[p] The advantage of joining counts for conspiracy with counts for constituent misdemeanor, is strongly illustrated by a leading case in Pennsylvania.[q] The defendants were charged in one set of counts with the sale of a lottery ticket, and in another with a conspiracy to sell it; the law being that in an indictment for this offence, the ticket should be particularly set out, and as the ticket is perhaps purposely of a very complex character, it is 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, and he could sell, not of any prohibited lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence."[r] The same liberality in the construction of counts for conspiracies to effect

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[oo] Johnson *v.* State, 2 Dutch. (N. J.,) 313.
[p] See ante, § 251–2, 431, post, § 2339.
[q] Com. *v.* Gillespie, 7 S. & R. 469; ante, § 564.
[r] S. P. Hazen *v.* Com. 11 Harris, 355.

objects *per se* illegal, having prevailed in England,[s] the same practice of joining conspiracy counts with counts for the constituent misdemeanor, is there sanctioned.[t]

§ 2296. The same difficulty as to merger, however, which is applied to felonies, has been started as to misdemeanors, with equal reason but with less success.[tt] A conspiracy, it has been said, in an early case in Massachusetts, to commit either a misdemeanor or felony, merges in the overt act, when such overt act appears to have been consummated. The case before the court was one of a conspiracy to commit a felony, and to extend the doctrine to cases of misdemeanors, is in conflict with the English text books, where such a doctrine is never broached, as well as with the book 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.[u] In New York, Maine, Vermont, Michigan, and Pennsylvania, the contrary opinion has been fortified by express decisions,[v] 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.,[w] "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 an 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."

Under this head will be considered,

§ 2297(*a*). *Conspiracies to cheat.*—Undoubtedly, as obtaining goods by false pretences, or secreting goods with fraudulent intent, are statutory misdemeanors, conspiracies to effect them are indictable, both as to real[x] and personal estate; and the unbroken and unquestioned practice of the courts has been to convict under indictments for conspiracies pointed at either of these statutory offences.[y] Where, therefore, the practitioner has a case in which he is able from the maturity of the offence, to specify in the indictment what pretences the defendant conspired to use, and what goods they

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[s] 1 Russ. on Crimes, 691.

[t] 3 M. & S. 550; 1 Chit. C. L. 255.

[tt] Com. *v.* Kingsbury, 5 Mass. 106; see ante, § 264.

[u] Com. *v.* Drum, 19 Pick. 479; Com. *v.* Goodhue, 1 Metc. 193.

[v] People *v.* Mather, 4 Wend. 265, Marcy, J.; Com. *v.* Hartmann, 5 Barr, 60; Com. *v.* M'Gowan, 2 Par. 341; State *v.* Murray, 15 Maine R. 100; State *v.* Noyes, 25 Vt. (2 Deane,) 415; People *v.* Richards, 1 Mann. (Mich. 216.

[w] 4 Wendell, 265.

[x] People *v.* Richards, 1 Mann. (Mich.) 216.

[y] See Wharton's Precedents, 611, &c.

conspired to obtain, he may be sure that he will bring himself within the strictest rules of criminal pleading, and that the offence, as thus stated, will be adjudged indictable at common law. But this can be rarely the case. A practical question of great importance, and about which there has been an embarrassing conflict and uncertainty of adjudication thus springs up, and that is whether an indictment merely averring that the defendants conspired to "cheat" the prosecutor, or "by divers false pretences" conspired to "cheat" him, is good.

§ 2298. Aside from authority, the reasons that it should be, greatly preponderate. "No judge," said, in one of his latest opinions, Gibson, C. J., (a judge who, as will presently be seen, cannot be cited as countenancing laxity of pleading in this respect,) "ever doubted that a conspiracy to cheat is as clearly criminal as a conspiracy to steal."[z] If so, the remedy by indictment is the same whether the conspirators disclose their means or not. As, therefore, the indictment in the latter case could not specify what was never made known, an indictment would be good which merely charges a conspiracy to cheat generally, provided the evidence sustains the charge. The utmost that could be exacted in such a case would be that the pleader should give the non-disclosure of the means as his reason for not setting them out.

In England such is certainly the law.

§ 2299. The leading case is R. *v.* Gill,[a] in which an indictment was sustained which merely charged the defendants with conspiring "by divers 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 thereto.

§ 2300. Notwithstanding, however, the statement of Lord Mansfield, that for an undigested conspiracy no form more stringent than this could be exacted, the courts were for some time in the habit of complaining of the precedent as too lax,[b] and in 1834, a case was reported in which it appeared that R. *v.* Gill was expressly overruled by the King's Bench.[c] 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 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. But in R. *v.* King, decided in the King's Bench, and afterwards in the Exchequer, in 1844,[d] the principle of R. *v.* Gill was broadly affirmed to be good by the several judges; and though the

[z] Rhoads *v.* Com., 3 Harris, 272.

[a] 2 B. & Al. 204; Wharton's Prec. 611, &c.

[b] R. *v.* Parker, 3 Q. B. R. 202; King *v.* R., 7 Ad. & El. N. S. 721; R. *v.* Peck, 9 Ad. & El. N. S. 686; 1 Per. & D. 508.

[c] R. *v.* Biers, 1 Ad. & El. 327.

[d] 7 A. & E. N. S. 721.

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 hereafter,) 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, Lord Denman said: "I am of opinion that this count is sufficient. The general form used in Rex *v.* Gill, has constantly been held good. Holroyd, J., says there: 'The conspiracy is the offence, and it is quite sufficient to state only the act of conspiring and the object of the conspiracy in the indictment. Here it is stated that the parties did conspire, and that the object was to obtain by false pretences, money from a particular person. Now a conspiracy to do that would be 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,[e] 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 reduced it to something not indictable. But I think that result does not follow, even if the overt acts alleged are innocent; the only object of those being to give information of the particular facts by which it is proposed to make out the conspiracy, and the mode in which the prosecutor asserts that it was carried into effect. As to the last paragraph, I think it does not contain any distinct charge, but is only an unnecessary summing up." Patteson, J., "I also think that the count is good. The general rule as to naming the parties, laid down by Mr. Starkie, applies only where, from the nature of the case, there is a person to be named; in conspiracy, for example, where the defendants have conspired to injure some given person; but, if the conspiracy is to cheat any person out of all mankind, the rule cannot be applied. In Rex *v.* De Berenger,[f] 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,

[e] 2 Burr. 999. [f] 3 M. & S. 67.

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 action against the third for such fictitious debts, and obtained judgment and execution, under which the goods were removed before the time of credit had transpired. That is a complete allegation of fraud upon the sellers; and the argument that no such fraud appeared was founded upon a fallacy, the defendant's counsel arguing upon each alleged act without reference to its being laid as done in pursuance of the conspiracy."

§ 2301. So, where the third count of an indictment to obtain money under false pretences, charged the offence in general terms as a conspiracy to cheat the prosecutor of his money, without setting out the false pretences, the evidence was, that the prosecutor was told by the defendant that the horses in question had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse-dealer, &c. All these statements were false, the defendants knowing that nothing but a belief of their truth would have induced the prosecutor to make the purchase. The conspiracy was proved: it was held, that this count was sufficient, and that it charged an indictable offence.[g]

§ 2302. Nor is this the only case in which the Court of King's Bench has expressly re-affirmed R. *v.* Gill. In R. *v.* Gompertz,[h] the last of eight counts charged the defendants with conspiring "by divers false pretences and indirect means to cheat and defraud the said S. P. R. of his moneys, to the great damage, fraud and deceit of the said S. P. R., to the evil example," &c. There was a verdict for the crown on each of the counts, before Lord Denman, C. J., at the Middlesex sittings, and on December 17, 1846, a motion for a new trial was argued before the court in banc. "First, we think," said Lord Denman, in giving the opinion of the court, "that there is no ground for arresting the judgment in this case; one count is good, on the authority of R. *v.* Gill,[i] 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,[j] but even from the expressions there used, and much

[g] R *v.* Kenrick, 3 Ad. & El. N. S. 48.
[h] 9 Ad. & El. N. S. 824.
[i] 2 B. & Al. 204.
[j] 1 A. & E. 327.

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."

§ 2303. So, as recently as 1848, an indictment was sustained in the Exchequer Chamber, which averred merely that the defendants "unlawfully, fraudulently and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud the prosecutor of his goods and chattels, to the great damage," &c.[k] "Rex *v.* Biers,"[l] said Wilde, C. J., "was relied on in support of the objection, and as overruling Rex *v.* Gill, from which we think the present case is not distinguishable. But, upon referring to the judgment in Rex *v.* Biers, there appears strong reason to doubt whether it did not go wholly on the one objection to the special counts. Neither Rex v. Gill, nor any other authority at all bearing on the point, was referred to in the judgment; and it appears distinctly from the recent case of Regina *v.* Gompertz, that Rex *v.* Biers has never been considered by the Court of Queen's Bench as overruling Rex *v.* Gill. We are of opinion that this count is good." In a series of still later cases, the same view has been solemnly affirmed.[m]

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;[n] 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.[o]

§ 2304. In this country R. *v.* Gill was for many years universally considered as law.[p] How far it may be considered as shaken by recent cases in Massachusetts and Pennsylvania, is perhaps still an open question.[q] In Pennsylvania, down to 1847, it was never disputed, and a series of convictions were sustained on its authority. In 1847, however, the Supreme Court examined in error the record of a case in which the defendants were convicted of conspiring to violate that section of the act of 1842, abolishing imprisonment for debt, which makes it a misdemeanor for a debtor to secrete his property with intent to defraud his creditors. How far the indictment shrank below the statutory standard, will be in a few moments

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[k] Sydserff *v.* R., 11 Ad. & El. N. S. 245. [l] 1 A. & E. 327.

[m] R. *v.* Whitehouse, 6 Cox C. C. 38; R. *v.* Carlise, 6 Cox C. C. 366; 25 Eng. Law & Eq. 577.

[n] R. *v.* Parker, 11 Law J., N. S. 102, Mag. C.; 3 Q. B. 292; 2 G. & D. 709.

[o] R. *v.* Hamilton, 7 C. & P. 448; R. *v.* Kendrick, 5 Ad. & El. 49; Wharton's Prec. 351; as to bill of particulars, see ante, § 291; post, § 2337.

[p] Com. Ward, 1 Mass. 473; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Warren, 6 Mass. 72; Com. *v.* M'Kisson, 8 S. & R. 420; State *v.* Buchanan, 2 Har. & J. 317; State *v.* Dewitt, 2 Hill, C. S. R. 282; State *v.* Bartlett, 30 Maine, 132; People *v.* Richards, 1 Man. (Mich.) 216.

[q] See Com. *v.* Eastman, 1 Cush. 190; Com. *v.* Hartman, 5 Barr, 60.

examined, the inquiry now being whether there was anything in the reasoning of the court, which would divert the application of the express point ruled in England from our own practice. After noticing the inadequacy of this indictment to sustain a conviction for the statutory offence, independent of the conspiracy, Gibson, C. J., said: "Now, though it may not be necessary in an indictment for conspiracy, so minutely to describe the unlawful act where it has a specific name, which indicates its criminality, yet where the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features, and without being so, it cannot be shown that the confederates had an unlawful purpose. It may be said that the form of a criminal purpose, meditated but not put in act, can seldom be described: but it can be as readily laid as proved." It is true, that in a preceding passage, exception was taken to the omission of the indictment of a description of the place where the secreted goods were kept, and the person who had them in custody, and the time and place of the transaction, and it was argued that as a conspiracy to secrete goods abroad, having for its object no infraction of the laws of Pennsylvania, would not be criminal *in* Pennsylvania, such an hypothesis should be distinctly excluded by the record. But it will be no difficult matter to frame a count for a conspiracy, in such a way as to meet these difficulties, without essentially varying from a 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 of Pennsylvania in Com. *v.* Eberle, Com. *v.* M'Kisson, Com. *v.* Gillespie, Com. *v.* Collins, Com. *v.* Clary, Com. *v.* Mifflin,[r]—cases which will be examined more fully under their appropriate head,—the precedent given in R. *v.* Gill, with the qualifications which have just been noticed, can hardly be treated as overruled in Pennsylvania.[s] And, as will be presently seen, it is now expressly re-affirmed.[t]

[r] 3 S. & R. 9; 8 S. & R. 420; 7 R. & R. 469; 3 S. & R. 220; 4 Barr. 210; 5 W. & S. 461; see post, § 2309.

[s] Com. *v.* Hartmann, in fact is the only cause in which the Pennsylvania courts have shown an inclination to tighten the English rule. In an early case, F. E., with fifty others, members of a German Lutheran Congregation, in Philadelphia, were charged, in the first count, with conspiring "to prevent by force and arms, the use of the English language in the worship of Almighty God, among the said congregation, and for that purpose did then and there wickedly and unlawfully, and oppressively confederate and agree among themselves, and did then and there determine and firmly bind themselves before God, and solemnly to each other, to defend, with their bodies and lives, the German divine worship, and to oppose by every means, lawful or unlawful, the introduction of any other language into the church;" and that in pursuance of the conspiracy, &c., the defendants did afterwards, at an election, &c., create a great riot and tumult, &c., and did commit divers assaults. The second count charged simply the conspiracy, without any overt acts. (Com. *v.* Eberle, 3 Serg. & R. 9; see pam-

[t] Hazen *v.* Com., 11 Harris, 355; see post, § 2305.

§ 2305. In Massachusetts,[a] it is said that in an indictment for a conspiracy to do an act, which is a well known and recognised offence at common law, the object of the conspiracy may be described by the general terms by which it is familiarly known; if the alleged purpose be the doing of an act which is not unlawful in itself, but which is to be effected by the use of unlawful means, those means must be particularly set forth; if it be the doing of an act which is not an offence at common law, but only by statute, the purpose of the conspiracy must be set forth in such a manner as to show that it is within the terms of the statute. The words "cheat and defraud," it was said, do not necessarily import any offence, either by statute or at common law; and, therefore, an indictment for a conspiracy,

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phlet trial, 218.) At the trial, before Yeates, J., great exceptions were taken to the indictment, and its insufficiency was urged with great learning by the eminent counsel engaged. It was said that casting out the overt acts, which were always considered mere aggravation, that there was nothing in the charging portion of the indictment to show that an offence was really committed. The object in the alleged conspiracy was clearly lawful; it was necessary, therefore, in order to make out the offence, that the record should show unlawful means were to have been employed. Judge Yeates, however, held both counts good, (pamphlet trial, 208,) and though a motion for a new trial was argued with great energy before the court in banc, (Com. *v.* Eberle, 3 Serg. & Raw. 9,) it does not appear from the report that the objections to the indictment were pressed. The judgment of the court below was sustained.

In an indictment shortly afterwards, the defendants were charged with conspiring to deceive and defraud divers citizens of the commonwealth of great sums of money, by means of false pretences, and false, illegal, and unauthorized paper writing in the form and similtude of bank notes, which were of no value, and purported to have been promissory notes for the payment of divers sums of money on demand, by a company which was in fact fictitious. The indictment was sustained, though at the time there was no statute in Pennsylvania making it indictable to obtain property on false pretences. Still, however, the passing off a batch of fictitious notes has been held a cheat at common law, and on this ground the case may be reconciled with the current of authority. (Com. *v.* Collins, 3 S. & R. 220.)

In a case some years later, the second count, on which alone the prosecution laid stress, averred that the defendants conspired "to cheat and defraud J. S. of the aforesaid heifer." "There may be confederacies," said Gibson. J., in giving the opinion of the court, "which are lawful; and you must therefore set forth some object of the confederates which it would be unlawful for them to attain either singly, or which, if lawful, singly, it would be dangerous to the public to be attained by the combination of individual means. For it is the object that imparts to the confederacy its character of guilt or innocence; and of the nature of such object, and the bearing which the various kinds of it may have on the question in different cases, it is at present necessary to say no more than that where it is the doing of an act which would be indictable, it would undoubtedly render the confederacy criminal. But in stating the object, it is unnecessary to state the means by which it is to be accomplished, or the acts that were to be done in pursuance of the original design; they may, in fact, not have been agreed on. You need not set forth more of the object than is necessary to show it, from its general nature, to be unlawful; for that is all that is necessary to determine the character of what is, in truth, essentially and exclusively the crime—the confederating together; and this is proved by the precedents produced on the part of the commonwealth." The count was held sufficient to support the indictment. (Com. *v.* M'Kisson, 8 S. & R. 420.)

To the same effect is Com. *v.* Mifflin, 5 W. & S. 461. (For the indictment in this case, see Wharton's Prec. 379.) So even after Com. *v.* Hartmann; where an indictment for a conspiracy to cheat by offering to sell forged foreign bank notes, of a denomination, the circulation of which was forbidden by law, averred that the defendants, in pursuance of their conspiracy, did "offer to sell, pass, utter, and publish to." &c., it was held, that the means whereby the conspiracy was to be effected were sufficiently stated. (Twitchell *v.* Com., 9 Barr. 211.)

[a] Com. *v.* Eastman, 1 Cush. 190.

in which the object is alleged to be to "cheat and defraud," must set forth in detail such other allegations as will show the object to be an offence, either by statute or at common law.[v]

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[v] The first count alleged, that the defendants "being evil-disposed persons, and devising, and intending, one P. S. S., &c., to injure and defraud, on the twenty-sixth day of March, in the year eighteen hundred and forty-four, at, &c., did unlawfully conspire, combine, confederate, and agree together, the said Shelton to injure, cheat, and defraud of his moneys, goods and chattels, against the peace," &c. The same view was reaffirmed in Com. *v.* Shedd, 7 Cush. 515.

The second count alleged, that the defendants, on, &c., at, &c., "did falsely conspire, combine, confederate, and agree among themselves, unlawfully and fraudulently to acquire and get into their hands and possession, the goods, wares, and merchandise of one Philo S. Shelton, &c., under color and pretence of buying the same of and from the said Shelton, and that, in pursuance of, and according to the conspiracy, combination, confederacy and agreement aforesaid, they, the said defendants, then and there falsely, unlawfully, and deceitfully did obtain and acquire of the said Shelton, one hundred and ten bags of coffee, being the proper goods and merchandise of him the said Shelton, of the value of thirteen hundred and twenty-eight dollars, under pretence of buying the same, and did then and there, in pursuance of the conspiracy, combination and agreement aforesaid, cheat and defraud him thereof, against the peace," &c.

The third count alleged, that the defendants, "wickedly and unjustly devising and intending one Philo S. Shelton, &c., to defraud and cheat, of his goods, property and merchandise, on, &c., at, &c., did falsely and fraudulently conspire, combine, confederate, and agree together among themselves, to obtain and get into their hands and possession, of and from the said Philo S. Shelton, his goods, property and merchandise, upon trust and credit, and then to remove, transport and send the same out of the said commonwealth, and defraud him thereof; and that the said defendants, in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforsaid had, did then and there falsely and fraudulently obtain and get into their hands and possession, of and from the said Shelton, one hundred and ten bags of coffee, of his proper goods, wares, and merchandise, altogether of the value of thirteen hundred and twenty-eight 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 defendants, before the time of payment for the said goods, property and merchandise had arrived, did then and there make certain preparations, and did then and there attempt, and did then and there do certain overt acts to remove, transport, and send the same out of the said commonwealth, and did then and there, in manner aforesaid, cheat and defraud the said Shelton of his goods, property and merchandise aforesaid, against the peace," &c.

The third count, in some of the charges, varied from the preceding, in alleging that the defendants, instead of attempting to remove, &c., did actually remove and transport the good mentioned therein out of the commonwealth. (Com. *v.* Eastman, 1 Cush. 191.)

The general form of allegation, said Dewey, J., adopted in the present indictment, has been comparatively rarely used in the class of cases just adverted to; much the greater number of such cases containing a particular statement of the illegal means by which the object was to be effected. Our own reports furnish no authoritative decision of this matter. The cases of Com. *v.* Ward, 1 Mass. 473; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Warren, 6 Mass. 72, which were cases of indictments for conspiracy, contain only *dicta*. These cases fully sustain the doctrine that when a conspiracy is plainly and technically alleged, overt acts done in pursuance of it, need not be set out, or if set out, need not be proved; but that does not meet the question now presented. The English cases, on this point, were very few in number, until a recent period, when the question seems to have been more frequently the subject of consideration; since which a much greater strictness has been required in indictments for conspiracy. The case of the King *v.* Eccles, 3 Doug. 337, is frequently cited as an authority for a general charge of conspiracy, without any allegation of illegal means; but that case, as was said by Lord Ellenborough, 13 East, 228, 231, was a conspiracy to restrain trade, and therefore a conspiracy affecting the public. The King *v.* Gill, 2 Barn. & Ald. 204, is a more direct authority, and may be considered as a case in point.

In that case, however, it was alleged, in addition to the general charge of a con-

In Pennsylvania, the later cases show an inclination to fall back once

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spiracy to cheat and defraud, that the defendants conspired to effect such cheat "by divers false pretences." But as these pretences were not set forth with particularity, the mere statement of them may not perhaps vary the case. The more recent English cases, however, strongly indicate a disposition to hold to a much greater strictness in indictments for conspiracy than had formerly been supposed to be required. The cases of the Queen *v.* Peck, 9 Ad. & Ell. 685; The Queen *v.* King, 7 Ad. & Ell. (N. S.) 782, and cases there cited, sustain this suggestion.

This subject was fully considered in the Court of Errors of New York, in the case of Lambert *v.* The People, 9 Cowen, 578, which presented the same questions that arise in the present case. The Court of Errors, in that case, by the casting vote of the presiding officer, adjudged the indictment to be insufficient. The cases, relating to the point in question, and the various considerations bearing upon the whole subject, are fully and ably presented in the two opinions, delivered by Senator Spencer on the one side, and Senator Stebbins on the other. Chancellor Jones concurred in the opinion of the former, declaring the indictment to be insufficient. The case came up by appeal from the Supreme Court of New York, that court having sustained the indictment. The authority of this case is, of course, to be received with some qualification. It led, at an early day, to legislative enactments, materially modifying the crime of conspiracy. (See Rev. Sts. of New York, II., 691.)

It has been supposed, that the Court of Pennsylvania, in the case of Com. *v.* M'Kisson, 8 Serg. & R. 420, had sanctioned the form of indictment adopted in the present case; but the very recent case of Hartman *v.* Com., 5 Barr, 60, holds directly the contrary; adopting the principle that, in an indictment for a conspiracy to do an act unlawful in itself, if the intended purpose be an offence at common law, it is sufficient to set out such purpose by its well known, or its technical name; but if the object of the conspiracy be to do an act which is an offence merely by statute, the intended purpose must in such case be set forth with so much detail, as may be necessary to bring it within the description of the statutory offence.

The "purpose of cheating and defrauding," which is the case now before us, does not necessarily import the commission of any indictable offence, either at common law or by statute. It may embrace only such civil frauds as are in violation of common honesty, and for which the party is amenable to justice, not by indictment, but by a civil action. Hence the necessity of alleging the purpose of the conspiracy more in detail, and with all the accompanying allegations to make it a statutory offence, if the illegal means are not set forth. If the purpose of the conspiracy be to cheat by false pretences, or by false tokens, or by any other means, by which the act of cheating is made a crime punishable by statute, the means proposed to be used must be set out; not because it is necessary, in an indictment for a conspiracy, to set forth the overt acts, but because it must appear on the face of the indictment, in some form, that the object of the conspiracy is a criminal one.

We are not surprised at the disposition, so clearly indicated in the various decisions to which reference has been made, to discountenance any attempt to extend the practice of charging the offence of conspiracy in general terms. It was originally, so far as it applied to cases in which the purpose had been executed, a departure from that precision and particularity of detail, which were held requisite in other cases, and which were deemed essential to a full statement of the offence set forth in an indictment.

The general form of indictment, to the extent of alleging a conspiracy to commit a criminal act, which is known as an offence at common law, is fully sanctioned. Beyond this, the question has been a controverted one; though, as we have seen, the tendency of the latter cases has been to require the charge to be more fully set forth. In the propriety of these decisions, we are disposed to concur; and called upon, as we now are, to establish a precedent for future cases of this kind, we have come to the result, that the first count of this indictment is defective, in not setting forth such allegations, as would show that the purposed "cheating and defrauding,"—the alleged object of the conspiracy,—were criminal acts. There being no allegation of any illegal means to effect the proposed object, the object itself should have been shown to be a criminal one.

The words "cheat and defraud" do not import any known common law offence. If punishable at all, as a crime, it is only when the cheat is effected by false tokens, false pretences, or the like; to make such an object of a conspiracy a criminal act, the com-

more upon R. *v.* Gill, as affording the only principle by which an undigested conspiracy can be averred.[w]

In 1859, however, on a civil issue, where the point decided was that a conviction for a conspiracy to cheat and defraud creditors did not disqualify the defendant as a witness, Judge Woodward, in giving the opinion of the court, quoted approvingly the language of Gibson, C. J., in Hartman's case, that "a conspiracy is even less than an attempt," and that an attempt to commit an offence shall never be punished more severely than the perpetration of it. This was said, however, *arguendo*, and it was admitted that a conspiracy to cheat by false pretences was indictable in Pennsylvania.[x] It was subsequently expressly held by the same court, that a conspiracy to cheat by false tokens cannot be more severely punished than the offence itself, that is, by imprisonment not exceeding one year.[y]

The question was settled in 1860, by the Revised Act making a conspiracy to cheat a substantive offence.[z]

"In an indictment for a conspiracy to do an act prohibited by the *common law*," said Lewis, C. J., in 1854, "where the act has a specific name which indicates its criminality, it is not necessary to describe it minutely. But it has been thought that where the object of the conspiracy is merely forbidden by the statute, it can be described only by its particular features.[a] But even in offences of this character, it has never been held necessary to set forth the unlawful object with the precision required in an indictment for perpetrating it."[b]

In New York the practice has been already stated.[c]

In Michigan it is held that if a conspiracy be entered into to commit an offence, known and recognised as an offence at common law, so that by describing it by the term by which it is generally known, the nature of

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bination or agreement must be to cheat and defraud in some of the modes made criminal by statute; and the indictment must contain allegations which show that the cheat and fraud agreed upon are embraced in such statutory provisions, and that if perpetrated, they would be punishable as a criminal offence.

For these reasons, we think that the first count, and the other similar and corresponding counts, are insufficient. The only remaining counts, that seemed to be relied upon by the government, are the second and others of the like form. It was urged, that the allegations contained in these counts, setting forth a conspiracy by the defendants to get into their hands and possession the goods of Philo S. Shelton, "under color and pretence of buying the same," might obviate the objection that was urged against the other counts. But these pretences are not set forth as false representations. There is no allegation that the defendants did not intend to buy, or that they did not actually buy the goods, which are delivered to them. The fraud complained of was the not paying for the goods, and the buying without the means of paying. The result, therefore, is, that judgment must be arrested. (Com. *v.* Eastman, 1 Cush. 224, Dewey, J.)

[w] Rhodes *v.* Com., 3 Harris, 272; Clary *v.* Com., 4 Barr, 210; Twitchell *v.* Com., 9 Barr, 211; Com. *v.* M'Gowan, 2 Parsons, 341; Hazen *v.* Com., 11 Harris, 355; ante, § 2043.

[x] Brebil *v.* Faseg, 33 Pa. St. R., (9 Casey,) 465.

[y] Williams *v.* Com., 10 Casey, Pa. 178.

[z] Ante, § 2290 (*a*).

[a] Com. *v.* Hartmann, Lewis U. S. Crim. Law, 223.

[b] Hazen *v.* Com., 11 Harris, 362; post, § 2334, 2358.

[c] See ante, § 2228–91.

the offence is clearly indicated, then it will only be necessary to use such term in describing the object of the conspiracy.[y]

§ 2306. Where the means are developed, and show an entire fraudulent scheme, the offence is clearly indictable. Thus it has been held that an indictment lies for a conspiracy to make another drunk, and to cheat him while at cards;[z] a conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods;[a] a conspiracy to defraud the bank of the United States, by illegal means, of large sums of money;[b] a conspiracy by a female servant and a man whom she got to personate her master and marry her, in order to defraud her master's relations of a part of his property after his death;[c] a conspiracy to injure a man in his trade or profession;[d] a conspiracy to charge a man as the reputed father of a bastard;[e] a conspiracy to cheat by offering to sell forged foreign bank notes of a denomination the circulation of which is prohibited in Pennsylvania;[f] a conspiracy to manufacture spurious indigo, with intent to sell it at auction as good, to defraud whoever may be defrauded, without having any particular person in view;[g] a conspiracy to defraud the public generally, though no specific persons were made its object;[h] a conspiracy between N. and the book-keeper of a bank, by which N. was to draw checks on the bank, and the book-keeper was to arrange the entries in the bank, so as to make it appear that N. was a creditor of the bank to the amount of the checks;[i] a conspiracy to file a fraudulent bond;[j] a conspiracy to extort a deed by means of a peace warrant;[k] a conspiracy to induce a party to forego a just claim by false representations as to its value;[l] a conspiracy to obtain possession of goods, under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use, in fraud of the seller.[m]

§ 2307. But an indictment will not lie for a conspiracy to kill game, or to commit any other mere civil trespass;[n] or for a conspiracy to sell a man

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[y] Alderman *v.* People, 4 Mich. 414.
[z] State *v.* Younger, 1 Dever. 357.
[a] R. *v.* Macarty, et al., 2 Ld. Raym. 1179; See State *v.* Rowley, 12 Conn. 101.
[b] State *v.* Buchanan, 5 Har. & J. 317.
[c] R. *v.* Taylor, et al., 1 Leach, 47.
[d] R. *v.* Eccles, 1 Leach, 274.
[e] 1 Hawk. c. 72, s. 2.
[f] Twitchell *v.* Com., 9 Barr, 211; see Clary *v.* Com., 4 Barr, 210; State *v.* Vankart, 2 Harr. 321.
[g] Com. *v.* Judd, 2 Mass. 329.
[h] 3 M. & S. 67; 2 Mass. 32[illegible]; R. *v.* Roberts, 1 Campbell, 399; Gardner *v.* Preston, 2 Day, 205.
[i] Com. *v.* Fœring, 6 Penn. Law Jour. 291; Brightly R. 315.
[j] Com. *v.* Gallagher, 4 Penn. L. Jo. 58; post, § 2312.
[k] State *v.* Shooter, 8 Richardson, 72.
[l] R. *v.* Carlisle, 25 Eng Law & Eq. 577.

An indictment alleged that S. sold B. a mare for £39; that while the price was unpaid, B. and C. conspired by false and fraudulent representations made to S. that the mare was unsound, and that B. had sold her for £27, to induce S. to accept £27, instead of the agreed on price of £39, and thereby to defraud S. of £12.

Held, that the indictment was good, and that, being supported by proof of the facts alleged, it warranted a conviction. (R. *v.* Carlisle, 25 Eng. Law & Eq. 577.)

[m] Com. *v.* Eastman, 1 Cush. 190.
[n] R. *v.* Turner, 13 East, 228.

an unsound horse;[o] or for a conspiracy to deprive a man of an office under an illegal trading company.[p]

§ 2308. It has been held in Massachusetts that an indictment does not lie for a conspiracy to defraud a *feme covert* of a promissory note, given for her separate use, in consideration of her distributive share in an estate;[q] but the point ruled, though the case has been cited for other purposes, was simply that in such case, the property of the note being in the husband, the fraud should have been laid as directed against him. In New Jersey it has been held not to be an indictable offence for several persons to conspire to obtain money from a bank by drawing their checks out when they had no funds there.[r] Such a position, however, is in conflict both with English authorities, and the current of American cases.[s]

§ 2309. The 26th section of the New York act "abolishing imprison-

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[o] R. *v.* Pywell, 1 Stark. 402.

[p] M. *v.* Stratton, 1 Camp. 549, n.

[q] Com. *v.* Manley, 12 Pick. 173.

[r] State *v.* Rickey, 4 Halsted, 293. 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 skill; as well as the earlier cases in Massachusetts, Pennsylvania and South Carolina, which have been already cited.

[s] Archbold, C. P., 9th ed. 633; 2 Russell on Cr. 82; State *v.* Cawood, 2 Stewart, 360; Collins *v.* Com., 3 S. & R. 220; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Warren, 6 Mass. 74; Morgan *v.* Bliss, 2 Mass. 111. Patton *v.* Gurney, 17 Mass. 182; see State *v.* Rowley, 12 Connect. 101; Com. *v.* McKisson, 8 S. & R. 420; State *v.* De Witt, 2 Hill's S. C. 282; Lambert *v.* People, 7 Cowen, 166; People *v.* Eckford, 7 Cowen, 535; State *v.* Younger, 1 Dev. 357.

ment for debt,"[t] provides that "any person who shall remove any of his property out of any county, with intent to prevent the same from being levied on by any execution, or who shall secrete, assign, convey or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent," &c., "shall, on conviction, be deemed guilty of a misdemeanor." This section, so far as it goes, was in its general features adopted by the legislature of Pennsylvania in the act of 12th July, 1842, section 20, but not until it had received, so far as the pleading a part is concerned, a definite construction by New York courts.[u] That case sanctioned the form of indictment previously in use, which has been placed in the text.[v] In New York, therefore, a conspiracy to violate the provisions of this act would be good, which follows the language of the act.[w] In Pennsylvania,[x] 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,[y] 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."

§ 2310. (b) *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 rigor with which the courts in that state applied the doctrine of variance to the setting out of lottery tickets. When the intentional complexity of lottery tickets is taken into consideration, it is no wonder that the pleader, under the pressure of a rule which held "Burril" for "Burrall" to be a fatal variance in the setting forth of the ticket, should insure beforehand against any vices in the stationary count, by adding to it a count for conspiracy. This device was countenanced by the Supreme

[t] Sessions Laws of 1831, p. 402; see ante, § 2165, &c.
[u] People *v.* Underwood, 16 Wend. 546; see ante, § 2165, &c.
[v] Ibid.
[w] See Wharton's Prec. 507.
[x] Com. *v.* Hartmann, 5 Barr. 60; see ante, § 2304.
[y] B. 2, c. 25, s. 60.

Court,[z] in a case virtually resting on the authority of R. *v.* Gill, discussed in the previous paragraph.[a] The defendants were charged, in eight out of nine counts, with the statutory offences of selling lottery tickets, offering them for sale and advertising them—some of the counts setting out tickets in full, others merely charging the sale of "a lottery ticket," &c., in the language of the act. The first count was for a conspiracy to "sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket and tickets in a lottery not authorized by the laws of the commonwealth;" therein precisely following the statute. On motion for a new trial, and in arrest of judgment, the court held, 1, that the counts stating the offence in the words of the statute, without setting forth the ticket, were bad from want of sufficient particularity; 2, that there must be a new trial on the count setting forth the ticket, in consequence of a variance between the ticket and the indictment; but 3, that the conspiracy count was enough to sustain a conviction at common law. This was in 1822; and in 1827, 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.[b] 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 demeanor, 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."[c] 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

[z] Com. *v.* Gillespie, 7 S. & R. 469. See for form, Wh. Prec. 624.
[a] See ante, § 2304.
[b] Com. *v.* Sylvester, 6 Pa. L. J. 283; Brightly, 331.
[c] 7 S. & R. 476.

at common law to the state. The position, however, may be considered as now qualified, in Pennsylvania,[d] in a case by which it is determined that a conspiracy to commit a statutory offence is never to be punished more heavily than the offence itself

§ 2311. (c) *Conspiracies to commit breaches of the peace and seditious conspiracies.*—No doubt a conspiracy to get up a public disturbance is indictable, and pointed illustrations of this are found in cases which will be subsequently considered in another relation, viz.: conspiracies to hiss an actor from the stage,[e] and to prevent by violent means the introduction of the English language into a church.[f] Precedents, also, are not uncommon for conspiracies to commit riots generally.[g]

A conspiracy to commit an assault and battery, is an indictable offence in Pennsylvania.[gg]

All conspiracies to "excite disaffection," to use the language of Alderson, B., are indictable at common law.[h]

§ 2312. (d) *Conspiracies to make or to utter forged or illegal notes* — A conspiracy of this nature is clearly indictable at common law.[i] The rule has been held to apply to the case of a conspiracy to cheat by offering to sell forged foreign bank notes, of a denomination, the circulation of which is prohibited in the state where the indictment is found;[j] to a conspiracy to destroy or erase an endorsement,[k] and to a conspiracy to induce others to violate the laws forbidding such notes to circulate.[l]

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

§ 2313. This class is here separately mentioned because it has usually been placed under a distinct head by text writers, though on principle it is difficult to distinguish it from cases where an indictable offence is the direct and immediate object of the conspiracy. In one case the defendants conspire to commit an indictable offence for the sake of itself, in the other they conspire to commit it for the sake of some other object; but when the cases usually put under the first head are analysed, they will be found, many of them, to fall under the second. Thus in a conspiracy to produce

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[d] Com. *v.* Hartmann, 5 Barr, 60.

[e] Clifford *v.* Brandon, 3 Campb. 369.

[f] Com. *v.* Eberle, 3 S. & R. 9.

[g] 2 Chit. Cr. Law, 506, n. *(a)*; R. *v.* Vincent, 9 C. & P. 91.

[gg] Com. *v.* Putnam, 29 Penn. State R. 296.

[h] R. *v.* Vincent, 9 C. & C. 91; 2 Russ. on Cr., 681; see post "Treason."

[i] Clary *v.* Com., 4 Barr, 210; Com. *v.* M'Gowan, 2 Parsons, 341; see Wh. Prec. 635, a.

[j] Twitchell *v.* Com., 9 Barr, 211; see ante, § 2306.

[k] State *v.* Norton, 3 Zabr. 33.

[l] Hazen *v.* Com., 11 Harris, 366. Thus in 1854, on a conviction for conspiracy to "solicit, induce, and procure" the officers of a particular bank to "violate and disobey the 28th and 49th sections of the act of 16th of April, 1850," prohibiting the circulation of foreign notes under $5, the Supreme Court declared the conviction good, and that it was not necessary for the indictment to do more than aver a conspiracy for this purpose, without setting forth the means or contract. Ibid.

the marriage of a young woman by coercion, to procure an appointment by corruption, to make a change in government by seditious means, and to fraudulently effect a change in the government of a corporation,[g] 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.[h]

When the combination be to do an act, not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means, then those means must be particularly set forth, and be such as to constitute an offence either at common law or by statute.[hh]

III. CONSPIRACIES TO DO AN ACT, THE COMMISSION OF WHICH BY AN INDIVIDUAL MAY NOT BE INDICTABLE, BUT THE COMMISSION OF WHICH BY TWO OR MORE IN PURSUANCE OF A PREVIOUS COMBINATION, IS CALCULATED TO AFFECT THE COMMUNITY INJURIOUSLY.

§ 2314. Where the act only becomes illegal from the means used to effect it, so much of the means must be stated as will show illegality of the act, and charge the defendant with a substantive offence.[hh] In an indictment for a combination to marry paupers, in order to throw the burden of maintaining them on another parish, it is necessary to show that some threat, promise, bribe, or other unlawful device was used, because the act of marriage being in itself lawful, the procuring it requires this explanation in order to be charged as a crime.[i] 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.[j]

§ 2315. Where an indictment charged the defendant 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.[k]

§ 2316. It is not essential, however, it should be observed, in cases where

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[g] State *v.* Burnham, 15 New Hamp. 394.
[h] 1 Leach, 38; 3 Burr. 439; 1 Wils. 41; 8 Mod. 321.
[hh] Alderman *v.* People, 4 Mich. 414.
[i] 1 A. & E. 706; R. *v.* Fowler, 1 East's P. C. 461, 462; R. *v.* Seward, 3 N. & M. 557.
[ii] Alderman *v.* People, 4 Mich. 414.
[j] R. *v.* Tanner, 1 Esp. Rep. 306, 307; R. *v.* Edwards, 8 Mod. 320.
[k] R. *v.* Blake, 13 Law J. N. S. M. C. 131.

the offence consists in the illegality of the *means*, and not the illegality of the *object*, that those means should be of themselves of such a character as to make their employment *per se* the ground for indictment.[l] Thus, if an object, not in itself illegal, is attempted to be effected by the employment of means which are prejudicial to society, or fraudulent and oppressive in their character, a confederacy for the purpose of employing such means is a conspiracy in the eye of the law, though in themselves, if indicted as individual and substantive offences, they would not be the subjects of the action of a criminal court. Seduction, for instance, is not indictable in Virginia, nor till recently in Pennsylvania; but as will presently be seen, a conspiracy to injure and disgrace a father by the seduction of his daughter, is held a criminal offence.[m] So, as has been seen, a conspiracy to cheat by means of fictitious notes was held in Pennsylvania indictable, though the uttering of such fictitious notes might not have been indictable.[n] On the same principle a conspiracy to defraud a man by selling him an unsound horse;[o] to defraud the public generally by the defendants holding themselves out to be men of property;[p] and to oppose "by every means, lawful and unlawful," the introduction of the English language into a German church;[q] have each been held indictable.

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

§ 2317. A combination to assist in the elopement of a female infant from her father's house, with a view to her marriage without his consent, has been held to be a common law offence, and is indictable as a conspiracy at common law.[r] This case certainly goes a great way, and it would be difficult to sustain the principle in all the relations which might arise. But a conspiracy to seduce without marriage is clearly indictable, even where seduction is not a misdemeanor.[s]

§ 2318. An indictment is unobjectionable both in form and substance, which alleges a conspiracy falsely and fraudulently to seduce her from virtue and carnally to know an unmarried female, by procuring the consent of herself and parents to her marriage with one of the conspirators, and then in furtherance of such conspiracy, producing a forged license, assuring them of its genuineness, falsely and fraudulently representing another of the conspirators to be authorized to celebrate the espousals, who actually performed the ceremony, in consequence of all which the daughter and her

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[l] State *v.* Burnham, 15 New Hamp. 394.

[m] Anderson *v.* Com. 5 Rand. 627, Com. *v.* Mifflin, 5 Watts & Serg. 461, post, § 2317-20.

[n] Com *v.* Collins, 3 Serg & R. 220.

[o] R. *v.* Gill, 2 B. & Ald. 204; 1 Stark, C. N. P. 402; see also Com. *v.* M'Kisson, 8 Serg. & R. 420; R. *v.* DeBeranger, 3 M. & Sel. 67.

[p] R. *v.* Roberts, 1 Camp. 399; see also, 9 Co. 51.

[r] Mifflin *v.* Com. 5 W. & S. 461.

[q] Com. *v.* Eberle, 3 Serg. & Rawle, 9.

[s] Anderson *v.* Com. 5 Randolph, 627; see for forms, Preo. 651, &c.

father and mother were deceived, &c., and she cohabited with her pretended husband.[t]

§ 2319. The prisoner induced the prosecutrix, a girl of fifteen years of age, who had left her place as a servant, to go to their house; one of them pretended that she had known the deceased parents of the prosecutrix, and saying that she should keep her until she got a place, and that they would both assist her in getting one. The prisoners were women of bad character, and the place where they resided was a house of ill-fame. It was false that either of them had known the parents of the prosecutrix, and they took no steps whatever to get her a place, but urged her to have recourse to prostitution. They introduced a man to her, and attempted, by persuasion, and holding out prospects of money to induce her to consent to illicit connexion with him. The prosecutrix refused to consent, and declared her intention of quitting the house, the prisoners refused to give her her clothes, and she left without them. It was held that the prisoners were rightly convicted of a conspiracy under statute 12 and 13 Vict. c. 76, and that they might have been indicted for the offence at common law.[u]

§ 2320. In an indictment of conspiracies to produce an abortion, 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.[v] Perhaps, however, if the conspiracy was unexecuted, it would be better, as in all cases of unexecuted conspiracies, for the grand jury to aver that they are unable to set out the particulars of the plan, because it was never carried into execution.

An indictment lies at common law for a conspiracy to prevent the interment of a deady body.[w]

§ 2321. It has been recently held in Pennsylvania, that no indictment lies for a conspiracy between a man and a woman to commit adultery.[x] It was said by the learned judge who tried the case, that where concert is the essential ingredient to the act, there is no conspiracy; but from the peculiar circumstances of the case, it is clear that this authority cannot be used beyond the class of cases to which it belongs.

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

§ 2322. A combination is a conspiracy in law, whenever the act to be done has a necessary tendency to prejudice the public, or oppress indi-

[t] State *v.* Murphey, 6 Ala. 765.
[u] R. *v.* Mears, 1 Eng. R. 581; 2 Den. C. C. 79; 1 Bennett & H. Lead. Cas. 462.
[v] Com. *v.* Demain, Bright, R. 441; 6 P. Law J.; see ante § 1220, 1221; Wh. Prec. 629.
[w] Matt. Ex. 71; Hood's Ex. 47.
[x] Shannon *v.* Com. 2 Harris, 226.

viduals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief.[y] Every association, therefore, is criminal, whose object it is to raise or depress the price of labor beyond what it would bring if it were left without artificial excitement.[z] A conspiracy of journeymen workmen of any trade or handicraft, to raise their wages by entering into combination to coerce journeymen and master workman employed in the same branch of industry to conform to rules adopted by such combination, for the purpose of regulating the price of labor, and carrying such rules into effect by other acts, is indictable as a misdemeanor; and accordingly when journeymen shoemakers conspired together and fixed the price of making coarse boots, and entered into a combination that if a journeyman shoemaker should make such boots for a price below the rate thus fixed, he should pay a penalty of ten dollars; and if any master shoemaker employed a journeyman who had violated their rules, that they would refuse to work with him, and would quit his employment; and carried such combination into effect by leaving the employment of a master workman, in whose service was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge him; it was held that the parties thus conspiring were guilty of a misdemeanor.[a] An association, however, the object of which is to adopt measures that have a tendency to impoverish a person, that is, to diminish his gains and profits, is lawful or unlawful as the means by which that object is to be effected are lawful or unlawful. If the means are unlawful then the combination is indictable.[b]

§ 2323. In conspiracy to injure a tradesman in his trade, under the 6 Geo. 4, c. 129, it is sufficinet to allege that the defendants conspired &c., by "molesting," "using threats," "intimidating" and "intoxicating" workmen hired by the tradesman, in order to force them to depart from their work; and also, that they conspired, &c., to "molest" and "obstruct" the tradesman and his workmen, with the same object, and in order to force him to make an alteration in the mode of carrying on his trade, the words used being those employed in the statute, and it not being necessary to set out the means of molestation, intimidation, &c., more specifically.[c] It was also held, that counts framed upon this statute, which charged that the defendants conspired, &c., by "molesting" and "obstructing," and by "using threats and intimidations" to obstruct such workmen as might be willing to be hired by the tradesman to prevent them from hiring themselves to him, were sufficieut. As has already been observed, a combination generally to impoverish an individual, is indictable.[d]

§ 2324. So, an indictment holds for a conspiracy to raise the price of the public funds by false rumors, as being a fraud upon the public;[e] for a

[y] Com. *v.* Carlisle, habeas corpus before Gibson, J., Feb. 1821, 1 Jour. Juris. 225; Brightly. See Wh. Prec. 656, &c., for forms.
[z] Ibid. R. *v.* Byerdike, 1 M. & R. 179. [a] People *v.* Fisbee, 14 Wendell, 9.
[b] Com. *v.* Hunt, 4 Metcal., 111. [c] R. *v.* Rowlands, 9 Eng. Law & Eq. 287.
[d] R. *v.* Eccles, 1 Leach, 274; see Wh Prec. 666. [e] 3 M. & S. 67.

conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen;[f] for a conspiracy by violence, threats, contrivance, or other sinister means to procure the marriage of a pauper of one parish to a pauper of another, in order to charge one of the parishes with the maintenance of both;[g] for a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm;[h] and for a conspiracy to raise tolls on the public works.[i]

§ 2325. An indictment which charged that the defendants, journeymen boot-makers, unlawfully, &c., confederated and formed themselves into a club, and agreed together not to work for any master boot-maker, or other persons, who should employ any workman or journeyman who should not be a member of said club, after notice given to such master or other person to discharge such workman, was held to contain no sufficient averment of any unlawful purpose or means.[j] An indictment for a conspiracy, it was said, which does not directly aver facts sufficient to constitute the offence, is not aided by matter which precedes or follows the direct averments; nor by qualifying epithets, as "unlawful, deceitful, pernicious," &c., attached to the facts averred.[k]

§ 2326. An indictment for a conspiracy alleged that the defendants fraudulently contrived to procure the election of certain persons as directors of an insurance company, and thereby cause themselves to be employed in the service of the company, fraudulently conspired to induce persons, by issuing to them fraudulent polices of insurance, to appear at the annual meeting of the company and vote for directors. It was held, that while the ultimate object of the respondents, that is, to procure themselves to be employed by the company, was lawful, the means were fraudulent, immoral, and illegal, where it appeared that the defendants had agreed with the insured, that the policies should be held and treated as mere nullities for every purpose but that of authorizing the holders to vote thereon at the annual meeting, although the defendants agreed also, that the policies should be duly approved by the requisite number of directors, not cognizant of the intended fraud, upon applications in regular form, and although the policies might be binding on both parties.[l]

A conspiracy to induce the violation of a statute prohibiting the circulation of bank notes under $5, is indictable at common law.[m]

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

§ 2327. A conspiracy to charge a man falsely with any indictable offence

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[f] R. *v.* Roberts et al., 1 Camp. 399; Gardner *v.* Preston, 2 Day 205.
[g] R. *v.* Tarrant, 4 Burr, 2106; R. *v.* Seward, 1 A. & Ell. 706; and see 1 East, P. C. 461, 462; 8 Mod. 320.
[h] R. *v.* Hevey, 2 East, P. C. 858; see State *v.* Norton, 3 Zabriz. 33.
[i] Wharton's Prec. 658. [j] Com. *v.* Hunt, 4 Met. 111. [k] Ibid.
[l] State *v.* Burnham, 15 New Hamp. 394.
[m] Hazen *v.* Com. 11 Harris, 555.

has frequently been the subject of indictment.[n] It is indictable to attempt to extort hush money,[o] and that whether the charge be true or false;[p] but it is not an indictable offence for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion.[q]

§ 2328. A conspiracy to procure the conviction of an innocent man, is a high crime; and although legally convicted before a competent tribunal by the conspirators, the legal conviction is no bar to an indictment against those who by such combination have procured the conviction.[r] Thus, an indictment was sustained against three defendants for a conspiracy in combining and confederating together for the arrest of one C. C., a resident of the county of Philadelphia, on the false charge of deserting the army of the United States, in the year 1847; and after arresting him, in forcibly carrying him to New York, for the purpose of obtaining the reward of $30, which had been offered by the government for the arrest and safe delivery of a soldier who had deserted by that name.[s]

§ 2329. A count in an indictment for conspiracy, averring that defendants corruptly charged one with being the father of a child to be born bastard, and did various acts to effect the object of the conspiracy, is good.[ss]

§ 2330. When the object of the combination is to indict the prosecutor, it is not necessary to show with what particular offence it was intended to charge him, but it will suffice to say that they conspired to indict him of a crime punishable by the laws of the land, and then it may be alleged that they, according to the conspiracy, did falsely indict him.[t] It is not necessary to aver that the man is innocent of the offence;[u] for he will be presumed to be innocent until the contrary appear.[v]

§ 2331. In an indictment for a conspiracy to prosecute a person who was not guilty, it is inadmissible to prove that the defendants prosecuted other persons who were not guilty.[w]

§ 2332. A conspiracy to defame by words not actionable, is indictable.[x]

4th. Conspiracies to prevent the due course of justice.

§ 2333. Any confederation whatever, tending to obstruct the course of justice, is indictable.[y] Thus, a conspiracy by certain justices of the peace

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[n] R. *v.* Macdaniel, I Leach, 45; Foster, 130; 1 Hawk. c. 72, s. 2; R. *v.* Spragg, 2 Burr, 993; R. *v.* Best, 2 Lord Ray. 1167; Salk. 174; Com *v.* Tibbetts, 2 Mass. 586.

[o] Com. *v.* Woods, 7 Boston Law Rep. 58; for forms, see Wh. Prec. 662, &c.

[p] R. *v.* Hollingsberry, 4 B. & C. 339; 6 D. & R. 345.

[q] R. *v.* Best, 1 Salk. 174; 2 Ld. R. 1167; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.* Dupuy, Brightly, R. 44.

[r] Commonwealth *v.* M'Lean, 2 Par. 367.

[s] Ibid. [ss] Johnson *v.* State, 2 Dutch. (N. J.) 313.

[t] R. *v.* Spragg, 2 Burr. 993.

[u] R. *v.* Kennersley, 1 Str. 193; Johnson *v.* State, 2 Dutch. (N. J.) 313.

[v] R. *v.* Best, 1 Salk. 174.

[w] State *v.* Walker, 32 Maine, (2 Red.) 195.

[x] Gibson, C. J., Hood *v.* Palm, 8 Barr, 237.

[y] State *v.* De Witt, 2 Hill's S. C. 282; State *v.* Norton, 3 Zabr. 33; State *v.* Noyes, 25 Vt., (3 Deane,) 415.

certify that a highway was in repair, when they knew it to be otherwise, was holden to be indictable.[z] So, where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such case, and the party who accordingly committed the robbery was afterwards convicted and actually executed, these persons were indicted for the conspiracy and convicted.[a] So, where two or more conspire for that purpose, and destroy a will, with a view to defraud the devisee, it is indictable.[b]

IV. General requisites of indictment.

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

§ 2334. When 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 case 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.[bb] But, as has just been seen,[c] the judges have lately been veering to the doctrine, 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.

§ 2335. 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 requisite, if the indictment charge what is in itself an unlawful conspiracy.[d] The offence is complete on the consummation of the conspiracy, and the overt acts, though it is proper to set them forth, may be either regarded as matters of aggravation, or discharged as surplusage.[e]

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[z] R. *v.* Mawbey, 6 T. R. 619.

[a] R. *v.* Macdaniel, 1 Leach, 45; Fost. 130.

[b] State *v.* De Witt, 1 Hill's S. C. R. 282.

[bb] See Alderman *v.* People, 4 Mich. 414.

[c] See ante, § 2305, &c.

[d] R *v.* Steward, 1 A. & E. 706; 3 N. & M. 557, S. C.; and see R. *v.* Gill, 2 B. & Al. 204; 1 East, P. C. 461; State *v.* Noyes, 25 Vt. (2 Deane,) 415; Com. *v.* Eastman, 1 Cushing, 180; Com. *v.* Shedd, 7 Cushing, 514; State *v.* Ripley, 31 Maine, (Redding,) 386; March *v.* People, 7 Barbour, 391; Clary *v.* Com. 4 Barr, 210.

[e] 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; Alderman *v.* People, 4 Mich. 414; State *v.* Ripely, 31 Maine, (1 Redding,) 386.

§ 2336. How far the overt acts can be taken in to aid the charging part, was recently considered by Tindal, C. J.[f]

"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[g] was cited as authority that the whole ought to be read together. The point decided in that case appears to have been merely this, that in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without proper cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor.

"But if we examine the allegations in this indictment, there is no sufficient description of any act, done after the conspiracy, which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and, if it is that, because it is averred to have been done in pursuance of the conspiracy above mentioned, it must be taken to be an equivalent to an averment that the conspiracy was to cheat the named individuals of their goods; the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods. And, secondly, another answer is, that if the averment is to be taken to be equivalent to one, that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective as not containing a *direct and positive* averment that he did conspire to cheat and defraud these persons, which an indictment for a conspiracy, where the conspiracy itself is the crime, ought certainly to contain."

As has been already seen, the subject of overt acts is regulated in New York by statute.[h]

2d. Unexecuted conspiracies.

§ 2337. Where the conspiracy is unexecuted, and nothing more is likely

[f] King *v.* R., 7 A. & E. 807. [g] 2 Burr. 999. [h] Ante, § 2288–91.

to appear in evidence than a mere undigested confederacy on the part of the defendants to do an indifferent 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 grand 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 a leading case already cited,[i] 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 reasoning leads to the position that where a material gap exists, the pleader should aver specially the reasons why the description of the offence is not complete. That this course is pursued in indictments for forgery where the grand jury are unable to describe the possession of the forged instrument from the fact of its loss or destruction, is shown,[j] 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.[k]

The indictment in conspiracies to cheat has already been fully considered.[l]

3d. Joinder of counts.

§ 2338. The policy of our courts, as has already been seen, in a kindred line of offences, has permitted a joinder of counts which, though originally discountenanced in England, can work no injustice to the prisoner, and may save great expense and loss of time. Thus, counts for robbery and for attempts to rob; for rape and attempts to ravish; for burglary and attempts to commit burglary, as has been seen, are frequently joined.[m] 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

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[i] R. *v.* King, 7 A. & E. 807.

[j] Ante, § 311, 2303. See State *v.* Hewett, 1 Redding, 396.

[k] R. *v.* Kendrick, per Ld. Denman, C. J.; 5 Ad. & El. N. S. 49; ante, § 2305.

[l] See ante, § 2305.

[m] Hartman *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; ante, § 414, 434.

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's case. That this practice extends as properly to conspiracies to commit indictable offences, as to attempts or assaults with intent to commit the same, may be urged with great reason. By such a course the difficulty of merger will be avoided; for if the attempt was completed, the verdict attaches to the felony; if not, to the conspiracy.[n]

4th. JOINDER OF DEFENDANTS.

§ 2339. A conspiracy must be by two persons at least: one cannot be convicted of it, unless he have been indicted for conspiring with persons to the jurors unknown.[o] So in an indictment for conspiracy against two, the acquittal of one is the acquittal of the other.[p] 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.[q]

Whether a conviction can take place when there are two defendants joined, one of them being insane, has been doubted.[r]

§ 2340. It is in the discretion of the commonwealth to include as many of the alleged co-conspirators in the indictment as it may deem expedient; and the non-joinder of any such, provided there are enough alleged on the record to constitute the offence *aliunde*, is not matter for demurrer.[s]

§ 2341. In a case where several conspired to procure an employment under government by corrupt means, it was held that a banker who received the money in order to pay it over for that purpose, became a party to the conspiracy.[t]

§ 2342. Where one of several defendants charged with a conspiracy had been acquitted, it was held that the record of acquittal is evidence for another defendant subsequently tried.[u]

§ 2343. When one defendant in conspiracy dies between indictment and trial, it is no ground of *venire de novo* for a mistrial if the trial proceeds against both, no suggestion of the death being entered on the record.[v]

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[n] See ante, § 264, 2293.

[o] 1 Hawk. c. 72; U. S. *v.* Cole, 5 McLean C. C. R. 513; ante, § 431; as to effects of allegation "unknown," see ante, § 251–6, 2295.

[p] State *v.* Tom, 2 Dev. 569.

[q] People *v.* Alcott, 2 Johnson's Cases, 301; R. *v.* Kennedy, 1 Str. 193; R. *v.* Nichols, 2 Str. 1227.

[r] Breckenridge's Law Miscellanies, 223.

[s] Com. *v.* Demain, Brightly R. 44.

[t] R. *v.* Pollman, 2 Camp. 233.

[u] R. *v.* Horne Tooke, Old Bailey, 1794; Burn's Justice, tit. "Conspiracy."

[v] R. *v.* Kendrick, 5 Ad. & El. N. S. 49.

A man and his wife, being in law but one person, cannot be convicted of the same conspiracy, unless other parties are charged.[w]

§ 2344. An indictment charging the defendant with conspiracy with persons unknown is good, notwithstanding the names of the persons unknown must necessarily have transpired to the grand jury.[x]

§ 2345. 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.[y]

§ 2346. Upon a count charging one conspiracy, and one only, against all the defendants therein named, to effect several illegal objects, the jury may find all or some of the defendants guilty of conspiring to effect one or more of the objects specified.[z]

§ 2347. 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.[a]

On an indictment against two, for a conspiracy to cheat, the judgment should be against each defendant, severally, and not against them jointly.[b]

Where two or more persons have been convicted of a conspiracy, a new trial as to one involves a new trial as to all.[c]

§ 2348. In a case in 1851, before the Queen's Bench, the defendants, A., B. and C., were charged with conspiring "with divers persons unknown." The evidence applied only to A., B., and C., none being given as to the "persons unknown." The jury found that A. had conspired with either B. or C., but that they could not say which. Lord Campbell, C. J., said, "I think that under these circumstances the verdict against A. cannot be supported. It is conceded, that if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. Then, I cannot draw a distinction between the cases of two and of three persons, if one only is found guilty. If three are indicted, and two found not guilty, the third must also be acquitted. But then it is argued that B. and C. may be included in the words, 'persons to the jurors unknown;' but I cannot say that they can come under the category of persons who were not known to the jury."[d]

The wife of one conspirator is not a witness either for or against the others.[e]

5th. Enumeration of parties injured.

§ 2349. It is important to set forth the names of the parties to be

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[w] Ante, § 431.
[x] People *v.* Mather, 4 Wendell, 231.
[y] Com. *v.* Wood, 7 Law Reporter, 58.
[z] O'Connell *v.* R., 11 C. & Fin. 155; 9 Jur. 25; see ante, § 620.
[a] O'Connell *v.* R., 11 C. & Fin. 155; 9 Jur. 25.
[b] March *v.* People, 7 Barbour, 393.
[c] Com. *v.* M'Gowen, 2 Par 341.
[d] R. *v.* Thompson, 4 Eng. R. 287.
[e] Com. *v.* Manson, 2 Ashmead, 31; 2 Strob. 294; 5 Esp. 107; ante, § 667, 671.

injured, unless a good reason be given for their non-specification. Thus,[f] Tindal, C. J., said: "Mr. Pashley, for the plaintiffs in error, argued that the indictment was bad, because it contained a defective statement of the charge of conspiracy; and we agree that it is defective. The charge is, 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 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 Beringer,[g] and the Queen *v.* Peck,[h] 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."

So the converse holds good that an intent to cheat A. is not sustained by evidence of an intent to cheat the public.[i]

6th. Venue.

§ 2350. 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.[j]

V. Evidence.

1st. Proof of conspiracy.

§ 2351. "In prosecutions for criminal conspiracies," says Judge King, "the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. In the history of criminal administration, the case is rarely found in which direct and positive evidence of criminal combination exists. To hold that nothing short of such proof is sufficient to establish a conspiracy, would be to give immunity to one of the most dangerous crimes which infest society. Hence, in order to discover conspirators, we are forced to follow them through all the devious windings in which the natural anxiety of avoiding detection teaches men so circumstanced to envelop themselves, and to trace their movements from the

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[f] R. *v.* King, 7 A. & E. 806; see post, § 2353, &c.
[g] 3 M. & S. 67. [h] 9 A. & E. 686. [i] Post, § 2356-9.
[j] R. *v.* Ferguson, 2 Stark. N. P. C. 484; see ante, § 277-284.

slight, but often unerring marks of progress, which the most adroit cunning cannot so effectively obliterate, as to render them unappreciable to the eye of the sagacious investigator. It is from the circumstances attending a criminal, or a series of criminal acts, that we are able to become satisfied that they have been the results not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; but which may be so linked together by circumstances, in themselves slight, as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole, that they have sprung from a common object, and have in view a common end. The adequacy of the evidence in prosecutions for a criminal conspiracy, to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury."[k]

§ 2352. In all cases of conspiracy, no matter to what purpose the confederacy is directed, it is sufficient, in order to show the illegal association, that the defendants should have been proved to have been associated in the prosecution of an illegal object. The conspiracy is frequently the subject of presumption for the jury.[l] All who accede to a conspiracy at any time after its formation, become conspirators;[m] and the prosecutor may go into general evidence of the nature of the conspiracy, before he gives evidence to connect the defendants with it.[n]

§ 2353. The offence of conspiracy, in fact, is rendered complete by the bare engagement and association of two or more persons to break the law, without any overt act being done in pursuance thereof by the conspirators.[o]

§ 2354. If any overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties.[p]

§ 2355. The actual fact of conspiring may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be proved.[q] Any concurrence of action, on a material point, seems to be sufficient to enable the jury to presume concurrence of sentiment; and one competent witness will suffice to prove the co-operation of any individual conspirator.[r] If, on a charge of conspiracy, it appear that two persons, by their acts, are pursuing the same object, often by the same means, one performing part of an act, and the other completing it, for the attainment of

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[k] Com. *v.* M'Lean, 2 Parsons, 368–9.

[l] R. *v.* Parsons, 1 W. Black. 392; R. *v.* Murphey, 8 C. & P. 297.

[m] People *v.* Mather, 4 Wendell, 229; Den. *v.* Johnson, 3 Harrison, 87 State *v.* Trexter, 2 Car. L. Jour. 90.

[n] R. *v.* Hammond, 2 Esp. 718.

[o] O'Connell *v.* R. 11 Cl. & Fin. 15; 9 Jur. 25; State *v.* Buchanan, 5 Har. & John. 317; Com. *v.* M'Kirsan, 8 Serg. & Rawle, 20; State *v.* Cawood, 2 Stewart, 360; Collins *v.* Com., 3 Serg. & R. 220; Alderman *v.* People, 4 Mich. 414.

[p] R. *v.* Bowes, 4 East, 171.

[q] R. *v.* Parsons, 1 W. Bla. Rep. 392; U. S. *v.* Cole, 5 McLean, C. C. R. 513.

[r] Com. *v.* Warner, 6 Mass. 74; Com. *v.* Crowinshield, 10 Pick. 497.

the object, the jury may draw the conclusion that there is a conspiracy.[s] It was considered in the Queen's case, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy, may in the first instance be received, as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy; and that this is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of individual defendants. In such cases the general nature of the whole evidence intended to be adduced, should be opened to the court; and if upon such opening it should appear manifest that previously no particular proof sufficient to affect the individual defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.[t]

§ 2356. An indictment for a conspiracy, charging the object of the conspiracy to be to cheat and defraud the citizens at large or particular individuals, out of their land entries, is not supported by evidence that the defendants conspired to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating lands to their own use and excluding others.[u]

§ 2357. An averment, in an indictment for a conspiracy, that the defendants conspired to defraud A., is not supported by proof that they conspired to defraud the public generally or any individual whom they might meet and be able to defraud.[v]

§ 2358. Whether, in an indictment for a conspiracy to cheat A., by false pretences, evidence of an attempt about the same time, by the same defendant, by the same pretences, to cheat B., is admissible, has been doubted. On the one hand it is argued that such evidence is proper to show the conspiracy; on the other, that it should be excluded as showing a distinct and substantial offence. On an indictment tried before Lord Ellenborough, at nisi prius, charging the defendants, that being persons of evil fame, and in low and indigent circumstances, they conspired together to cause themselves to be reputed persons of considerable property, and in opulent circumstances, for the purpose of defrauding one A. B., &c., evidence being given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it, as people of large fortune, a witness was called to show that at a different time they had made a similar representation to another tradesman. It was objected that the evidence formed a new offence; and that the prosecutor having elected him in his indictment to press a particular charge, it was not just to enable him to

[s] R. *v.* Murphey, 8 Car. & P. 297.
[t] Queen's Case, 2 Brod. & Bing. 310.
[u] State *v.* Trammel, 2 Iredell, 379; ante, § 2349.
[v] Com. *v.* Harley, 7 Metcalf, 506; ante, § 2349.

spring another on the defendants without notice. The court, however, admitted the evidence, and the defendants were convicted.[w]

§ 2359. But in a late case, where the defendant was charged with conspiring, with other persons unknown, "to cheat and defraud J. D. and others," and the overt acts laid were, that the defendant did falsely pretend to J. D. that he was a merchant named G., and did, under color of pretended contract with J. D., for the purchase of certain goods of "the said J. D. and others," obtain a large quantity of the goods "of the said J. D. and others," with intent to defraud "the said J. D. and others," it was held by the judges that the words "and others," throughout this indictment, must be taken to mean others the partners of J. D., and not other persons wholly unconnected with J. D., and that, on the trial of the indictment, evidence was not admissible to show that the defendant attempted to defraud other persons wholly unconnected with J. D.[x]

§ 2360. On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been relieved on a *habeas corpus*, was allowed to be given in evidence.[y] So where the defendants were charged in several counts, with a conspiracy, alleging several conspiracies of the same kind, on the same day, the prosecutor was permitted to give evidence of several conspiracies on different days.[z]

The responsibility of co-conspirators for each other's acts has been already considered.[a]

2d. Declaration of co-conspirators.

§ 2361. On this point reference is made to a prior head, where the question has been fully examined.[b]

CHAPTER III.

NUISANCE.[aa]

I. INDICTMENT, EVIDENCE AND JUDGMENT IN GENERAL, § 2362.
II. OFFENCES TO HEALTH AND COMFORT, § 2370.
III. DISORDERLY HOUSE, § 2382.
IV. NOTORIOUS LEWDNESS AND DRUNKENNESS, § 2396.
V. OBSTRUCTING AND NOT REPAIRING HIGHWAY, § 2402.
VI. LOTTERIES, § 2411.
VII. TIPPLING-HOUSES, § 2433.
VIII. GAMBLING, § 2446.

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[w] R. *v.* Roberts, 1 Campbell, 399; see R. *v.* Hevice, 2 Yeates, 114.
[x] R. *v.* Steel, 1 Car. & M. 337; see ante, § 2349.
[y] R. *v.* Hevice, 2 Yeates, 114.
[z] R. *v.* Levy, 2 Stark. 458; but see R. *v.* Steel, 1 Car. & M. 337.
[a] Ante, § 702–6.
[b] See ante, § 702–6.
[aa] Nuisances, in most of the states, have been made subject to minute municipal

I. Indictment, evidence and judgment in general.[b]

Statutes.

Pennsylvania.

§ 2361(*a*). *Common nuisance.*—Any person who shall erect, set up, establish, maintain, kept up or continue, or cause to be erected, set up, established, maintained, kept up or continued, any public or common nuisance, shall be guilty of a misdemeanor, and on conviction, shall be sentenced to pay a fine, and suffer an imprisonment, or either, or both, according to the discretion of the court under the circumstances of the case; and where the said nuisance shall be in existence at the time of the conviction and sentence, it shall be lawful for the court in its discretion, to direct either the defendant or the sheriff of the proper county, at the expense of the defendant, to abate the same: *Provided, also*, That all obstructions to private roads, laid out according to law, shall be nuisances, which would be nuisances in cases of obstructions to public roads or highways.[bb]—(Rev. Act, Bill I., sect. 73.)

Ohio.

§ 2361(*b*). *Penalty for nuisance.*—That every person who shall erect, keep up, or continue and maintain any nuisance, to the injury of any part of the citizens of this state, shall be fined in any sum not exceeding, at the discretion of the court; and the court shall, moreover, in case of conviction of such offence, order every such nuisance to be abated or removed.—(Act of April 15, 1857, sect. 1.)

§ 2361(*c*). *What to be deemed nuisances.*—That the erecting, continuing, using, or maintaining any building, structure, or other place for the exercise of any trade, employment, manufacture, or other business, which, by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort, or property of individuals, or the public; the causing or suffering of any offal, filth, or noisome substance to be collected, or to remain in any place, to the prejudice or damage of others or the public; the obstructing or impeding, without legal authority, the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome or impure any water-course, stream or water; or unlawfully diverting any such water-course from its natural course or state, to the injury or prejudice of others; and the obstructing or encumbering

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regulations, and as the statutory enactments in relation to them are both complex and local, it is proposed in the present chapter, to confine the inquiry to the result of the common law authorities.

[b] See Wharton's Precedents, as follows:—

Nuisance, general frame of indictment, 674.
General requisites of indictment, Ibid.
What defences admissible in indictment for, Ibid.
What length of time, Ibid.
What public benefit, Ibid.

[bb] "This section provides for the punishment of the common law crime of keeping or continuing a public nuisance. Express power is also given to the courts to direct, upon conviction, the abatement of the nuisance at the expense of the defendant. The proviso to this section embraces the provision of the first section of the act of 16th March, 1847, entitled 'An Act declaring obstructions to private roads to be a public nuisance, and for other purposes.' Pamphlet Laws, 476; Brightly's Digest, 720, No. 23; and the first section of the act of 27th February, 1849, entitled 'An Act declaratory to the act, entitled "An Act declaring obstructions to private roads a public nuisance,"' &c. Pamphlet Laws, 90; Brightly's Digest, 720, No. 24." (Revisor's note.)

by fences, buildings, structures, or otherwise, any of the public highways, or streets or alleys of any city or village, shall be deemed nuisances; and every person or persons guilty of erecting, continuing, using, or maintaining, or causing any such nuisance, shall be guilty of a violation of this act.—(Ibid. sect. 2.)

§ 2361 (*d*). *Prosecutions.*—All prosecutions for a violation of the provisions of this act shall be by indictment in the court of common pleas of the county in which the offence is committed, and in case of the conviction of any person for any such nuisance, the court shall make it a part of the judgment of the court, that such a nuisance be abated or removed, by an order to be issued from said court to the sheriff of the proper county, for that purpose, at the expense and cost of the defendant in such prosecution, unless such nuisance shall be abated or removed before said order be issued to the sheriff.—(Ibid. sect. 3.)

§ 2362. An indictment for a nuisance, which concludes "to the common nuisance of divers of the commonwealth's citizens," is insufficient. It should be laid to the common nuisance[c] "of all the citizens of the commonwealth residing in the neighborhood," or "of all citizens," &c., residing, &c., and passing thereby,"[d] or, in Pennsylvania, to the common nuisance of the citizens of the commonwealth of Pennsylvania.[e] 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.[f] Thus, where it was charged that the defendants assembled at a public place, and profanely and with a loud voice, cursed, swore and quarrelled 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,[g] though in a parallel case, an indictment was supported in Pennsylvania for the constituent misdemeanor.[h] 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."[i] It would seem, however, that to utter loud cries and exclamations in the public streets, to the great disturbance of divers citizens, constitutes a nuisance, if alleged and proved to be to the great damage and common nuisance of all the citizens.[j]

§ 2363. An indictment for a nuisance will lie, if, from the nature of the establishment, a house may be an annoyance, and, from its situation, it has become so. These two things must be set out in the indictment.[k]

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[c] See, as to necessity of this, under 14 and 15 Vict., ch. 100, § 24; R. *v.* Holmes, 20 Eng. Law & Eq. R. 597; 3 Car. & K. 360.

[d] Com. *v.* Faris, 5 Rand. 691.

[e] Graffins *v.* Com., 3 Pa. R. 502.

[f] Com. *v.* Webb, 6 Randolph, 726; State *v.* Baldwin, 1 Dev. & Bat. 195, post, § 2375.

[g] State *v.* Baldwin, 1 Dev. & Bat. 195.

[h] Barker *v.* Com., 7 Harris, 412.

[i] Brooks *v.* State, 2 Yerger, 482.

[j] Com. *v.* Smith, 6 Cushing, 80.

[k] State *v.* Purse, 4 M'Cord, 472; People *v.* Cunningham, 1 Denio, 524.

No length of time renders a nuisance lawful, or estops the state from abating it, and punishing the person who creates such nuisance.[l]

§ 2364. The doctrine has more than once been broached, that, in judging of a public nuisance, the public good it does may, in some cases, where the public health is not concerned, be taken into consideration, to see if the public benefit outweigh the public annoyance ;[m] but in a later case of much consideration,[n] it was held to be no answer to an indictment for a nuisance in a harbor, by erecting an embankment, that although the work was, in some degree, a hindrance to navigation, it was advantageous in a greater degree to other uses of the port.[o] 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."[p]

Works of internal improvement, erected by the state for the benefit of the citizens at large, do not become a public nuisance, because they may render the neighborhood unhealthy, by reason of the obstruction of running water, and the consequent overflowing of the adjacent lands; nor is their character changed by a transfer into the hands of a private corporation, with a requirement that the works shall be kept up for the purposes of their creation.[pp]

§ 2365. One indicted for a nuisance, cannot defend against the legality of the conviction, by alleging that he only acted as the agent or overseer of another.[q] Thus, one indicted for a nuisance in the erection of mills, cannot interpose a bar against the legality of a conviction for the offence, on the ground that the mills are the property of another, residing in a different state, for whom defendant is acting as agent.[r]

§ 2366. It is no defence to an indictment for a nuisance in a city, that it has been conducted in the same place for a long series of years, as no nuisance can be justified by prescription; nor that it has become necessary to the community in which it is situated;[s] nor that at the time the dam was erected, no inhabitants dwelt in the neighborhood of the stream ;[ss] nor that other erections, of a character similar to the one complained of, are equally injurious to the public health.[t]

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[l] Elkins *v.* State, 2 Humphrey, 543; Com. *v.* Alburger, 1 Wharton, 469; Com. *v.* Tucker, 2 Pick. 44; 1 Hawkins, Bk. 1, c. 32, s. 8; Weld *v.* Hornby, 7 East, 199; R. *v.* Cross, 3 Camp. 227; Elliotson *v.* Teetham, 2 Bing. N. C. 283; Bliss *v.* Hall, 4 B. N. C. 185; Mills *v.* Hall & Richards, 9 Wendell, 315; People *v.* Cunningham, 1 Denio, 524; State *v.* Phipps, 4 Ind. 515.

[m] R. *v.* Russell, 6 B. & C. 566; 9 Dowl. & Ryl. 566.

[n] R. *v.* Ward, 4 Ad. & E. 384.

[o] See R. *v.* Morris, 1 B. & Ad. 441; R. *v.* Tindall, 6 Ad. & E. 143.

[p] Caldwell's case, 1 Dall. 150.

[pp] Com. *v.* Reed, 10 Casey, Pa. 275.

[q] State *v.* Bell, 5 Porter, 365.

[r] State *v.* Bell, 5 Porter, 366; Thompson *v.* State, 5 Humph. 138; 2 Humph. 399; State *v.* Mathes, 1 Hill's S. C. 37; Com. *v.* Major, 3 Hump. 203.

[s] Com. *v.* Vansickle, Brightly, R. 69.

[ss] Douglass *v.* State, 4 Wis. 387.

[t] Ibid.

§ 2367. It is not a good plea in bar that the defendant has been convicted or acquitted for the same nuisance laid at a former date. Each day's repetition of the nuisance is a distinct offence, and may be so prosecuted.[tt]

On the trial of an indictment for nuisance, it is not admissible to show that the general reputation of the concern was that of a nuisance.[u]

§ 2368. Upon conviction the defendant may be sentenced to fine and imprisonment;[v] but not to abatement, unless the nuisance be laid with a *continuando*.[w]

An indictment charged that the accused, "on the first day of October, 1854," erected gates on a highway, "and did, on divers other days between that day and the time of taking this inquisition, continue and allow to remain the said" gates, "by reason whereof the citizens of this state, during the time aforesaid," could not go and ride, &c. It was held, that the continuance of the nuisance was sufficiently charged to justify a judgment to abate it.[ww]

§ 2369. When the defendant is convicted of a nuisance on a highway, judgment is that he remove it at his own cost; and he will be committed until the sentence be complied with. Should, however, he neglect to do so, the sheriff may be commanded to abate the nuisance in his place. When there is a *license* to erect a building, and the license is exceeded, the sentence is not to remove the building altogether, but to make it conform to the license. In the latter case, it seems it is proper to direct a writ to the sheriff commanding him to execute the judgment.[x] But the writ must be

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[tt] Ante, § 608; Beckwith *v.* Griswold, 29 Barbour, 291.

[u] Com. *v.* Hopkins, 2 Dana, 418; Com. *v.* Stewart, 1 Serg. & R. 42; Overstreet *v.* State, 3 How. Miss. 328; ante, § 608.

[v] State *v.* Noyes, 10 Foster, 279. [w] Ibid.

[ww] Wroe *v.* State, 8 Md. 416.

[x] Taggart *v.* Commonwealth, 9 Harris, 527. Error to Northumberland. Lewis, J.— The plaintiff in error was convicted of placing a nuisance in a public street in the borough of Northumberland. He was sentenced to abate it at his own cost, and was ordered to stand committed until the sentence be complied with. It is alleged that this is erroneous, and that the nuisance ought to be abated by means of a writ directed to the sheriff. In looking for authorities to support this sentence, it is certainly going far enough back, when we draw from the black letter law of Rolle's Abridgment. It is there declared in the Norman French then in use, that, "*Si home soit convict d'un Nusans fait al hault chemyn le Royil serra command, per le judgment, a remover le Nusans a son costs demesne.*" 2 Rolle's Abr. 84, sec. 15. Here we have the ancient common law declared by one of its most approved writers. He tells us expressly that if a man is convicted of a nuisance done in the King's highway, he shall be commanded by the judgment, to remove the nuisance at his own costs. He cites authorities to support his position. Other writers of eminence have, from time to time, affirmed the same principle. It is so declared in 3 Burns' Justice, 222. The same language is used in Hawkins' Pleas of the Crown, 1 Hawkins, 365, ch. 26, s. 14. In Russell on Criminal Law the same principle is stated in language equally distinct and positive, 1 Russell Cr. Law, 331. Thus, ancient and modern authorities concur in their sanction of the sentence which was pronounced in this case. Where the indictment is at common law, as this was, we know of no decision that such a sentence is illegal. The rule varies where statutory provisions require it.

Where a party has a license to erect the structure complained of, and the nuisance consists in exceeding his privileges, the sentence is not to remove the building altogether, but to make it conform to the license. In such cases, it is usual to issue a writ to the sheriff, commanding him to execute the judgment. Respal *v.* Arnold, 3 Yeates, 423,

directed to the correction of the specific nuisance. Thus, where the nuisance consisted in the *wrong use* of a building, and not in the building itself, it was held that it was error to direct the removal of the building, the proper course being to stop the wrongful use.[y]

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was a case of that kind. The sentence in that case could not be pronounced according to the common law, because the defendant, after conviction and before sentence, had procured an act of assembly which authorized him to continue the dam complained of, upon the terms prescribed in the act. All that could be done, in such a case, was to see that the dam was made to conform to the provisions of the statute which authorized its continuance. This case, therefore, furnishes no precedent whatever for sentence at common law. The case in 11 Pick. 452, relates to the judgment in a civil action under a statute of Massachusetts, which authorized the sentence and prescribed its form. The case in 1 Johns. Cases, 336, decides nothing which touches the question. So far from it, the Supreme Court declined expressing any opinion whatever, because the record had not been returned. In 2 Strange, 688, an "old book of forms" is cited, in which, as the counsel citing it informs the court, it is stated that judgment was given, in an assizes of nuisance, that the nuisance should be removed and the ditch filled up, (*quod nocumentum præd. amoveatur et trenchea pæd. obstruatur*) without mentioning by whom or at whose costs it was to be done. As this was not the particular point under investigation, the citation may not have embraced all that the case contained in relation to it; the book itself is not known as a work of authority—and the decision reported is in an assize of nuisance, and not in an indictment. It has, therefore, no application to the question before us. These are the cases which have been relied upon to show that the sentence is erroneous; but they fail in pertinency to the question before us, and do not in any manner impair the influence of the distinguished writers already cited in support of the judgment of the court below. Where the law is settled, judges ought not to unsettle it except upon the most urgent necessity. But when it is rightly settled, in the way that promotes justice, and accords with the public convenience, there is no justification whatever for disturbing it. But we are told that it is very hard to commit the defendant until he complies with the sentence, and that he cannot abate the nuisance while he is in prison. Doubtless it is so; but "the way of the transgressor" is always "hard." The sentence was not intended so much for his convenience as for that of the public whose rights he has violated. Every convict who has been sentenced to pay a fine, or costs, or to restore stolen goods, might make the same complaint. While confined in jail he cannot personally go to his desk at home to procure the money to pay the fine and costs; nor can he proceed to the place where the stolen goods are concealed for the purpose of restoring them to the owner. As he has voluntarily subjected himself to the inconvenience, he must be content to transact his business by agents. The plaintiff in error could very easily surmount the difficulties of his case in this way, even if he had been actually imprisoned under the sentence. But he has had the good fortune to avoid this inconvenience thus far. It is not probable that a gentleman, unaccustomed to the labor of erecting or prostrating buildings, would rely much on his own personal exertions in abating a nuisance like the one complained of here. But whatever the inconveniences of the case may be, they should have been considered by the defendant below before he submitted himself to them. In this case, it might be safe enough to trust to the personal engagement of the party, to comply with the sentence. But the rule of law has been established for those in whom it has not quite so much confidence. This objection to the sentence has been urged with such sober earnest, that we have felt bound to notice it; but it would be more appropriately addressed to the legislative department. As soon as the legislature think proper to abolish imprisonment for crimes, we shall be ready to enforce the new enactment in the manner which may be prescribed. But at present we have to execute the law as it now exists. In what is said we do not wish to be understood as denying the power of the court to issue a writ commanding the sheriff to abate the nuisance. On the contrary, this is the proper course, if the defendant fails to comply with the sentence. But to justify the writ the judgment of abatement should be pronounced in the manner already indicated No writ of execution can legally issue without a judgment to support it. (8 T. R. 144.) If the defendant fails to comply with the sentence, and the nuisance, in consequence, be abated by the sheriff, the imprisonment should continue until the costs and charges of that proceeding be paid, or the defendant be otherwise legally discharged. Those who place nuisances in the highway, ought to bear the charges of removing them. There is nothing in the other errors assigned. Judgment affirmed. See also Campbell *v.* State, 16 Ala. 144.

[y] Barclay *v.* Com., 1 Casey, 503; Hackney *v.* State, 8 Ind. 494.

When a public nuisance has become the subject of judicial investigation, the power of a private citizen to remove it is gone. The court has the power to allow such time for its removal as it shall deem reasonable.[yy]

II. Offences to health and comfort.[z]

§ 2370. Whatever is injurious to a large class of the community, or annoys that portion of the public which necessarily comes in contact with it, is a nuisance at common law.[a] Keeping a billiard room, without allowing any noise to disturb the neighborhood, and without allowing any bets on the game, is not such a nuisance;[b] but a bowling alley, kept for gain or price is, though it appears that in it gambling is expressly prohibited.[c]

§ 2371. In an indictment for exercising a noxious trade in a public locality, it is no defence that the town or city authorities have omitted to assign any place for the exercise of such a trade.[d]

§ 2372. Any trade, the carrying on of which is offensive to the senses or the health, is in itself a nuisance.[e] If it be injurious to the comfort of the community at large, it is enough; it is not necessary to constitute a public nuisance, that it should be deleterious to health.[f] It must be shown, also, that it is in a populous neighbourhood, or near a highway;[g] for its being

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[yy] Commonwealth *v.* Erie and Northeast Railroad Co., 27 Penn. State R. 339.

[z] For forms of indictment, see Wh. Prec., as follows:

(705) General form for nuisance in carrying on unwholesome occupations near to habitations or public highways.
(706) Carrying on the trade of a trunk-maker near to houses, so as to become a nuisance.
(707) Erecting a soap manufactory near a highway and dwelling-house.
(708) Nuisance by deleterious smoke and vapors.
(709) Nuisance by rendering water unfit to drink.
(710) Keeping gunpowder in a city.
(711) Keeping hogs in a city. First count, placing hogs in a certain messuage, &c., and feeding them, so as to generate a stench, &c.
(712) Second count, keeping hogs near the dwelling-houses of divers citizens, &c., and near the public highways.
(713) 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.
(714) Boiling bullock's blood for making colors, near to public ways.
(715) Keeping a distillery near to public streets.
(716) Exposing a child, infected with small-pox, in the public streets.
(717) Against a parent for not giving his deceased child a Christian burial.
(718) Bringing a horse infected with the glanders into a public place.
(719) Against owner of land for erecting offensive buildings.
(720) Keeping a privy in a street.
(721) Keeping a privy near an adjoining house.

See, also, generally, post note to § 2402.

[a] Lansing *v.* Smith, 8 Cowen, 146. Anything offensive to the sight, smell or hearing, erected or carried on in a public place where the people dwell or pass, or have a right to pass, to their annoyance, is a nuisance at common law. Hackney *v.* State, 8 Ind. 494.

[b] People *v.* Sergeant, 8 Cowen, 139.

[c] Tanner *v.* Trustees, &c., 5 Hill, N. Y. R. 121.

[d] State *v.* Hart, 4 Redding, 36.

[e] R. *v.* White, 1 Brev. 333; People *v.* Cunningham, 1 Denio, 524; Com. *v.* Vansickle, Brightly R. 69.

[f] R. *v.* Neil, 2 C. & P. 485; People *v.* Cunningham, 1 Denio, 524.

[g] R. *v.* Pappinan, 1 Str. 686.

a nuisance depends in a great measure upon the number of houses, and the concourse of people in its vicinity, which is a matter of fact to be judged by the jury.[h]

A swine-yard in a city is *per se* a nuisance.[i]

To exhibit stud-horses in a city is a nuisance.[ii] In an indictment against C., for keeping such a nuisance, it was not alleged that he had not provided an inclosure in which his stallion was let to the mares in question, but the indictment charged that the letting to mares was on a public street of the town, and in view of its inhabitants. It was held that the indictment was sufficient.[j]

A house, which from the purposes for which it is used, or the situation in which it is placed, may not be a nuisance, may become so by keeping it negligently, (*i. e.* a necessary;) but when such is the ground for prosecution it must be so laid in the indictment.[jj]

§ 2373. To support an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a state as that, if eaten, they would, by their noxious, unwholesome, and deleterious qualities, have affected the health of those who were to have consumed them.[k]

An indictment for selling unwholesome beef need not set forth that it was sold to the vendees to be eaten by them.[kk]

An indictment for selling unwholesome provisions sufficiently avers a sale for consumption as food for man by stating that the prisoner sold to divers citizens beef as unwholesome food, well knowing the same to be diseased, unwholesome, and not fit to be eaten.[l]

The offence is made out by the proof of the sale of the flesh of an animal which the seller knew to have a disease, the nature and tendency of which are to taint and affect the flesh of the animal in any degree, although the taint was imperceptible to the senses, and the eating of the flesh produced no apparent injury.[ll] Guilty knowledge that the disease, (*e. g.*,) a running abscess in the head of a cow, which had been apparent and increasing for some months, would render the flesh unwholesome, may be inferred from circumstances, without proving the defendant a person of skill.[m]

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[h] R. *v.* White, et al., 1 Bur. 332.

[i] R. *v.* Vigg, 2 Salk. Nuisance, s. 7; Com. *v.* Vansickle, Brightly R. 69; 4 Cr. Recorder, 26.

[ii] Nolin *v.* Mayor, 4 Yerger, 163.

[j] Crane *v.* State, 3 Ind. 193.

[jj] State *v.* Purse, 4 M'Cord, 472.

[k] State *v.* Norton, 2 Iredell, 40; State *v.* Smith, 3 Hawks, 378; see for forms, Wh. Prec. as follows:

(759) Selling unwholesome meat. Rev. sts. of Mass., ch. 171, § 11.

(760) For adulterating bread for the purpose of sale. Rev. sts. of Mass., ch, 31, § 12.

(761) Selling adulterated medicine. Mass. sts. 1853, ch. 394, § 1.

(762) Selling a diseased cow in a public market.

(763) Offering putrid meat for sale.

(764) Another form for the same.

[kk] Goodrich *v.* People, 3 Parker C. R. (N. Y.) 622. (MASON, J., dissenting.)

[l] Goodrich *v.* People, 5 E. P. Smith, (N. Y.) 549.

[ll] Ibid.

[m] Ibid.

In PENNSYLVANIA, the Revised Acts of 1860 provide as follows:

§ 2373 (*a*). *Selling unwholesome provisions or adulterated liquors or medicines.*—If any person shall sell or expose for sale, the flesh of any diseased animal, or any other unwholesome flesh, knowing the same to be diseased or unwholesome, or sell or expose for sale unwholesome bread, drink or liquor, knowing the same to unwholesome, or shall adulterate for the purpose of sale, or sell any flour, meal or other article of food, any wine, beer, spirits of any kind, or other liquor intended for drinking, knowing the same to be adulterated, or shall adulterate for sale, or shall sell, knowing them to be so adulterated, any drugs or medicines, such person so offending shall be guilty of a misdemeanor, and upon conviction, be sentenced to pay a fine not exceeding one hundred dollars, or undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court.—(Rev. Acts, Bill I., sect. 69.)

§ 2373 (*b*). *Selling poisons.*—No apothecary, druggist or other person, shall sell or dispose of by retail, any morphia, strychnia, arsenic, prussic acid, or corrosive sublimate, except upon the prescription of a physician, or on the personal application of some respectable inhabitant of full age, of the town or place in which such sale shall be made; in all cases of such sale, the word poison shall be carefully and legibly marked or placed upon the label, package, bottle, or other vessel or thing in which such poison is contained; and when sold or disposed of, otherwise than under the prescription of a physician, the apothecary, druggist, or other person selling or disposing of the same, shall note in a register, kept for that purpose, the name and residence of the person to whom such sale was made, the quantity sold, and the date of such sale; any person offending herein, shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding fifty dollars.—(Ibid. sect. 70.)

2374. An indictment lies against a corporation for neglecting to do what the common good requires, as where the corporation of a city have power to excavate, deepen, and cleanse a basin connected with a river, but neglect to take the necessary measures in that respect after such basin becomes foul by the aggregation of mud and other substances, whereby noisome and unwhosome stenches arise, and a nuisance is created.[mm]

§ 2375. 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, it is not sufficient 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, produced a stagnation of the waters, and corrupted the air, in or near a public highway, or in some other place in which the public have a special interest.[n]

§ 2376. The mere keeping of a large quantity of gunpowder in a house

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[mm] People *v.* Corporation of Albany, 11 Wendell, 539.
[n] Com. *v.* Webb, 6 Randolph, 726.

near dwelling-houses and a public street, does not constitute a nuisance; but keeping it negligently and improvidently does.[nn]

In Massachusetts and Virginia it is a statutory misdemeanor to sell corrupt or unwholesome provisions, without notice, and to adulterate food, liquors, drugs or medicines.[o]

§ 2377 Common scolds and common barraters are both nuisances, and may be punished as such;[p] and a person who, in presence of citizens generally, uses indecent and infamous language, is in like manner liable to indictment.[q] Anger is not necessary to constitute the offence of common scolding.[r] Ducking, which is the common law punishment, is obsolete in this country.[s]

Eaves dropping, as has already been seen, is a misdemeanor in the nature of a nuisance.[t]

On the same principle, to cast a dead body into a river, without the rites of sepulture,[u] to disinter a dead body,[v] and to indulge publicly in profane swearing,[w] have each been held indictable.

III. Disorderly house.[x]

Statutes.

Massachusetts.

§ 2378. All buildings, places or tenements used as houses of ill-fame, resorted to for prostitution, lewdness, or for illegal gaming, or used for the illegal sale or keep-

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[nn] People *v.* Sands, 1 Johns. 78.

[o] R. Stat. Mass. c. 131, s. 1. 2, 3; Virg. Code, 1849, chap, 149, s. 1, 2.

[p] Com. *v.* Pray, 13 Pick, 962; James *v.* Com. 12 S. & R. 220; 6 Mod.; Com. *v.* Davis, 11 Pick. 432; 9 Cowen, 587; U. S. *v.* Royall, 3 Cranch, C. C. R. 618.

[q] Barker *v.* Com. 7 Harris, 412. [r] U. S. *v.* Royall, 3 Cranch, C. C. 618.

[s] Ibid. James *v.* Com. 12 S. & R. 220.

[t] State *v.* Williams, 2 Tennessee, 108; see 4 Black. Com. 157, 168; 1 Russ. on Cr. 327; Com. *v.* Lovett, 6 Pa. L. J. 226; ante, § 5, 6.

[u] Kanavan's case, 1 Greenleaf, 226; ante § 6. [v] Com. *v.* Cooley, 10 Pick. 37.

[w] State *v.* Kirby, 1 Murphey, 254; State *v.* Ellar, 1 Devereux, 267; ante, 6.

[x] For forms, see Wh. Prec. as follows:

(722) Disorderly house, &c. Form used in New York.
(723) Second count. Gaming houses &c.
(724) Disorderly house. Form in use in Massachusetts.
(725) Keeping a common bawdy house in Massachusetts.
(726) Against keeper of house of ill-fame. Rev. stat. Mass. ch. 130, s. 8; stat. 1839, ch. 84.
(727) Keeping brothel in Hamilton County under Ohio stat.
(728) Keeping disorderly tavern, under Ohio stat.
(729) Disorderly house. Form used in Philadelphia.
(730) Second count. Tippling house.
(731) Another form for same.
(732) Disorderly house, under Vermont Rev. stat. s. 9, c. 99.
(733) Keeping disorderly house, and fighting cocks, &c., at common law.
(734) Disorderly house. Form used in South Carolina.
(735) Letting house to woman of ill-fame, at common law.
(736) Keeping a gaming house, at common law.
(737) Second count. Gaming room.
(738) Keeping a common gaming house, at common law. Another form, omitting the averment in last of playing rouge et noir.
(739) Same the game played being hazard.
(740) Same, and permitting persons unknown to play at E. O.
(741) Gaming house. Form in use in New York.

ing of intoxicating liquors, are hereby declared to be common nuisances, and are to be regarded and treated as such.—(Supplement to Revised Statutes, 1855, ch. 405, sect. 1.)[xx]

§ 2379. Any person keeping or maintaining any such common nuisance shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not more than one year.—(Ibid. sect. 2.)

PENNSYLVANIA.

§ 2379 (*a*). *Disorderly house*—If any person shall keep and maintain a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking or other misbehavior, to the common nuisance and disturbance of the neighborhood or orderly citizens, he or she shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.—(Rev. Code, Bill I., sect. 42.)

§ 2379 (*b*). If any person shall keep and maintain a common bawdy house, or place for the practice of fornication, or shall knowingly let or demise a house, or part thereof, to be so kept, he or she shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding two years—(Ibid. sect. 43.)

OHIO.

§ 2379 (*c*). *Houses of ill-fame held as public nuisances.*—Every house or building situate within this state, used or occupied as house of ill-fame, or for the purposes of prostitution, shall be held and deemed a public nuisance; and any person owning, or having the control of, as guardian, lessee, or otherwise, such house or

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(742) Against an inn-holder, in Massachusetts, for allowing nine-pins, &c., to be played on his premises.
(743) Against same, for keeping gaming cocks, under Rev. Stat. c. 47, s. 9.
(744) Against tavern-keeper, for permitting unlawful gaming in Pennsylvania.
(745) Against a person, in same, for keeping a gambling device called sweat-cloth.
(746) Second count. Common gaming house.
(747) Gambling under Pennsylvania Act of 1847. First Count, keeping a room for gambling.
(748) Second count, exhibiting gambling apparatus.
(749) Third count, aiding persons unknown in keeping a gaming table.
(750) Fourth count, persuading T. S. to visit a gambling room.
(751) Against a tavern-keeper for holding near his house a horse-race, under the Pennsylvania statute.
(752) Masquerade, under Pennsylvania statute of 15th February, 1808.
(753) Gaming with persons of color, under the South Carolina statute.
(754) Gaming in Alabama. First count, playing at cards.
(755) Keeping a gambling table in Alabama.

[xx] An indictment on st. 1855, c. 405, § 1, which avers that the defendant, at a certain time and place, "did keep and maintain a certain building, to wit: a dwelling-house, used as a house of ill-fame, resorted to for prostitution, lewdness, and for illegal gaming, and used for the illegal sale and keeping of intoxicating liquors, the said building so used as aforesaid, being then and there a common nuisance, to the great injury and common nuisance of all the peaceable citizens of said commonwealth, there residing," &c., is not bad for publicity: and is sufficient without alleging that the building was used by the defendant for the purposes enumerated; and does not require, to support it, evidence of the buildings having been used for more than one of the purposes enumerated, or of its having been a common nuisance to the whole community. (Com. *v.* Kimball, 7 Gray, Mass. 328.)

The character of women frequenting a house, and the character of their conversation in the house, are competent evidence on the trial of an indictment under st. 1855—against the keeper of the house. (Com. *v.* Kimball, 7 Gray, Mass. 328.)

building, and knowingly leasing or sub-letting the same, in whole or in part, for the purpose of keeping therein a house of ill-fame, or knowingly permitting the same to be used or occupied for such purpose, or using or occupying the same for such purpose, shall, for every such offence, be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or imprisonment for a term not less than thirty days nor more than six months, or both, at the discretion of the court.—(Act of April 11, 1856, sect. 1.)

§ 2379 (*d*). *Owner may avoid lease.*—The use or occupation by the lessee or tenant of any house or building, or any part thereof, for the purposes prohibited in the first section of this act, shall be held by the courts of this state, good cause on the part of the owner or lessor to avoid the agreement of lease or renting, and to re-enter at any time and take possession of such house or building.—(Ibid. sect. 2.)

VIRGINIA.

§ 2380. If a free person keeps a house of ill-fame, resorted to for the purpose of prostitution or lewdness, he shall be confined in jail not more than one year, and fined not exceeding two hundred dollars.—(Code, 1849, ch. 196, sect. 10.)

§ 2381. *Penalty on landlord letting, &c., for such uses.*—If any person shall knowingly let any building or tenement owned by him or under his control, for any of the purposes in the first section of this act enumerated, or shall knowingly permit any such building or tenement, or part thereof, to be so used while under his control, or shall, after due notice of any such use of said building or tenement, omit to take all reasonable measures to eject the said person or persons from said premises, as soon as the same may lawfully be done, he shall be deemed and taken to be guilty of aiding in the maintainance of such nuisance, and be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than six months. —(Ibid. sect. 4.)

§ 2382. The keeping of a disorderly house is *per se* an indictable offence, when laid as a common nuisance.[y]

§ 2383. 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 neighborhood 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."[z] On the same principle, a verdict finding a defendant "guilty of keeping a disorderly house, and disturbing his neighbors," is bad.[a]

§ 2384. An indictment, charging that the defendant kept "a certain unlawful, disorderly, ill-governed house," "as a common tavern," "without

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[y] Hunter *v.* Com. 2 Serg. & Rawle, 298; State *v.* Bailey, 1 Foster, 343; Clementine *v.* State, 14; Miss. 112; State *v.* Stevens, 40 Maine, 559; Hackney *v.* State, 8 Ind. 494.

[z] Dunnaway *v.* State, 9 Yerger, 350.

[a] Hunter *v.* Com. 2 Serg. & Rawle, 298; but see Com. *v.* Pray, 13 Pick. 259; 1 Term Rep. 754.

license," "and kept a common tippling house," and therein openly sold spirituous liquors to all persons calling for the same, and allowed the same to be drunk in and about the house at all times both at day and night and on Sundays; and permitted certain idle and ill-disposed persons to assemble and continue drinking and tippling, to the common nuisance, &c., is a good indictment, at common law, for keeping a disorderly house. And evidence that the defendant kept an open house for selling spirituous liquors, and that such liquors were sold to other persons than boarders and lodgers, and that the house was kept open, and such liquors there sold on Sundays and at late hours of the night, that persons intoxicated were seen in and coming out of the house drunk and disorderly, is sufficient to support the indictment. Proof of riot or disorder produced in the neighborhood is not necessary.[b]

§ 2385. An indictment, charging the defendant 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.[c]

§ 2386. An allegation that the party kept such a house on a day specified, and on divers days and times, &c., is sufficient; and it is sufficient if the indictment charge the offence to have been committed "unlawfully," without saying "knowingly" or "corruptly." It is not necessary in such case to allege that the house was kept for lucre and gain.[d]

§ 2387. 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."[e] An indictment on Rev. Sts. c. 130, s. 8, which avers that the defendant unlawfully kept and maintained a house of ill-fame, resorted to for the purpose of prostitution and lewdness, is sufficient, without alleging that the house was resorted to by divers persons, men as well as women, or that the defendant kept it for lucre.[ee]

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[b] U. S. *v.* Columbus, 5 Cranch, C. C. R. 304.

In the case of the United States *v.* Bede, the indictment was in the same form as that of United States *v.* Columbus.

The following is the instruction moved by Mr. Key, and given by the court in the absence of Cranch, C. J.: "That if the jury believe from the evidence that the traverser kept a public and open shop in this city, in which he sold liquors to persons not lodgers or boarders in his house, at times to persons who were drunk, at times to persons who came in drunk, and drank there, and went out drunk; sometimes to persons who came out and went away from his house in a noisy manner, and went away sky-larking in the streets; that his shop was generally kept open on Sundays, and that persons, not lodgers or boarders, bought and drank spirituous liquors in the shop, on Sundays; and that he had no accommodations for travellers or boarders, neither beds nor stable for such accommodation; and that he had no license for keeping a public house from the corporation; then the charge of the indictment is sustained." (U. S. *v.* Columbus, 5 Cranch, C. C. R. 305.)

[c] Com. *v.* Stewart, 1 Serg. & R. 342.

[d] State *v.* Bailey, 1 Foster, 343; Com. *v.* Ashley, 2 Gray, 356.

[e] Com. *v.* Pray, 13 Pick. 359; 1 Term R. 754.

[ee] Com. *v.* Ashley, 2 Gray, 356.

It is not necessary to state the names of the persons frequenting the house, although evidence of particular acts of disorder may be given on the trial.[f]

§ 2388. On an indictment for keeping a disorderly house, a witness, although he has stated facts tending to prove the offence charged, cannot be asked "whether the house was not a matter of general complaint by the neighbors, as disturbing them."[g]

§ 2389 It has been ruled in Mississippi, that the refusal of witnesses who have frequented the house, to answer questions in reference to the conduct of the inmates and visitors while there, upon the ground that they would degrade themselves by their answers, may be taken into consideration by the jury.[h]

§ 2390. Upon the trial of an indictment for keeping a bawdy house, so as to become a common nuisance, it is competent to prove the character of the women who live and are lodged in the house, and the character and behavior while there, of the men who frequent the house, and also the effects of the establishment upon the peace and good order, and consequent enjoyment of the neighborhood.[i]

§ 2391. Permitting a man's slaves to meet and dance on his premises, on Christmas eve or other holidays, even though other slaves, with the permission of their masters, participate in the enjoyment, and though some of the younger members of the owner's family occasionally join in the dance, does not constitute the offence of keeping a disorderly house, nor any other offence.[j]

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[f] State *v.* Patterson, 7 Iredell, 70.

[g] Com. *v.* Stewart, 1 Serg. & R. 242; Com. *v.* Hopkins, 2 Dana, 418; see R. *v.* Rogier, 1 B. & C. 272; 2 D. & R. 431.

[h] Clementine *v.* State, 14 Miss. 112; ante, § 667.

[i] Ibid.

[j] State *v.* Boyce, 10 Iredell, Law Rep. 536. "When the law tolerates such merry makings among these people, it must be expected, in the nature of things, that they will not enter into them with the quiet and composure which distinguish the gaieties of a refined society, but with somewhat of a boisterous and hearty gladsomeness and loud laughs which are usually displayed in rustic life, even where the peasantry are much in advance of our negroes in the power and habit of restraining the exhilaration of a keen sense of such pleasures. One cannot well regard with severity the rude pranks of a laboring race, relaxing itself in frolic, though they may seem to some to be at times somewhat excessive. If slaves would do nothing tending more to the corruption of their morals, or to the annoyance of the whites, than seeking the exhibition of their simple music and romping dances, they might be set down as an innocent and happy class. We may let them make the most of their idle hours, and may well make allowances for the noisy outpourings of glad hearts, which Providence bestows as a blessing on corporeal vigor united to a vacant mind. In the assemblage at the defendant's, there seems to have been nothing more: no brawls, no profane swearing, no other vicious disorder. It was but the dancing, in a retired situation, of the negroes of the plantation, to which the greater hilarity was probably imparted by the participation of a few others, who had been of the same family, and by the leave of their owners, came at the season of Christmas, to receive the affections belonging to the ties of kindred, and former association. There was nothing contrary to morals or law in all that—adding, as it did, to human enjoyment, without hurt to any one, unless it be that one feels aggrieved, that these poor people should, for a short space, be happy in finding the authority of the master give place to his benignity, and at being freed from care and filled with gladness." (State *v.* Boyce, 10 N. Carolina Reports; Iredell, Law R. 541, 542, Ruffin, C. J.

Collecting together in the night-time and making loud and unsuitable noises, so as to disturb persons in the neighborhood, is indictable at common law as a nuisance.[k]

Upon a charge for keeping a disorderly house, where it appeared that the defendant lived in the country, remote from any public road, and that loud noises and uproar were often kept up by his five sons, when drunk, whom he did not encourage (save by getting drunk himself), but would sometimes endeavor to quiet, by which disorder, only two families, in a thickly settled neigborhood were disturbed, this was held not to amount to a common nuisance.[kk]

§ 2392. At common law, it is an indictable offence to keep a house of ill-fame for lucre,[l] or to let a house, knowing it is to be used for the purposes of prostitution ;[m] though in New York the last point was once ruled differently, and it was laid down that to rent a house to a woman of ill-fame, with the intent that it should be kept for purposes of public prostitution, is not an offence punishable by indictment, though it be so kept afterwards.[n] Perhaps, however, the doctrine held in the latter case was

[k] See Bankus *v.* State, 6 Indiana, 114, where Perkins, J., very sensibly said :—"A great noise in the night-time, made by the human voice, or by blowing a trumpet, is a nuisance to those near whom it is made. The making of such a noise, therefore, in the vicinity of inhabitants, is an unlawful act; and, if made by three or more persons in concert, is by the statute of 1843, a riot. All these facts exist in the present case. Here was a great noise, heard a mile, in the night-time, made with human voices and a trumpet, in the vicinity of inhabitants. The requirements of the statute for the making out of the offence are filled. The noise was also made tumultuously. The act itself involves tumultuousness of manner in its performances. But it is said, here was no alarm or fear. The statute defining the offence says nothing about alarm or fear. In this case, however, it was only the witnesses who were not alarmed. Others within the distance of the mile in which the noise was heard, and who were not present to observe the actual condition of things, may have been, and doubtless were alarmed; and the pedlar was afraid his horses would be stolen. It is said the rioters were in good humor. Very likely, as they were permitted to carry on their operations without interruption. But with what motive were they performing these good humored acts? Not, certainly, for the gratification of Wise and his family. They were giving them what is called a 'charivari,' which Webster defines and explains as follows: 'A mock serenade of discordant music, kettles, tin-pans, &c., designed to annoy and insult. It was at first directed against widows who married a second time, at an advanced age, but it is now extended to other occasions of nocturnal annoyance and insult.' Again, it is urged that these defendants were but acting in accordance with the customs of the country. But a custom of violating the criminal laws will not exempt such violation from punishment. In the case of the State of Pennsylvania *v.* Lewis et al., Add. R. 279, it appeared that on the 5th of November, 1795, there was a wedding at the house of one John Weston. The defendants in said case were there without invitation, were civilly treated, and in the evening, when dancing commenced, began a disturbance, in which, during the evening, Weston was so seriously injured that, on the third day after, he died. On the trial of the indictment against said defendants, Campbell, Pentecost, and Breckenridge, in the argument, said 'These men did nothing more than an usual frolic, according to the custom and manners of this country. There was no intention of hurt, no design of mischief, in which the malice, which is a necessary ingredient of murder, consists.' But the argument did not prevail; and the court said, 'If appearance of sport will exclude the presumption of malice, sport will always be affected to cover a crime.'" The defendants were convicted of murder in the second degree. Bankus *v.* State, 4 Indiana R. 116.

[kk] State *v.* Wright, 6 Jones Law, N. C. 25.

[l] Jennings *v.* Com., 17 Pick. 26.

[m] Com. *v.* Harrington, 3 Pick. 26; Smith *v.* State, 6 Gill, 425; U. S. *v.* Gray, 2 Cranch C. C. R. 748.

[n] People *v.* Brockway, 2 Hill, 558.

somewhat qualified, as it was declared, that when it appeared that the owner of lands has either created a nuisance, or continued, or in any way sanctioned its creation or continuance, he was indictable.[o] At present, the law seems clear that such letting or hiring, with a guilty knowledge, would make the landlord indictable as a principal in keeping the house.[p]

An indictment for letting a tenement, to be used for purposes of prostitution, must allege some day as the time of making the lease. An averment that the defendant, on the fifteenth day of April, eighteen hundred and fifty-three, and during the five months next preceding that day, was in possession of a certain tenement, and then and there let the same, &c., is not sufficiently specific. Such an indictment must give the name of the lessee, or state some reason for not giving it, and that he accepted the lease.[pp]

To make a party liable for knowingly permitting his house to be used for the purposes of prostitution, it is said in Iowa to be necessary that he be shown to have done some act, or made some declaration, sufficiently assenting to the premises being so used after he had knowledge of such use.[q] Mere inactivity, it is said in the same case, or failure to take steps to prosecute, do not make him liable. But, however this may be under the Iowa Statute, such acquiescence, it is submitted, after notice, involves a party in the common law offence, in those jurisdictions where this offence is recognized.

A woman cannot be indicted for keeping a bawdy house, merely because she is unchaste, lives by herself, and habitually admits one or many to an illicit intercourse with her.[qq]

§ 2393. In a prosecution for the offence of keeping bawdy houses, particular facts need not be proved; common reputation as to the character of the defendants, and the house which they kept, and of the persons visiting them,[r] is admissible.[s] But common reputation that the defendant was the keeper, is not admissible to show him to have been such. He must be proved positively to have acted in such capacity, or so held himself out.[ss]

It has been said that several persons in the same venue, occupying different houses, and having no community of interest, may be included in the same indictment for keeping bawdy houses.[t]

§ 2394. In an indictment for "open gross lewdness or lascivious behaviour," it is not sufficient to charge the offence in the general words of the statute.[u]

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[o] People *v.* Townsend, 3 Hill, 479.
[p] People *v.* Erwin, 4 Denio, 129.
[pp] Com. *v.* Moore, 11 Cush. (Mass.) 600.
[q] State *v.* Abrahams, 6 Iowa, 118.
[qq] State *v.* Evans, 5 Iredell, 603.
[r] U. S. *v.* Stevens, 4 Cranch C. C. R. 341.
[s] State *v.* McDowell, Dudley, S. C., 346; U. S. *v.* Gray, 2 Cranch C. C. R. 675; *contra*, U. S. *v.* Jourdine, 4 Cranch C. C. R. 338.
[ss] State *v.* Hand, 7 Iowa, (Clarke,) 411.
[t] State *v.* McDowell, Dudley, S. C., 346; U. S. *v.* Gray, 2 Cranch C. C. R. 675; *contra*, U. S. *v.* Jourdine, 4 Cranch C. C. R. 338, sed quære.
[u] Cameron *v.* State, 5 Miss. 494.

§ 2395. Under the Missouri statute against lewdly and lasciviously "abiding and cohabiting," it is sufficient to charge the offence as having been committed on a certain day, without a *continuando*.[v]

IV. Notorious lewdness and drunkenness.[w]

Pennsylvania.

§ 2395 (*a*). *Open lewdness.*—If any person shall commit open lewdness, or any notorious act of public indecency, tending to debauch the morals or manners of the people, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, or undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.—(Rev. Acts, 1860, Bill I., sect. 45.)

[*For other statutes, see post "Adultery," "Fornication," chap.* § 2616, 2939, 2668.]

§ 2396. An indecent exposure of person to public view is an indictable offence.[x] 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." In North Carolina, it is said, it is not necessary to aver that the prisoner was seen by citizens.[y]

An indictment for indecent exposure, which alleges that the defendant, devising and intending the morals of the people to debauch and corrupt, at a time and place named, in a certain public building there situate, in the presence of divers citizens, &c., unlawfully, scandalously, and wantonly did expose to the view of said persons, present, &c., his body, &c., sufficiently alleges the intent with which the act was committed.[z]

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[v] Hinson *v.* State, 7 Mo. 244.

[w] For forms, see Wh. Prec., as follows:

(765) Exhibiting scandalous and libellous effigies, and thereby collecting a crowd, etc. First count.

(766) Keeping a house in which men and women exhibit themselves naked, etc., as "model artists."

(767) Bathing publicly near public ways and habitations.

(768) Public exposure of naked person.

(769) Exposing the private parts in an indecent posture.

(770) Same, under s. 8, c. 444, Vermont Rev. Stats. First count, exposure to divers persons, etc.

(771) Second count—Exposure in the presence of one Polly P.

(772) Third count—Exposure in the presence of Polly P. and divers other persons to the jurors unknown.

(773) Another form for the same in North Carolina, there being no allegation of the presence of lookers on.

(774) Lewdness and lascivious cohabitation in Massachusetts. First count—lascivious behaviour by lying in bed only with a woman.

(775) Second count—Lascivious behaviour, by putting the arms openly about a woman, etc.

(776) Lascivious cohabitation at common law.

(777) Lewdness, etc., by a man and woman unlawfully cohabiting and living together.

(779) Notorious drunkenness.

[x] R. *v.* Sedley, 10 St. Trials, Ap. 93; 1 Sid. 168; 1 Keb. 620; and see R. *v.* Gallard, 1 Sess. Cas. 131; R. *v.* Cruden, 2 Camp. 89; 1 B. & Adol. 933.

[y] State *v.* Roper, 1 Dev. & Bat. 208.

[z] Com. *v.* Haynes, 2 Gray R. 72.

The indictment need not conclude "to the common nuisance of all the citizens," &c.[a]

A urinal, fixed in a market place, open to the public for the purpose of making urine, is not "an open and public place," so as to sustain an indictment for this offence;[b] but an omnibus is.[c]

§ 2397. On the trial of an indictment for misdemeanor, in exposing the bodies of the defendants naked and uncovered, to the public view, the intent with which the act was done is a material ingredient in the offence, and is a question of fact, for the consideration of the jury, under all the circumstances of the case. It is for the jury to find whether there has been an intentional, wanton, and indecent exposure of the persons of the defendants, at such a time and place, and in such a manner, as to offend against public decency. And a charge which withdraws that question from the consideration of the jury, as a question of fact, is erroneous.[d]

The English rule is, that if a man indecently expose his person to *one woman* only, this is not an indictable misdemeanor.[e]

It is said to be misdemeanor to exhibit stud horses in a city.[f]

§ 2398. 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 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.[g]

§ 2399. 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,"[h] and so for an indictment for lewdness.[i]

An indictment for open and notorious lewdness, may be sustained by circumstantial evidence.[j]

§ 2400. 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.[k]

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[a] Com. *v.* Haynes, 2 Gray R. 72.

[b] R. *v.* Orchard, 3 Cox C. C. 348; 20 Eng. Law & Eq. 598.

[c] R. *v.* Holmes, 20 Eng. Law & Eq. 597.

[d] Miller *v.* People, 5 Barbour, 203.

[e] R. *v.* Watson, 2 Cox C. C. 376; 20 Eng. Law & Eq. 599. Whether an indictment which charges A. with having "in a certain public place, within a certain victualling ale-house," indecently exposed his person *in the presence* of M. A., the wife of B., and other the liege subjects there, is good—*quære*. But if it appear that the exposure was to M. A., the wife of B., *only*, the defendant ought not to be convicted. (R. *v.* Webb, 2 Car. & K. 933; S. C. 1 Den. C. C. 334.)

[f] Nolin *v.* Mayor, 4 Yerger, 163; see Crane *v.* State, 3 Ind. 193.

[g] Britain *v.* State, 3 Humph. 203.

[h] Brooks *v.* State, 2 Yerger, 482; see, per contra, State *v.* Eagle, 2 Humph. 414.

[i] State *v.* Moore, 1 Swan, (Tenn.) 136.

[j] Peak *v.* State, 10 Humph. 99.

[k] Grisham *v.* State, 2 Yerger, 589.

If a man be frequently and publicly drunk, he may be indicted as a common nuisance,[l] and if he use obscene language publicly.[m]

§ 2401. But 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.[n]

In Massachusetts, a complaint which alleged that the defendant on a day named, at F., "was and is a common drunkard, having been at divers times and days, within six months now last past, at said F., drunk and intoxicated, by the voluntary and excessive use of spirituous and intoxicating liquors," is sufficient, and need not conclude, "to the common nuisance of all citizens."[nn]

V. Obstructing, and not repairing highways.[o]

§ 2402. An indictment lies for the obstruction of a highway,[p] even though laid out and established by an erroneous judgment of the county court.[q]

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[l] Smith *v.* State, 1 Humph. 396; State *v.* Waller, 3 Murphey, 229.
[m] Bell *v.* State, 1 Swan, (Tenn.) 42; Barker *v.* Com. 7 Harris, 412.
[n] State *v.* Waller, 3 Murphey, 229.
[nn] Com. *v.* Boon, 2 Gray, (Mass.) 174.
[o] For forms, see Wh. C. L., as follows:
(675) Erecting a gate across a public highway.
(676) Erecting and continuing a house part of which was on the highway.
(677) Obstructing a common highway, by placing in it drays,
(678) Same with filth, etc.
(679) Letting off fireworks in the public street.
(680) Keeping a pond of stagnant water in a city.
(681) Placing a quantity of foul liquor, called "returns," in the highway.
(682) Laying dung near a public street, whereby the air was infected and inhabitants annoyed.
(683) Letting wagons stand in public street, so as to incommode passengers.
(684) Placing casks in the highway.
(685) Leaving open an area on foot pavement in a street.
(686) Laying dirt in a footway.
(687) Keeping a ferocious dog.
(688) Profane swearing in a public street.
(689) Obstructing townways in Massachusetts, under the statutes of 1786, c. 67, s. 7, and 1786, c. 81, s. 6.
(690) Blocking up the great square of a town-house in Pennsylvania.
(691) Erecting a wooden building on public square of a village in Vermont.
(692) Throwing dirt upon a public lot.
(693) Stopping an ancient water-course, whereby the water overflowed the adjoining highway and damaged the same.
(694) Diverting a water-course running into a public pond or reservoir.
(695) Obstructing a water-course called "Peg's Run."
(696) Permitting waters of a mill to overflow.
(697) Obstructing an ancient water-course, whereby a public highway was overflowed and spoiled.
(698) Erecting a dam on a navigable river.
(699) Erecting obstructions on a navigable river.
(700) Obstructing a river which is a public highway, by erecting a fish-trap or snare in it called "putts."

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[p] Gregory *v.* Com., 2 Dana, 417; Com. *v.* Gowen, 7 Mass. 378; Co. Litt. 56 a; 1 Hawk, P. C. c. 76, s. 1; 2 Russ. on Crimes, 340.
[q] State *v.* Spainhour, 2 Dev. & B. 547. See on this point fully, Wh. Prec. 781, n.

The obstruction of a way, however, to be a nuisance must affect the public as an aggregate, not an individual, as a definite number of individuals.[qq]

§ 2403. Constables obstructing the streets by their sales are indictable for a nuisance,[r] and it is unlawful, in a large city, for an auctioneer to place goods, intended for sale, in the public streets.[s] Where a wagoner occupied one side of a public street, in a city, before his ware-houses, in loading and unloading his wagons, for several hours at a time, both day and night, and having one wagon, at least, usually standing before his warehouses, so that no carriages could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying upon the ground ready for loading; this was holden to be a public nuisance, although it appeared that there was room for two carriages to pass on the opposite side of the street.[t]

§ 2404. It is a public nuisance, and indictable at common law to place on the footway of a public street a stall for the sale of fruit and confectionery, although the defendant pay rent to the owner of the adjoining premises for the use of so much of the pavement as is occupied by him.[u]

§ 2405. A grant will not be presumed of a part of a public square or street from lapse of time, so as to bar an indictment for a nuisance.[v] Where the travelling public had for ten years actually ceased to use a portion of a road established by public authority, and had by use acquired a right to a portion of the land of the trustees of a church, for highway purposes, instead of the said portion of old roads; it was held, that the acquisition of a right of way over the land of the trustees did not estop the state from asserting its claim to the old road, nor shield the individual obstructing it from punishment.[w]

When a railroad authorized by its charter to be made at one place, is made at another, it is a mere nuisance on every highway it touches in its illegal course.[ww]

§ 2406. It is a nuisance, on the same principle, to obstruct the passage

(701) Damming creek.

(702) Obstruction of fish in the river Susquehanna, under the act of 9th March, 1771.

(703) Obstructing a harbor by erecting in it piles, etc.

(704) Negligently permitting fences to remain, during the crop season, less than five feet high, under the North Carolina statute.

[qq] People *v.* Jackson, 7 Mich. (3 Cooley) 432; ante, § 2363.

[r] Com. *v.* Milliman, 13 S. &. R. 403. [s] Passmore's case, 1 S. & R. 217.

[t] R. *v.* Russell, 6 East 427; and see R. *v.* Cross, 3 Camp. 227. 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 streets opposite their distillery, where they were received into casks standing in carts and wagons; and the teams and carriages of the purchasers were accustomed to collect there in great numbers to receive and take away the article; and in consequence of their remaining there 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.)

[u] Com. *v.* Wentworth, Brightly, R. 318; Smith *v.* State, 6 Gill. 425.

[v] Com. *v.* Alburger, 1 Whart. 469; Com. *v.* Tucker, 2 Pick. 44; ante § 2363.

[w] Elkins *v.* State, 2 Humph. 543.

[ww] Commonwealth *v.* Erie & Northeast Railroad Co., 27 Penn. State R. 339.

of a navigable river by bridges or otherwise.[x] To divert a part of a public stream, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burden as it would before, is a common nuisance.[y] But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, yet the owner is not indictable, as for a nuisance, for not removing it.[z]

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage, occasioned by these staiths, was for a public purpose, and occasioned a public benefit, and if the erection were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; it was holden that this direction was right.[a] This case, however, was overruled afterwards, in England,[b] and the later position, that no countervailing benefit can be a defence, has been followed in this country.[c]

§ 2407. The provincial statute of 8 Anne, ch. 3, for preventing obstructions to fish in rivers, is still in force in Massachusetts; and, as it declares all obstructions therein mentioned, common nuisances, an indictment will lie; the special remedy provided by that statute being merely cumulative.[d] A seine or net, not placed permanently, is not within the act.[e]

An indictment at common law does not lie for obstructing the passage of fish by a dam across an unnavigable river.[f] But such a mill-dam becomes a nuisance when it obstructs the water to such an extent that it overflows its banks and the surrounding country, and stagnates, whereby the air along the highways and around the dwellings is infected with noxious and unwholesome vapors, and the health of the surrounding country is sensibly impaired.[ff]

The following statute was passed in Massachusetts in 1857:

Penalty for wilful obstruction of flow of water of mill-ponds, &c.—Every person who shall wilfully or wantonly, without color of right, obstruct the water of any mill-pond, reservoir, canal or trench, from flowing out of the same, shall be punished by imprisonment in the State prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail, not more than two years.—(May 15, 1857.) (Supplement to Revised Statutes, 1857, chapter clx., p. 410.)

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[x] Com. *v.* Church, 1 Barr, 105; State *v.* Dibble, 4 Jones' (Law) N. C. 107; State *v.* Freeport, 43 Maine, 198.

[y] 1 Hawk. c. 75, s. 11.

[z] R. *v.* Watts, 2 Esp. 675; see R. *v.* Russell et al., 9 D. & R. 561; 6 B. & C. 566; R. *v.* Ward, 4 Ad. & E. 384; R. *v.* Tindall, 6 Ad. & E. 143; R. *v.* Morris, 1 B. & Ad. 441.

[a] R. *v.* Russell, 9 D. & R. 566, Tenterden, C. J., dissentiente; 6 B. & C. 566.

[b] R. *v.* Ward, 4 Ad. & E. 384.

[c] Caldwell's case, 1 Dallas, 150; see ante § 2364. [d] Com *v.* Ruggles, 10 Mass. 391.

[e] Ibid. [f] Com. *v.* Chapin, 5 Pick. 199. [ff] Douglass *v.* State, 4 Wis. 387.

§ 2408. Where a wharf is extended below low-water-mark, and into the channel of the tide waters of the commonwealth, it does not necessarily follow that it is a common nuisance, but this is the presumption, and the defendant must show that it is no impediment to navigation, or detriment to the public.[g] If the effect of such a wharf is to fill up the channel, or divert the current, it is a nuisance.[h]

Planting oysters in public waters is not such a special appropriation of such waters as will justify their removal as a nuisance, unless they interfere with the rights of the public; and in this latter case, a private person has no right to take them away and convert them to his own use.[hh]

§ 2409. An indictment will lie against those whose duty it is to repair highways and bridges, for neglect, whether the duty is public or private.[i] In such case the indictment must set forth how the defendant became subjected to the duty of making repairs.[j]

§ 2410. It is a nuisance in like manner to obstruct the streets of a city, by collecting large numbers of persons by means of loud and indecent language.[k]

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[g] Com. *v.* Wright, Thac. C. C. 211. [h] Ibid.

[hh] State *v.* Taylor, 3 Dutch. 117.

[i] State *v.* King, 3 Iredell, 411; State *v.* Commissioners, etc., 2 Car. Law R. 617; State *v.* Commissioner, 1 Walker, 368. See fully on this point, Wh. Prec. 781, *note.*

[j] State *v.* King 3 Iredell, 411. For forms, see Wh. Prec., as follows:

(781) Against inhabitants of a township for not repairing a highway situate within the township.

(782) Against a county for suffering a public bridge to decay.

(783) Against the inhabitants of a parish for not repairing a common highway.

(784) Against a corporation of a town for suffering a water-course which supplied the inhabitants with water, and which they were bound to cleanse, etc., to be filthy and unwholesome.

(785) Information in New Hampshire against a town for refusing to repair etc.

(786) Against the inhabitants of a town for not repairing a highway in Massachusetts.

(787) Against a supervisor in Pennsylvania for refusing to repair road.

(788) Against a supervisor in Pennsylvania for refusing to open a road, etc.

(789) Against overseer in North Carolina for refusing to repair road.

(790) Against commissioner in South Carolina for refusing to repair road.

(791) Against overseer, in Alabama for same.

[k] Barker *v.* Com. 7 Harris, 412. "The common highways," said Lewis, J., "were designed for no such purpose. If the purposes of the meeting be lawful, a suitable place can be obtained for it, without obstructing the public in their undoubted right of passing along their own highways. The liberty of speech does not require that the clear legal rights of the whole community shall be violated. The freedom of the press is as well deserving protection as the liberty of speech; but no one, in his wildest enthusiasm in favor of the former, has claimed the right to establish printing presses in the public streets. One of Hoe's printing presses would certainly be as effectual in collecting a crowd, as the indecent and violent harangue described in this indictment. The nuisance in the one case would be quite respectable in its nature and objects, compared with the demoralizing character of the other; but both are prohibited by law, as infractions of the public right of passage. In the third count the defendants are charged with 'openly and publicly speaking with a loud voice, in the hearing of the citizens, etc. wicked scandalous and infamous, words representing men and women in obscene and indecent positions and attitudes.' And this is averred to have been done with intention to debauch, debase and corrupt the morals of the youth as well as others, and to their manifest corruption and subversion. This offence is not averred to be a common nuisance, nor is such an averment necessary; 2 Serg. & R. 91. If the language be addressed to the public, in a public place, and the intent and manifest tendency of it be to debauch and corrupt the public morals, the

VI. Lotteries.[1]

A. STATUTES.

Massachusetts.
Setting up or promoting lottery, &c., § 2412.
Selling tickets, &c., § 2413.
Double conviction, § 2414.
Advertising lottery ticket, § 2415.
Having ticket in possession, or attempting to sell same, &c., § 2416.
Ticket to be deemed false, unless proved to the contrary, § 2417.
Reward to informer, § 2418.
Prizes to be forfeited, § 2419.
New York. § 2420.
Pennsylvania. § 2421.
Virginia.
Setting up or permitting a lottery or a raffle, § 2422.
Selling or keeping, &c., ticket, &c., in lottery in last section, § 2423.
Selling or keeping, &c., ticket in any false lottery, &c., § 2424.
Ticket presumed to be false until proved to the contrary, 2425.
Prizes forfeited, § 2426.
Law remedial, § 2427.
Attorney's fee, § 2428.

§ 2411. In New York all lotteries are declared by statute to be illegal, and to be common and public nuisances.[m] In Pennsylvania, by an act

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offence is complete. All these essentials sufficiently appear upon the face of the indictment, and the jury have found the defendants guilty. It would be a reproach on the common law, if such acts were not held to be indictable as a gross misdemeanor.

There is nothing in the objection that the words spoken and attitudes described by the defendants below, are not particulary set forth in the indictment. It is sufficient that the first are averred and found to be 'wicked, scandalous and infamous,' the last 'obscene and indecent,' and both 'designed' and manifestly tending to the corruption of the public morals. In a prosecution for publishing an obscene book or picture, the law is not so absurd as to require that the indictment should contain in itself a repetition of the offence which it was framed to suppress. This principle governs the case presented on the record." (Bell *v.* State, 1 Swan, (Tenn.) 42.)

[1] For forms of indictment, see Wh. Prec., as follows :—

(828) Selling lottery tickets. General frame of indictment.
(829) Same where ticket is lost or destroyed, or in defendant's possession.
(830) Selling ticket in New Hampshire.
(831) Same in Massachusetts.
(832) Advertising lottery ticket in same, under stat. 1825, c. 184.
(833) Selling lottery tickets in same, under stat. 1825, c. 184, s. 1.
(834) Selling ticket in New York.
(835) Another form for same.
(836) Promoting lottery in same, being the form in common use.
(837) Carrying on lottery whose description is unknown to jurors.
(838) Selling lottery policy in Pennsylvania, under Act of March 16, 1847.
(839) Selling ticket in same, under same.
(840) Same, under repealed Act of March 1, 1833. First count, sale of ticket, ticket being set forth.
(841) Second count. Conspiracy to sell a lottery ticket, &c., the defendant being singly charged with a conspiracy with others unknown.
(842) Same in Virginia.
(843) Selling lottery tickets, under Ohio statute.
(844) Opening up a lottery scheme, called "The Western Reserve Art Union," under Ohio statute.
(845) Obstructing authorities, under Ohio statute.
(846) Obstructing authorities and preventing a proclamation at a riot, under Ohio statute.
(847) Riot, and refusing to disperse on proclamation being made, under Ohio statute.
(848) Publishing scheme of chance, under Ohio statute.

[m] 1 R. S. 665, sect. 25.

which, though of doubtful validity, has on one or two occasions been held to be still in force, the same general provision exists.[n] An indictment, therefore, against a lottery, as against a common nuisance, with the same generality of statement as obtains in cases of nuisance, would seem to be good in these States.

A.—Statutes.

Massachusetts.

§ 2412. *Setting up or promoting lottery, &c.*—Every person who shall set up or promote any lottery, not authorized by law, for money, or shall dispose of any property of value, real or personal, by way of lottery, and every person who shall aid, either by printing or writing, or who shall in any way be concerned in the setting up, managing or drawing of any such lottery, or who shall, in any house, shop, or building owned or occupied by him, or under his control, knowingly permit the setting up, managing or drawing of any such lottery, or the sale of any lottery ticket, or a share of a ticket, or any other writing, certificate, bill, token or other device, purporting or intending to entitle the holder, bearer, or any other person, to any prize, or to any share of or interest in any prize, to be drawn in a lottery, or who shall knowingly suffer money or other property to be raffled for in such house, shop or building, or to be won there by throwing or using dice, or by any other game of chance, shall, for every such offence, be punished by a fine not exceeding two thousand dollars.—(Chapter 132, sect. 1)[o]

§ 2413. *Selling tickets, &c.*—Every person who shall sell, either for himself or for any other person, or shall offer for sale, or shall have in his possession, with intent to sell or to offer for sale, or to exchange or negotiate, or shall in any wise aid, or assist in the selling, negotiating or disposing of a ticket in any such lottery, or a share of a ticket, or any such writing, certificate, bill, token, or other device, as is mentioned in the preceding section, shall be punished for every such offence by a fine not exceeding two thousand dollars.—(Ibid. sect. 2.)[p]

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[n] Act of 17th Feb. 1762; 1 Dallas, 415; 1 Smith, 266; 6th ed. Purd. 246; see 4 S. & R. 151.

[o] The prohibition in this section of the sales, &c., of tickets in "any lottery and not authorized by law," extends to all lotteries not authorized by a law having force in this commonwealth. (Com. *v.* Dana, 2 Met. 829.)

In an indictment for having in possession lottery tickets, with intent to sell or offer them for sale, it is not necessary to aver the intent of the defendant to sell or offer them for sale within this commonwealth. (Com. *v.* Dana, 2 Metc. 329.)

A person selling a chance in a lottery, and retaining in his own hands the ticket or other evidence of the chance, sells a ticket within the meaning of the statute of 1825, c. 184. (Com. *v.* Pollard, Thacher's C. C. 280.)

Books kept in relation to the proceedings respecting a lottery "are materials for a lottery," within the meaning of the Rev. Stat. c. 142, and may be seized on a search-warrant. (Com. *v.* Dana, 2 Met. 329.)

An indictment on this section, &c., which alleges that the defendant, in a house occupied by him, "did unlawfully and knowingly permit the setting up of a lottery, in which certain articles of personal property and of value were disposed of, by the way of a lottery," is sufficient, without alleging that the lottery, so permitted to be set up, was a lottery not authorized by law, for money, and without stating the name of the lottery, or describing the articles disposed of, or stating their value, or the names of their owners, or of the persons who received them as prizes. Com. *v.* Horton, 2 Gray, R. 69.

[p] Under the former statute, 1825, c. 184, sect. 1, providing that "if any person shall sell, or offer for sale," &c., any lottery ticket, &c., "he shall forfeit, and pay for either of the offences aforesaid," a sum not more than $100, an indictment charg-

§ 2414. *Double conviction.*—If any person shall, after being convicted of any offence mentioned in either of the two preceding sections, commit the like offence, or any other of the offences therein mentioned, he shall, in addition to the fine before provided therefor, be further punished by imprisonment in the house of correction, for a term not more than one year.—(Ibid. sect. 3.)

§ 2415. *Advertising lottery ticket.*—Every person who shall advertise any lottery ticket, or any share in any such ticket for sale, either by himself or by another person, or who shall set up or exhibit, or shall devise or make, for the purpose of being set up or exhibited, any sign, symbol, or any emblematic or other representation of a lottery, or of the drawing thereof, in any way indicating where a lottery ticket, or a share thereof, or any such writing, certificate, bill, token, or other device before mentioned, may be purchased or obtained, or shall in any way invite or entice, or attempt to invite and entice any other person to purchase or receive the same, shall be punished for every such offence, act, or attempt, by a fine not exceeding one hundred dollars.—(Ibid. sect. 4.)[q]

§ 2416. *Having ticket in possession, or attempting to sell same, &c.*—Every perwho shall make or sell, or shall have in his possession, with intent to sell, or to exchange, or negotiate, or who shall, by printing, writing, or otherwise, assist in making or selling, or in attempting to sell, exchange, or negotiate any false or fictitious lottery ticket, or any share thereof, or any writing, certificate, bill, token, or other device before mentioned, or any ticket or share thereof, in any fictitious or pretended lottery, knowing the same to be false or fictitious, or who shall receive any money, or other thing of value, for any such ticket, or share of a ticket, or for any such writing, certificate, bill, token, or other device, purporting that the owner, bearer, or holder thereof, shall be entitled to receive any prize, or any share of a prize, or any other thing of value, that may be drawn in any lottery, knowing the same to be false or fictitious, shall, for every such offence, be punished by imprisonment in the state prison, not more than three years.—(Ibid. sect. 5.)

§ 2417. *Ticket to be deemed false unless proved to the contrary.*—Upon the trial of an indictment for either of the offences mentioned in the preceding sections, any ticket or share of a ticket, or any other writing or thing before mentioned, which the defendant shall have sold, or offered for sale, or for which he shall have received any valuable consideration, shall be deemed to be false, spurious, or fictitious,

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ing in one count that the defendant, on February 4, 1833, at Boston, "did unlawfully offer for sale, and did unlawfully sell," was held not to be bad for duplicity. (Com. *v.* Eaton, 15 Pick. 273.)

[q] In an information against a party for advertising lottery tickets, in violation of the statute of 1825, c. 184, it is not necessary to allege, nor to prove upon the trial, specifically, what kind of lottery tickets the defendant advertised, nor that they were advertised, as being for sale within the county where the information is filed. (Com. *v.* Hooper, 5 Pick. 42; Com. *v.* Johnson, Thacher's C. C. 284.)

A sign board at a person's place of business, giving notice that lottery tickets are for sale there, is an advertisement within the meaning of the statute of 1825, c. 184, prohibiting the advertising of lottery tickets for sale. (Ibid.)

The continuance of such a sign board after the passage of that act, though put up before, is a new advertisement, by which the penalty of the statute is incurred. (Com. *v.* Hooper, 5 Pick. 42; Com. *v.* Johnson, Thacher's C. C. 284.)

If a person send to a printer to be inserted in his newspaper, an advertisement of lottery tickets for sale, he is guilty of advertising, and causing to be advertised as set forth in the statute of March, 1826. (Com. *v.* Braynard, Thacher's C. C. 146.)

In an indictment for causing the advertisement of lottery tickets for sale, it is not necessary to allege that the tickets were advertised as for sale within the commonwealth, or that the lottery was within the commonwealth, or to specify the lottery. (Com. *v.* Clapp, 5 Pick. 41.)

unless such defendant shall prove the same to be true and genuine, and to have been duly issued by the authority of some legislation within the United States, and that such lottery was existing and undrawn, and that such ticket, or share thereof, or other writing, or thing before mentioned, was issued by lawful authority, and binding upon the person who issued the same.—(Ibid. sect. 6.)

§ 2418. *Reward to informer.*—There shall be paid, for every person convicted and sentenced under the preceding section, to the person who shall inform and prosecute, the sum of fifty dollars, and for every person who shall be convicted and punished by a fine, under any of the provisions of this chapter, there shall be paid, at the discretion of the court, a sum not exceeding one-half of the fine actually paid by such offender, which rewards shall be paid out of the public treasury, in the manner provided in the one hundred and twenty-seventh chapter.—(Ibid. sect. 7.)

§ 2419. *Prizes to be forfeited.*—All sums of money, and every other valuable thing, drawn as a prize, or as a share of a prize, in any lottery, by any person, being an inhabitant or resident within this state, and all sums of money or other things of value received by any such person, by reason of his being the owner or holder of any ticket, or share of a ticket, in any lottery or pretended lottery, contrary to the provisions of this chapter, shall be forfeited to the use of the commonwealth, and may be recovered by an information to be filed, or by an action for money had and received, to be brought by the attorney-general, or any district attorney, or other prosecuting officer, in the name and on behalf of the commonwealth.—(Ibid. sect. 8.)

NEW YORK.

§ 2420. [In this state the provisions as to lotteries are so numerous that it is not proposed at present to do more than to present a brief abstract of their character. The revised statutes, sect. 22, act 4, title 8, chap. 20, impose a penalty on setting up money, goods, &c., to be raffled for, and, by sect. 23, raffling for money, goods, &c., is prohibited. All contracts, agreements, &c, on account of raffling, are, by sect. 24, declared void; and sect. 25 provides for the recovery of all moneys paid for chances. In sect. 26 lotteries are declared unlawful, and common and public nuisances, and in sect. 27 a penalty is imposed for setting up, drawing, &c., lotteries unauthorized by special laws. In sect. 28 a penalty is fixed for printing, publishing, &c., notices of illegal lotteries, and sect. 29 provides a penalty for selling, procuring, furnishing, &c., or causing to be procured or furnished, &c., tickets, &c., in illegal lotteries. Sect. 30 prohibits the offering for sale any real estate, or any money, goods, &c., dependent on the drawing of any lottery, under the penalty of a fine or imprisonment; and sect. 31 provides that property so offered shall be forfeited. By sect. 32, purchasers of tickets, &c., in an illegal lottery, are enabled to recover double the sum paid for such tickets, &c. Prizes in illegal lotteries, by sect. 33, are forfeited to the use of the poor; and sect. 34 prohibits the opening, setting up, &c., any office or other place for registering the numbers of any tickets in any lottery not authorized by the laws of the state. Sect. 35 provides that no person shall sell the chance or chances of any ticket in any lottery not authorized by the laws of the state, and prohibits the insurance for or against the drawing of any such lottery. Sect. 36 contains a prohibition against insuring tickets in any lottery, and against publishing notices thereof, &c. By sect. 38 every grant, bargain, sale, &c., of any real estate, or of any goods, &c., in pursuance of any lottery not authorized by the laws of the state, or for the purpose of aiding, &c., in any such lottery, &c., is declared void and of no effect. By sect. 39 it is provided that

no person within the state shall, directly or indirectly, sell, vend, &c., any ticket or share, &c., of any lottery, &c., unless thereby duly authorized in a manner prescribed in sect. 40; and sect. 41 requires that the license shall be registered. Sects. 42, 43, 44, 45, and 46, contain regulations as to the granting of licenses, and prosecution of the bond to be given at the time of granting such licenses, in case of the violation of such bond. Sects. 47 and 48 provide for the disposition of the moneys received for licenses granted, and from recoveries upon bonds as aforesaid. Sect. 49 provides for the forfeiture of licenses upon conviction of any of the offences specified in this article. By sect. 50 it is prescribed that certain lottery tickets be divided into shares by the agents of the institutions or corporations for whose benefit the lotteries have been framed; and it is required that a complete list thereof be made and filed in the office of the secretary of the state. Sect. 51 imposes a penalty for selling any share, &c., in any lottery whatsoever, other than the certificates of shares issued in conformity to the preceding section. Section 52 regulates the evidence in prosecutions under article 4th of chap. 20. Sect. 53 provides that if any person shall falsely make, &c., or cause to be falsely made, &c., or willingly assist in the false making, &c., of any ticket of any lottery, or other game or device of chances, &c., with intent to defraud any person or body corporate whatsoever, or shall utter or publish as true, &c., any false, altered, &c., ticket of any lottery, &c., with intention to defraud any person or body politic, &c., knowing the same to be false, any such person, upon conviction, shall be subject to imprisonment. Sect. 54 makes it the duty of the presiding judge of every court of Oyer and Terminer, and of every court of General Sessions of the Peace, specially to charge the grand jury to inquire into all violations of the laws against lotteries, and against the unlawful selling of tickets in lotteries.[r]

[r] A count in an indictment, charging the defendant with keeping a common gaming-house, and selling lottery tickets therein, was held insufficient; and also a count charging the keeping an ill-governed and disorderly room for the sale of lottery tickets. (People *v.* Jackson, 3 Denio, 101.)

Under the 27th section of 1 Rev. Sts. of New York, 665, a lottery which is not for the purpose of disposing of property, is not illegal; and an indictment for selling lottery tickets, not describing the lottery as being for such purpose, cannot be supported. (People *v.* Paine, 3 Denio, 88.) The indictment should contain either a particular description of the lottery, or assign as a reason that a more particular description of the lottery was unknown to the grand jury; and an averment merely that the name of the lottery was unknown to the grand jury, is insufficient; but it is not necessary that the indictment should set forth the amount of the lottery. (People *v.* Taylor, 3 Denio, 91.) It is not necessary to set out the tickets sold, or the names of the purchasers, it being alleged that the names were unknown to the jurors. (People *v.* Taylor, 3 Denio, 99.)

The publication in New York, of an advertisement of a lottery to be drawn in a place where such lottery is not unlawful, is an indictable offence; and if the indictment set forth the advertisement in *hæc verba*, showing that the lottery was for the purpose of disposing money or property, it is sufficient, although the purpose of the lottery is not otherwise alleged in the indictment. (People *v.* Charles, 3 Denio, 212, 610.)

The act to prevent raffling and lotteries, was intended to prohibit the sale of lottery tickets in the state, whether the lottery was established here or elsewhere. And an indictment for vending lottery tickets need not allege that the lottery was established in this state. An indictment for vending a lottery ticket need not expressly aver that the ticket was of a lottery established or set on foot for the purpose of disposing of real estate, goods, money, or things in action. The character and description of the lottery need not form the subject of an express averment. It is sufficient if these appear argumentatively, in the indictment, especially after verdict. (The People *v.* Warner, 4 Barbour, 314.)

Under the revised statutes (1 R. S. 665, § 28,) it is a misdemeanor to publish in this state an account of a lottery to be drawn in another state or territory, although such lottery be authorized by the laws of the state where it is to be drawn.

PENNSYLVANIA.

§ 2421. *Lotteries nuisances.*—All lotteries not authorized by law, whether public or private, for moneys, goods, wares or merchandise, chattels, lands, tenements, hereditaments, or other matters or things whatsoever, are hereby declared to be common nuisances; and every grant, bargain, sale, conveyance or transfer of any goods or chattels, lands, tenements or hereditaments which shall be made in pursuance of any such lottery, is hereby declared to be invalid and void.—(Rev. Code, Bill I., sect. 52.)

§ 2421 (*a*). *Setting up same.*—If any person shall, within this state, either publicly or privately, erect, set up, open, make or draw any such lottery as aforesaid, or be in any way concerned in the managing, conducting or carrying on the same, he he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding one year.—(Ibid. sect. 53.)

§ 2421 (*b*). *Selling ticket.*—If any person shall sell or expose to sale, or cause to be sold or exposed to sale, or shall barter or exchange, or cause or offer to be bartered or exchanged, or shall advertise, or cause to be advertised for sale, barter or exchange, any lottery ticket or share, or part thereof, or any lottery policy, or any writing, certificate, bill, token or other device, purporting or intending to entitle, or represented as entitling the holder or bearer, or any other person, to any prize to be drawn in any unlawful lottery, or any part of such prize, or any interest therein, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding two years, and to pay a fine not exceeding one thousand dollars. The purchaser of such ticket, policy or device, shall not be liable to any prosecution or penalty by virtue of this or any other law of the commonwealth, and shall, in all respects, be a competent witness to prove the offence. Any indictment under this act shall be deemed and adjudged good and sufficient, which describes the offence in the words of this law, although it does not set out the name or location of such lottery, nor set out in words and figures the ticket, policy or device sold, bartered or exchanged, or offered or advertised to be sold, bartered or exchanged.—(Ibid. sect. 54.)[a]

VIRGINIA.

§ 2422. *Setting up or permitting lottery or raffle.*—If a free person, without authority of law, set up or promote a lottery or raffle for money or other thing of value, or be concerned in managing or drawing such lottery or raffle, or in any house under his control, knowingly, permit such lottery or raffle, or the sale of any lottery ticket or share thereof, or any other writing, certificate, bill, token or other device, purporting or intended to entitle any person to any prize, or share of, or interest in a prize, to be drawn in such lottery, or in any foreign lottery, or shall,

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It was accordingly held, that a demurrer to an indictment which charged the defendant with publishing in the city of New York, an account of a lottery to be drawn in the District of Columbia, was not well taken.

Where the indictment charged the defendant with publishing an account of an illegal lottery, and set forth in *hæc verba* the lottery scheme, which showed that the prizes consisted of sums of money; held good, although it was not otherwise averred that the lottery was set on foot for the purpose of disposing of money, lands, &c. (Charles *v.* The People, 1 Comstock, 181.)

[a] Under the previous act of 1847, indictments merely averring a sale, but not stating to whom, or selling the ticket, are not sufficient. (Anon., Phil. Qr. Sess., June, 1847, Kelley, J., cited Wh. Prec. 486.)

knowingly, permit money or other property to be raffled for in such house, or to be won therein by throwing or using dice, or by any other game of chance, he shall be fined not exceeding one thousand dollars.—Code, 1849, chap. 198, sect. 11.)

§ 2423. *Selling or keeping, &c., ticket, &c., in lottery in last section.*—If a free person, for himself or another person, without lawful authority, sell or have in his possession for the purpose of sale, or with intent to exchange or negotiate, or aid in selling, exchanging or negotiating a ticket or share of a ticket in a lottery, or any such writing, certificate, bill, token or device, as is mentioned in the preceding section, he shall be fined not exceeding one hundred dollars.—(Id. sect. 12.)

§ 2424. *Selling or keeping, &c., ticket in any false lottery, &c.*—If a free person make, sell, exchange, or negotiate, or have in his possession with intent to sell, exchange or negotiate, or assist in making or selling, or in attempting to sell, exchange or negotiate, any false or fictitious lottery ticket, or share thereof, or any writing, certificate, bill, token or device, before mentioned, or any ticket, or share thereof, in any false or fictitious lottery, or if he receive any money, or other thing of value for such ticket or share, writing, certificate, bill, token or device, purporting that any person shall be entitled to receive any prize, or share thereof, or other thing of value, that may be drawn in such lottery, he knowing the same to be false or fictitious, he shall be confined in jail not more than one year, and fined not exceeding five hundred dollars.—(Id. sect. 13.)

§ 2425. *Ticket presumed to be false until proved to the contrary.*—In a prosecution under the preceding section, any ticket, or share of a ticket, or any other writing or thing which the accused sold or offered for sale, shall be presumed to be false or fictitious, unless it be proved that the same is true and genuine, and that such lottery was existing and undrawn, and that such ticket, or share thereof, or other writing or thing before mentioned, was issued by lawful authority, and binding upon the persons who issued the same.—(Id. sect. 14.)

§ 2426. *Prizes forfeited*—All money and things of value, drawn or proposed to be drawn by an inhabitant of this state, and all money or things of value received by such person, by reason of his being the owner or holder of a ticket or share of a ticket in any lottery, or pretended lottery, contrary to this act, shall be forfeited to the commonwealth.—(Id. sect. 15.)

§ 2427. *Law remedial.*—All laws for suppressing gaming, lotteries, unchartered banks, and the circulation of bank notes for less than five dollars, shall be construed as remedial.—(Id. sect. 16.)

§ 2428. *Attorney's fee.*—In every case of conviction, for an offence under any preceding section of this chapter, an attorney's fee of ten dollars shall be taxed in the costs.—(Id. sect. 17.)

§ 2429. By the Maryland act of 1826, ch. 251, declaring that "It shall not be lawful for any person within this state to have in possession any ticket of any lottery, not granted or permitted in this State, with intent to sell, negotiate, or dispose of the same, or to sell, negotiate, or advertise in any way whatever, any such ticket or part of a ticket," &c., it was held to be the great object of the legislature to prevent the sale of unauthorized tickets, and for that purpose the law prohibited both the possession of such tickets with intent to sell, and the selling of them; and it was decided, therefore, that the word "such" did not refer to the possession of the seller, as part of the description of the ticket which it would be unlawful to sell, for that would legalize the selling of tickets by any person who at

the time of sale had not possession, and defeat the obvious intent of the law.[t] In an indictment under the above act of assembly, the lottery ticket or part of a ticket should be set out; the sale of only such tickets as are not authorized by the state is prohibited, and it would be proper that the ticket should be set out, that the court might see whether it were a ticket the sale of which was authorized or prohibited.[u]

A "gift sale" of books, according to a scheme by which the books are offered for sale at prices above their real value, and by which each purchaser of a book is entitled in addition to a gift or prize, to be ascertained after the purchase by a correspondence, unknown to the purchaser, between certain numbers endorsed on the books offered for sale, and the different gifts or prizes proposed, is a lottery within the meaning of the Maine statute against disposing of property, real or personal, by lottery.[uu]

§ 2430. In New Hampshire an indictment alleged that F. sold to one E. "a part of a ticket, to wit, one quarter part of a ticket in a certain lottery not authorized by the legislature of the state," without any description of the ticket, or of the lottery to which it belonged. It was held, as there was no lottery authorized by the legislature, that the indictment was sufficient.[v]

§ 2431. In Pennsylvania, in a case decided before all lotteries were made unlawful by the act of 1st March, 1833, it was stated that on an indictment for selling a lottery ticket, it was not necessary to set out the ticket or tickets; but it was added the indictment should state what was the name of the lottery, and the number of tickets sold, where the charge is for advertising or selling.[w] If the indictment charge that the defendant sold a lottery ticket, "which ticket is in the words and figures following, viz.," &c., it must contain a literal recitation of the ticket; and a variance in spelling a name, though the sound is the same, as Burrill or Burrall, is fatal.[x]

§ 2432. Where an indictment contained but one count, founded on the Massachusetts statute of 1825, which provides that "if any person shall sell, or offer for sale, or shall advertise, or cause to be advertised for sale," any lottery ticket, "he shall forfeit," &c., it was alleged that the defendant "did unlawfully offer for sale, and did unlawfully sell," &c.; upon demurrer on account of duplicity, the indictment was held to be sufficient, since offering to sell and actually selling were together but one offence.

VII. Tippling House.[z]

1st. License, its averment, proof, and effect, § 2434.
2d. What is evidence of a tippling house, § 2435.

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[t] State *v* Scribner, State *v.* Barker, 2 Gill. & Johns. 246.
[u] Ibid.
[uu] State *v.* Clarke, 33 N. H. 329; see, also, post, § 2453.
[v] State *v.* Follett, 6 N. Hamp. 53.
[w] Com. *v.* Gillespie, 7 Serg. & R. 469.
[x] Ibid.
[y] Com. *v.* Eaton, 15 Pick. 278; see particularly Wh. Prec., 828, n.
[z] For forms of indictment see Wh. Prec., as follows:
(792) Presuming to be a common seller of wine, under Maine stat.
(793) Selling liquors by retail in New Hampshire.

3d. PRINCIPAL RESPONSIBLE FOR ACT OF AGENT OR PARTNER, § 2436.
4th. AGENT'S RESPONSIBILITY FOR PRINCIPAL, § 2437.
5th. WHAT MAY BE CONSIDERED SPIRITUOUS LIQUORS UNDER THE STATUTES, § 2438.
(a) Common cordial, § 2438.
(b) Brandy or gin mixed with sugar and water, § 2438.
(c) Unadulterated gin, brandy or rum, without proof that they are intoxicating, § 2438.
6th. HOW FAR MEDICAL USE IS A DEFENCE, § 2539.
7th. AUTREFOIS ACQUIT, § 2440.
8th. FEME COVERTS, § 2442.
9th. AVERMENT AND PROOF OF VENDEE, § 2443.
10th. AVERMENT AND PROOF OF SALE, § 2445.

§ 2433. The statutes of the several states regulating or prohibiting the sale of intoxicating liquors are so numerous, so various, and so constantly the subject of repeal or amendment, that it is not proposed to introduce them under this head. All that can be here attempted is to classify such of the decisions under them as may be of general application.

1st. LICENSE, ITS AVERMENT, PROOF, AND EFFECTS.

§ 2434. As a general rule, the indictment should negative the license.[a] If the negation of the license to sell is, as to quantity, co-extensive with the quantity charged to be sold, it is sufficient. The general negation "not having a license to sell liquors, as aforesaid," relates to the time of sale, and not to the time of finding of the bill, and will suffice.[b]

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(794) Retailing in liquor, &c., without license, under s. 1, c. 83. Ver. Rev. stat.
(795) Selling liquor by the small, under the same.
(796) Selling liquor, &c., under Massachusetts Rev. stat., c. 47, § 1.
(797) Another form under same section.
(798) Under Rev. stat., c. 47, s. 2.
(799) Another form under same.
(800) Under Rev. stat., c. 47, s. 2.
(801) Another form under same.
(802) Another form under same.
(803) Another form, under Rev. stats., c. 47, s. 2, where defendant is licensed to sell wine.
(804) Another form under same.
(805) Another form under same.
(806) Another form under same.
(807) Selling liquor without license, under Massachusetts Revised statutes, c. 47, s. 3.
(808) Another form under same.
(809) Another form under same.
(810) Violation of license laws in Rhode Island.
(811) Same in New York.
(812) Same in New Jersey.
(813) Same in Pennsylvania.
(814) Another form for same, being that used in Philadelphia.
(815) Same in Virginia.
(816) Same in North Carolina.
(817) Same in Alabama.
(818) Same in Kentucky.
(819) Same in Tennessee.
(820) Same in Mississippi.

[a] Com. v. Thurlow, 24 Pick. 374; State v. Webster, 5 Halsted, 293; Hampton's case, 3 Gratt. 590; State v. Munger, 15 Ver. 290; though see State v. Buford, 4 Missouri, 703; and see ante, § 378–81; as to indictment, see also State v. Fuller, 33 N. H. 259; State v. Blaisdell, 33 Ibid., 388.

[b] State v. Munger, 15 Vermont, 290.

How provisoes and exceptions in statutes are to be treated, has already been discussed.

It is for the defendant to prove he is licensed, the prosecution not being bound to prove a negative.[c] It is specially held in Massachusetts, that the stat. 1844, c. 102, imposing upon the defendant the duty of proving a license in all prosecutions for selling "spirituous" liquors, applies to the stat. 1850, c. 232, against selling "intoxicating" drinks.[cc]

A license having been granted to one man to keep a tavern in a particular house, from which he afterwards removed; another being indicted for retailing spirituous liquors in that house, may show that he did it as the agent or partner, and under the charge of him to whom it was granted: and may, on that ground, be acquitted by the jury.[d]

A license to sell liquor, granted to two persons as partners, will, during the period mentioned in the license, protect one of the partners against the penalty for selling without a license, although the other has retired from the firm.[dd]

The grant of a license to retail spirituous liquors, from a day past, is a release of the penalties for retailing without license subsequent to that day, although prior to the taking out of the license.[e]

A license to sell spirituous liquors has no relation back to the date of the order of the county court granting permission to obtain it, and will only protect one who sells from and after the date of its issue.[ee] Nor will a license "to keep a dram-shop, block No. 15, in the city of St. Louis," justify a sale in any other place in St. Louis.[f]

2d. What is evidence of a tippling house.

§ 2435. Proof of retail sales of liquor drunk on the premises, is sufficient proof of a tippling house.[ff]

3d. Principal's responsibility for act of agent or partner.

§ 2436. A shopkeeper is indictable for an unlawful sale of spirituous liquors by a servant employed in his business.[g] Where, however, the sale is not in the immediate line and direction of the principal's business, the fact of agency is only *prima facie* evidence of the principal's guilt.[h]

[bb] ante, § 378.

[c] State *v.* Morrison, 3 Dev. 299; State *v.* Crowell, 25 Maine, 175; R. *v.* Turner, 5 M. & Sel. 205; R. *v.* Hanson, Paley on Conv. 45, n.; 1 Car. & P. 538; State *v.* McGlynn, 34 N. H. 422; but see Com. *v.* Thurlow, 24 Pick. 374; see ante, § 707–8–9, &c.

[cc] Commonwealth *v.* Kelly, 10 Cush. (Mass.) 69.

[d] Barnes *v.* Com., 2 Dana, 390.

[dd] State *v.* Gerhardt, 3 Jones' Law, (N. C.) 178.

[e] City *v.* Corlies, 2 Bail. 186. [ee] State *v.* Hughes, 24 Miss. (3 Jones,) 147.

[f] State *v.* Hughes, 24 Miss. (3 Jones,) 147. [ff] Brock *v.* Com., 6 Leigh, 634.

[g] Com. *v.* Park, 1 Gray, 553; Com. *v.* Nichols, 10 Metc. 259; Com. *v.* Major, 6 Dana, 293; State *v.* Mathis, 1 Hill, S. C. 37; Britain *v.* State, 3 Humph. 203; Com. *v.* Gillespie, 9 Serg. & R. 469.

[h] Com. *v.* Nichols, 10 Metc 259; see ante, § 151–2–3–4.

If there be no authority, express or implied, the principal must be acquitted.[i]

One partner is liable for another's sale, when such sale was in pursuance of an agreement between the two that liquor should be sold.[j]

In order to convict an employer for sales of intoxicating liquor by his clerk, the jury must be satisfied of his assent to, and not merely of his knowledge of the sales.[jj]

Evidence that liquor charged to have been sold by the father, was sold by the son at his bar, supports an information against the father. But the mere fact that the son sold liquor at his father's bar, is not, in the father's absence, *prima facie* evidence that he sold it at his request or by his authority.[k]

4th. AGENT'S RESPONSIBILITY FOR PRINCIPAL.

§ 2437. It is no defence that the defendant was acting as agent for another. He is criminally responsible as principal himself, notwithstanding such agency.[kk]

§ 2438. 5th. WHAT MAY BE CONSIDERED SPIRITUOUS LIQUORS UNDER THE STATUTE.

(*a*) Common cordial.[l]

(*b*) Brandy or gin mixed with sugar and water.[m]

(*c*) Unadulterated gin, brandy, or rum, without proof that they are intoxicating.[n]

An averment that the respondent sold rum, brandy and gin, is sufficient, without an averment that they were spirituous liquors.[o] And, on the other hand, it is said not to be necessary to designate what was the particular kind of spirituous liquor sold.[p]

6th. HOW FAR MEDICAL USE IS A DEFENCE.

§ 2439. Unless there be an express exception in the statute, the fact that the liquor is bought for medicine is no defence.[q] And to constitute the defendant an apothecary under the exception, he must have some skill in the preparation of medicine. Keeping drugs merely will not be enough.[r]

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[i] Barnes *v.* State, 19 Connect. 398; Hipp *v.* State, 5 Black. 149; State *v.* Dawson, 2 Bay, 360; Goods *v.* State, 3 Iowa, 566; see fully ante, § 151–2–3, &c.

[j] State *v.* Neal, 7 Foster, 131.

[jj] Com. *v.* Putnam, 4 Gray (Mass.) 16.

[k] Parker *v.* State, 4 Ohio (N. S.) 563.

[kk] State *v.* Mathis, 1 Hill's S. C. Rep. 37; Britain *v.* State, 3 Hnmph. 203; Com. *v.* Gillespie, 7 Serg. & R. 469; Com. *v.* Major, 6 Dana, 293.

[l] State *v.* Bennett, 3 Harring. 565.

[m] Com. *v.* Odlin, 23 Pick. 275.

[n] Com. *v.* Peckham, 2 Gray, 514.

[o] State *v.* Munger, 15 Ver. 290.

[p] State *v.* Fox, 1 Harrison, 152; Com. *v.* Odlin, 23 Pick. 275.

[q] Phillips *v.* State, 2 Yerger, 458; State *v.* Whitney, 15 Ver. 425; Com. *v.* Kimball 24 Pick. 266.

[r] State *v.* Whitney, 15 Ver. 425.

Where there was evidence tending to show that the liquor was *purchased* for medicinal purposes, but none that it was *sold* for that purpose, a conviction was held right.[rr]

In Ohio, any person may lawfully, *in good faith*, give away intoxicating liquors, for medicinal or other purposes, and may lawfully sell them in any quantity for such purposes, to be drank elsewhere than where sold; but he cannot lawfully *sell* them (except such as are specially excepted by the statute) *to be drank where sold*, for any purpose.[s]

7th. Autrefois acquit.[ss]

§ 2440. A conviction for retailing to one person, is no bar to an indictment for retailing to another, though the act of selling charged in the second indictment was anterior to the finding of the bill on which the conviction was had.[t] Thus, where two bills for retailing were found against the defendants at the same time, and the first charged a retailing to A. B., and to divers other persons; the second, a retailing to C. D., and to divers other persons, and a conviction was had on the first indictment, and it was pleaded in bar of the second; it was held that the words "and to divers other persons," in both indictments, must be rejected as surplusage, and the plea in bar was overruled.[u]

§ 2441. A conviction for specific sales, under one statute, is not barred by a conviction, under another statute, of being at the same period of time, a common seller.[v]

An acquittal for a sale to a "person unknown," is no bar to a prosecution for a sale to A. B.[w]

8th. Feme coverts.

§ 2442. A *feme covert* may be jointly indicted with her husband for an illegal sale,[x] and if made by her in his absence, and not under his immediate command, though in the house in which they live and trade together, is individually responsible.[y]

A fortiori she is responsible for such a sale when living separate and apart from her husband.[z]

9th. Averment and proof of vendee.

§ 2443. In Vermont, New Jersey, Virginia, Illinois, and New York, the rule is, that in an indictment against a person for selling spirituous liquors

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[rr] Leppert *v.* State, 7 Ind. 300.

[s] Schaffner *v.* State, 8 Ohio State R. (N. S.) 643.

[ss] See generally ante, § 564–5–6–7.

[t] State *v.* Cassety, 1 Richardson, 90; State *v.* Ainsworth, 21 Ver. 91; see, per contra, State *v.* McBride, 4 M'Cord, 332, overruled by State *v.* Cassety, as above.

[u] State *v.* Cassety, 1 Richardson, 90.

[v] State *v.* Coombs, 32 Maine, 527; State *v.* Maher, 35 Maine, 225.

[w] State *v.* Birmingham, 1 Busbee, 120; see ante, § 565.

[x] See ante, § 67–80.

[y] Com. *v.* Murphy, 2 Gray, 512.

[z] State *v.* Collins, 1 M'Cord, 355.

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.[a] So in Virginia, in an indictment for selling ardent spirits to slaves, it is not necessary to state the names of the owners of the slaves to whom the liquor was sold.[b] But in Massachusetts, and Delaware, and Missouri, it has been determined that in the indictment, the name of the person to whom it was sold must be specified, if known.[c] In Tennessee it is enough to aver the vendee to be unknown, if such be the case.[d]

2444. Where the vendee must be named, and his name is at the time unknown, it is enough so to aver it, and it will be no variance, though it appear that subsequently to the framing the complaint or indictment the name became known.[dd]

An allegation in an indictment, that the defendant, without being licensed according to law, sold spirituous liquors to A., is proved by evidence that A. bought the liquors of the defendant for B., at B.'s request and with his money, without disclosing that fact to the defendant.[e] Where, however, the agency is disclosed, the sale must be averred to have been to the principal.[f]

An information upon the second section of the Ohio act to provide against the evils resulting from the sale of intoxicating liquors, must aver that the seller knew that the buyer was a minor.[g]

10th. Averment and proof of sale.

§ 2445. A complaint which charges the defendant with selling intoxicating liquor "without being duly authorized and appointed thereto according to law," sufficiently negatives the defendant's right to sell in any mode not prohibited by law.[h]

A complaint for an unlawful sale of "intoxicating liquor," need not more particularly describe the kind or quantity of liquor sold.[i]

A complaint which charges the defendant with selling intoxicating liquor, "not having then and there any authority or appointment according to law to make such sale," sufficiently negatives all modes of selling warranted by law.[j]

An indictment which avers generally that the defendant, at a time and place named, was a common seller of intoxicating liquors, is sufficient, without setting forth any particular sales, or any number of sales.[k]

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[a] State *v.* Munger, 15 Ver. 290; People *v.* Adams, 17 Wendell, 475; Com. *v.* Dove, 2 Virg. Cas. 26; Com. *v.* Thurlow, 24 Pick. 374; State *v.* Webster, 5 Halsted, 293; Cannady *v.* People, 17 Ill. 158; see Morrison *v.* Com., 7 Dana, 219.

[b] Com. *v.* Smith, 1 Grattan, 553.

[c] State *v.* Walker, 3 Harrington, 547; Com. *v.* Thurlow, 24 Pick. 374; Neales *v.* State, 10 Miss. 498.

[d] State *v.* Carter, 7 Humph. 152.

[dd] Ante, § 251.

[e] Com. *v.* Perley, 2 Cushing, 559.

[f] Com. *v.* Remby, 2 Gray, 508.

[g] Aultfather *v.* State, 4 Ohio (N. S.) 467.

[h] Com. *v.* Keefe, 7 Gray, Mass. 332.

[i] Com. *v.* Conant, 6 Gray, Mass. 482.

[j] Ibid.

[k] Com. *v.* Edwards, 4 Gray, (Mass.) 1; Com. *v.* Wood, 4 Gray, (Mass.) 11.

An information upon the fourth section of the Ohio statute, must aver that the place of sale was one of public resort.[l] Under the same statute it is a sufficient averment, if the place of sale is described as either a tavern, eating-house, bazaar, restaurant, grocery, or coffee-house, which *ex vi termini* import a place of public resort; but it is otherwise with "room," which has no such import.[m]

In New York it is admissible to prove that the defendant, being a tavern keeper, kept a bar with bottles in it.[n]

In Rhode Island, a sign board put up in a bar room, as such, with the words, "Boarding by J. B. Wilson," the defendant, painted thereon, is presumptive proof, unexplained, that the defendant is the keeper of the bar room.[o]

But in Massachusetts, it is said that on the trial of an indictment for being a common seller of intoxicating liquors, evidence that the defendant during a part of the time covered by the indictment, kept a public house, and had upon it an inn-keeper's sign, is irrelevant and inadmissible.[p]

Where the respondent, being one of a firm, had 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 held competent evidence to go to the jury to prove a sale, and it was determined that the person to whom the sale was made need not be produced.[q]

One who is tried on several complaints charging him with unlawful sales of intoxicating liquors to the same person on different days, and convicted upon evidence which is sufficient to prove only one such sale, may be sentenced on either one of the complaints, and have a new trial on the others.[r]

Two persons may be jointly guilty and jointly convicted of the offence of retailing spirits.[s]

It is erroneous to admit evidence of a greater number of offences than there are counts in the indictment.[t]

The requiring of a bill of particulars, on the trial of an indictment for being a common seller of intoxicating liquors, is within the discretion of the presiding judge; and his refusal to require one is not subject to exception.[u]

Proof that the defendant, during part of the time embraced in an indictment for being a common seller of intoxicating liquors, was authorized to sell, is not an answer to the whole indictment.[v]

An indictment for being a common seller of intoxicating liquors during

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[l] Aultfather *v.* State, 4 Ohio (N. S.) 467.
[m] Aultfather *v.* State, 4 Ohio (N. S.) 467.
[n] People *v.* Hulbert, 4 Denio, 133.
[o] State *v.* Wilson, 5 Rh. Is. (2 Ames) 291.
[p] Com. *v.* Madden, 1 Gray R. 486.
[q] State *v.* Munger, 15 Ver. 290.
[r] Com. *v.* Remby, 2 Gray R. 508. Hodgman *v.* People, 4 Denio, 235.
[s] State *v.* Caswell, 2 Humph. 399.
[t] Com. *v.* Wood, 4 Gray (Mass.) 11.
[v] Com. *v.* Putnam, 4 Gray (Mass.) 16.

a period defined is supported by proof of the commission of the offence during any part of the period.[w]

The provision of the Massachusetts Stat. 1835, c. 215, sec. 34, that in prosecutions for the sale of spirituous and intoxicating liquors, delivery in or from any building or place, other than a dwelling-house "shall be deemed *prima facie* evidence of a sale, and be punishable as such sale," is constitutional and applies to all cases of such prosecutions; but the presumption is liable to be rebutted by attending circumstances, or other facts.[x]

VIII. Gambling.[y]

§ 2446. The keeping of a common gaming-house is indictable at common law, on account of its tendency to bring together disorderly persons, to promote immorality, and to lead to breaches of the peace.[z] But an indictment only alleging that the defendant kept a common gaming-house, without stating what was transacted there, would not, it seems, be sufficient,[a]

§ 2447. 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.[b]

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.[c]

§ 2448. 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 behavior.[d]

§ 2449. The actual keeping of a building furnished with bowling alleys, and suffering persons to resort there, for hire, gain, or reward, for the purpose of playing at bowls, is an offence within the Rev. Sts. c. 50, § 17, whether the person keeping the same does so of his own will, or by the procurement, or as the agent or hired man of another, and whether for his own emolument, or that of another.[e]

§ 2450. Under Rev. Sts. 50, s. 17, it is sufficient to allege that the

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[w] Com. *v.* Wood, 4 Gray (Mass.) 11.

[x] Com. *v.* Wallace, 7 Gray (Mass.) 222.

[y] For reference to forms of indictment against gambling, &c., see note to § 2382.

[z] Vanderworker *v.* State, 8 Eng. (13 Ark.) 700; U. S. *v.* Ringgold, 5 Cranch. C. C. R. 378; U. S. *v.* Dixon, 4 Cranch. C. C. R. 107.

[a] People *v.* Jackson, 3 Denio, 101, Bronson, C. J.; though see Vanderworker *v.* State, 8 Eng. (13 Ark.) 700; U. S. *v.* Ringgold, 5 Cranch. C. C. R. 378; U. S. *v.* Milburn, 5 Cranch. C. C. R. 390.

[b] 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 Crimes, 321.

[c] Com. *v.* Hopkins, 2 Dana, 420, *sed quære.*

[d] Estes *v.* State, 2 Humph. 469.

[e] Com. *v.* Drew, 3 Cush. 279.

defendant did for hire, gain and reward, permit persons to resort, &c., for the purpose of playing at a certain unlawful game mentioned, without alleging that persons actually did resort there for the purpose of playing, or did there play, at any unlawful game.[t]

§ 2451. 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.[u]

§ 2452. A conviction which states that a keeper of a public house, licensed under the 9 Geo. 4, c. 61, has been "guilty of an offence against the tenor of his license, that is to say, that he knowingly suffered a certain unlawful game, to wit, the game of dominoes, to be played in his house," is bad; as the game of dominoes is not itself unlawful, and playing at dominoes does not necessarily amount to "gaming," within the meaning of the license.[v]

§ 2453. In Massachusetts, the game of bowls and nine-pins has been held to be an unlawful "game" within the meaning of the R. S. c. 50, s. 17, which prohibits "Billiards, cards, or dice, or other unlawful game;" and no betting or gaming is necessary to make the game unlawful.[w]

So, cock-fighting is an unlawful "game" or sport,[x] although game cocks are not *implements* of gaming, within the meaning of a statute against "gaming apparatus, or implements used in unlawful gaming."[y]

That form of lottery called a "gift enterprise," by which a merchant or tradesman sells his wares for their market value; but by way of inducement, gives to each purchaser a ticket, which entitles him to a chance to win certain prizes, to be determined after the manner of a lottery, has been held to be common gaming under the Tennessee laws, so as to make all persons aiding or abetting such transaction indictable.[z]

In Massachusetts the following statute now exists:

§ 2454. *Obtaining money by gambling made larceny.*—Sect. 1. Any person or persons who shall, by the game of three-card monte, so called, or by any other game, device, sleight of hand, pretensions to fortune-telling, trick, or other means whatever, by the use of cards, or other implements or instruments, obtain from any other person or persons any property of any description, shall be punished as in case of larceny of property of like value.—(Supplement to Revised Statutes, 1855, ch. 135, sect. 1.)

§ 2455. *Jurisdiction.*—Sect. 2. Justices of the peace within their respective counties, and the several police courts established by law in their respective coun-

[t] Com. *v.* Stowell, 9 Metc. 572. [u] Reynolds *v.* State, 2 N. & M'Cord, 365.
[v] 22 Law J. Rep. (N. S.) M. C. 1; 17 Jur. 501; 1 El. & Bl. 286.
[w] Com. *v.* Goding, 3 Metc. 130; Com. *v.* Stowell, 7 Metc. 572; Com. *v.* Drew, 3 Cush. 279; see State *v.* Record, 4 Harr. 554.
[x] Com. *v.* Tilton, 8 Metc. 232. [y] Coolidge *v.* Choate, 11 Metc. 79.
[z] Bell *v.* State, 5 Sneeds, 507; see ante, § 2430.

ties, shall have jurisdiction of the offence herein created, to the same extent as they now have jurisdiction in cases of larceny; and all the proceedings before such courts and justices shall be the same as in prosecutions for larceny, so far as the same may be consistent with the provisions of this act; and nothing herein contained shall be so construed as to restrain either the right of any person, accused under the provisions of this act, to appeal from the judgment of such justice or court, or the power of said justice or court to bind any person or persons accused as aforesaid, to answer in a higher court.—(Supplement to Revised Statutes, 1855, Ibid. sect. 2.)

In PENNSYLVANIA, by the Revised Acts:

§ 2455 (*a*). *Gambling.*—If any person shall set up or establish, or cause to be set up or established, in any house, room, out-house, tent, booth, arbor or other place whatsoever, any game or device of address, or hazard, with cards, dice, billiard balls, shuffle boards, or any other instrument, article or thing whatsoever, heretofore or which hereafter may be invented, used and employed, at which money or other valuable thing may or shall be played for, or staked or betted upon; or if any person shall procure, permit, suffer and allow persons to collect and assemble in his house, room, out-house, booth, tent, arbor or other place whatsoever, under his control, for the purpose of playing at, and staking or betting upon such game or device of address, or hazard, money or other valuable thing; or if any person being the owner, tenant, lessee or occupant of any house, room, out-house, tent, booth, arbor or other place whatsoever, shall lease, hire or rent the same, or any part thereof, to be used and occupied, or employed, for the purpose of playing at, or staking and betting upon such game or device of address, or hazard, for money or other valuable thing, the person so offending in either of the enumerated cases, shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year. The owner of such house, room, out-house, tent, booth, arbor or other place whatsoever, who shall have knowledge that any such game or device of address, or hazard, as aforesaid, has been set up in or upon the said premises, and shall not forthwith cause complaint to be made against the person who has set up or established the same, shall be deemed and held to have knowingly leased, hired or rented the said premises for the said unlawful purposes: *Provided*, That this act shall not be construed to apply to games of recreation and exercise, such as billiards, bagatelle, ten pins, et cetra, where no betting is allowed.—(Rev. Acts, Bill I., sect. 55.)

§ 2455 (*b*). *Common gamblers.*—If any person shall keep or exhibit any gaming table, establishment, device or apparatus, to win or gain money or other property of value, or aid, assist, or permit others to do the same; or if any person shall engage in gambling for a livelihood, or shall be without any fixed residence, and in the habit or practice of gambling, he shall be deemed and taken to be a common gambler, and upon conviction thereof, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine not exceeding five hundred dollars.—(Ib. sect. 56.)

§ 2455 (*c*). *Enticing others to visit gambling-houses.*—If any person shall, through solicitation, invitation or device, persuade or prevail on any other person to visit any room, building, arbor, booth, shed or tenement, or other place kept for the use of gambling, such person shall be guilty of a misdemeanor, and upon conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars, and besides,

shall be civilly responsible and liable to pay back to any person induced by him to enter such gambling-house, any sum he may have lost at play therein.—(Ibid. sect. 57.)

§ 2455 (*d*). *No witness exempt from testifying.*—No witness shall be excused, under any allegation or pretence whatsoever, in any prosecution or proceeding for unlawful gambling, from giving his testimony touching the same; but no evidence given, or facts divulged by him, shall be used or employed against him in any criminal prosecution whatever.—(Ibid. sect. 58.)

§ 2455 (*e*). *Seizure of implements to prove the charge.*—If an affidavit be made and filed before any magistrate, before whom complaint has been made of the commission of either of the crimes provided against in the three preceding sections, setting forth that the affiant has reason to believe, and does believe, that the person charged in such complaint has upon his person, or at any other place named in said affidavit, any gaming table, device or apparatus, the discovery of which might lead to establish the truth of such charge, the said magistrate shall, by his warrant, command the officer who is authorized to arrest the person so charged, to make diligent search for such table, device or apparatus, and if found, to bring the same before such magistrate; and the officer so seizing, shall deliver the same to the magistrate before whom he takes the prisoner, who shall retain possession, and be responsible therefor until the discharge, commitment or letting to bail of the person so charged; after which such officer shall retain such table, device or apparatus, subject to the order of the court before which such offender may be required to appear, until his discharge or conviction; and in case of the conviction of such person, the gaming table, device or apparatus shall, by the direction of the court, be destroyed.—(Ibid. sect. 59.)

2455 (*f*) *General authority to seize gambling instruments.*—It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and remove any device or machine of any kind, charactor or description whatsoever, used and employed for the purposes of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same. And it shall be the duty of such sheriff, constable or other officer, to make return, in writing, to the next court of quarter sessions of the proper county, setting forth the nature and description of the device or machine so seized upon, and the time, place and circumstances under which such seizure was made; and the said court, upon hearing the parties, if they should appear, if satisfied that such device or machine was employed and used for the purpose of unlawful gaming as aforesaid, shall adjudge the same forfeited, and order it to be publicly destroyed, and at the same time order such reasonable costs and charges to the seizing officer as they shall deem adequate and just, to be paid by the owner or possessor of such device or machine, or in case of his default, or in case he cannot be found, to be paid as costs are now by law paid upon indictments; and such adjudication shall be conclusive evidence to establish the legality of such seizure, in any court of this commonwealth, in any cause in which the question of its legality shall arise; and in any case in which a decree of forfeiture shall not be pronounced, if said court shall, upon the evidence, be satisfied that there was probable cause for the seizure, they shall certify the same, which certificate shall be a bar to any action brought against the officer for or on account of such seizure, in those cases in which the said officer returns, or offers to return such device or machine; and in all cases shall prevent a recovery in damages, for any sum beyond the real value of the device or machine seized.—(Ibid. sect. 60.)

[*By the same statute no writ of replevin can issue for such devices.*]

OHIO.

§ 2455 (*g*). *Playing games for money, or property, or betting.*—The seventh section of the act entitled "An Act for the prevention of gaming," passed March 12, 1831, as amended by the third section of the act passed April 17, 1857, entitled an act to amend an act entitled "An Act more effectually to prevent gambling," passed January 17, 1846, is so amended as to read, as follows: "SECT. 7. That if any person shall play at any game whatsoever, for any sum of money, or other property of any value, or shall make any bet, or wager, for any sum of money, or other property of value, every such person shall, on conviction thereof, be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not less than ten days nor more than six months."—(Act of February 21st, 1859, sect. 1.)

CHAPTER IV.

RIOT; ROUT; UNLAWFUL ASSEMBLY, AND AFFRAY.

A. STATUTES.

MASSACHUSETTS.
Duty of mayor, &c., to disperse riot, § 2456.
Persons not dispersing to be deemed rioters, § 2457.
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Judges and other peace officers to warn rioters to disperse, and may call to their aid the power of the county, § 2472.
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B. RIOT, UNLAWFUL ASSEMBLY, AND AFFRAY AT COMMON LAW.
I. OFFENCE GENERALLY, § 2473.
II. INDICTMENT, § 2501.

A.—STATUTES.

MASSACHUSETTS.

§ 2456. *Duty of mayor, &c., to disperse riot.*—If any persons, to the number of twelve or more, being armed with clubs or other dangerous weapons, or if any persons to the number of thirty or more, whether armed or not, shall be unlawfully,

riotously, or tumultuously assembled in any city or town, it shall be the duty of the mayor, and of each of the aldermen of such city, and of each of the selectmen of such town, and of every justice of the peace, living in any such city or town, and also of the sheriff of the county, and his deputies, to go among the persons so assembled, or as near to them as may be with safety, and in the name of the commonwealth to command all the persons so assembled immediately and peaceably to disperse; and if the persons so assembled shall not thereupon immediately and peaceably disperse, it shall be the duty of each of the said magistrates and officers to command the assistance of all persons there present, in seizing, arresting and securing in custody the persons so unlawfully assembled, so that they may be proceeded with for their offence according to law.—(Chapter 129, sect. 1.)

§ 2457. *Persons not dispersing to be deemed rioters.*—If any person present, being commanded by any of the magistrates or officers mentioned in the preceding section, to aid or assist in seizing and securing such rioters or persons so unlawfully assembled, or in suppressing such riot or unlawful assembly, shall refuse or neglect to obey such command, or, when required by any such magistrate or officer to depart from the place of such riotous or unlawful assembly, shall refuse or neglect so to do, he shall be deemed to be one of the rioters or persons so unlawfully assembled, and shall be liable to be prosecuted and punished accordingly.—(Ibid. sect. 2.)

§ 2458. *Responsibility of peace officer not doing his duty.*—If any mayor, alderman, selectmen, justice of the peace, sheriff, or deputy sheriff, having notice of any such riotous or tumultuous and unlawful assembly as is mentioned in this chapter, in the city or town in which he lives, shall neglect or refuse immediately to proceed to the place of such assembly, or as near thereto as he can with safety, or shall omit or neglect to exercise the authority with which he is invested by this chapter for suppressing such riotous or unlawful assembly, and for arresting and securing the offenders, he shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding three hundred dollars.—(Ibid. sect. 3.)

§ 2459. *Power to arrest.*—If any person who shall be so riotously or unlawfully assembled, and who have been commanded to disperse, as before provided, shall refuse or neglect to disperse without unnecessary delay, any two of the magistrates or officers before mentioned may require the aid of a sufficient number of persons, in arms or otherwise, as may be necessary, and shall proceed in such manner as in their judgment shall be expedient, forthwith to disperse and suppress such unlawful, riotous or tumultuous assembly, and seize and secure the persons composing the same, so that they may be proceeded with according to law.—(Ibid. sect. 4.)

§ 2460. *Armed force to obey orders, &c.*—Whenever an armed force shall be called out in the manner provided by the twelfth chapter, for the purpose of suppressing any tumult or riot, or to disperse any body of men, acting together by force, and with intent to commit any felony, or to offer violence to persons or property, or with intent, by force or violence, to resist or oppose the execution of the laws of this commonwealth, such armed force, when they shall arrive at the place of such unlawful, riotous or tumultuous assembly, shall obey such orders for suppressing the riot or tumult, and for dispersing and arresting all the persons who are committing any of the said offences, as they may have received from the governor, or from any judge of a court of record, or the sheriff of the county, and also such further orders as they shall there receive from any two of the magistrates or officers mentioned in the first section.—(Ibid. sect. 5.)

§ 2461. *Homicide caused by such orders justifiable.*—If by reason of the efforts made by two or more of the said magistrates, or officers, or by their direction, to

disperse such unlawful, riotous, or tumultuous assembly, or to seize and secure the persons composing the same, who have refused to disperse, though the number remaining may be less than twelve, any such persons, or other persons then present as spectators, or otherwise, shall be killed or wounded, the said magistrates and officers, and all persons acting by their orders, or under their direction, shall be held guiltless, and fully justified in law; and if any of the said magistrates or officers, or any person acting by their order or under their direction shall be killed or wounded, all the persons so unlawfully, riotously, or tumultuous assembled, and all other persons who, when commanded or required, shall have refused to aid and assist the said magistrates or officers, shall be held answerable therefor.—(Ibid. sect. 6.)

§ 2462. *Pulling down building, &c.—Punishment.*—If any of the persons so unlawfully assembled shall demolish, pull down, or destroy, or shall begin to demolish, pull down, or destroy any dwelling-house, or any other building, or any ship or vessel, he shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than two years, and shall also be answerable to any person injured, to the full amount of damage, in an action of trespass.—(Ibid. sect. 7.)

PENNSYLVANIA.

§ 2463. *Riots, routs, unlawful assemblies, and aggravated riots.*—If any person shall be so concerned in any riot, rout, unlawful assembly, or an affray, and shall be thereof convicted, he shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars, or undergo an imprisonment not exceeding two years, or both, or either, at the discretion of the court; and in case any one is convicted of an aggravated riot, the court may sentence the offender to imprisonment by separate or solitary confinement at labor, not exceeding three years.—(Rev. Act, 1860, Bill I., sect. 19.)[a]

§ 2463 (*a*). *Riotous destruction of buildings or machinery.*—If any person riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force, demolish or pull down or destroy, or begin to demolish, pull down, or destroy any public building, private dwelling, church, meeting-house, stable, barn, mill, granary, malt-house or out-house, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or movable, prepared for or employed in any manufacture or any branch thereof or any steam-engine or other engine for sinking, working or draining any mine, or any building or erection used in conducting the business of any mine, or any bridge, wagon-way, road or trunk, for conveying minerals from any mine, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be imprisoned by separate or solitary confinement at labor, or by simple imprisonment, not exceeding seven years.—(Ibid. sect. 20.)

§ 2463 (*b*). *Furious driving and racing.*—If any person shall be maimed, or otherwise injured in person, or injured in property, through or by reason of the wanton and furious driving, or racing, or by reason of the gross negligence or wilful misconduct of the driver of any public stage, mail coach, coachee, carriage or car, employed in the conveyance of passengers, or through or by reason of the gross negligence or wilful misconduct of any engineer or conductor of any locomotive engine or train of railroad cars or carriages, or any captain or other officer of any steamboat employed in the conveyance of passengers, or of goods, wares, mer-

[a] See Shouse *v.* Com , 5 Barr, 83.

chandise or produce of any description, such driver, engineer, conductor, captain or officer, shall, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement, or by simple imprisonment, not exceeding five years: *Provided*, That the provisions of this act shall not interfere with the civil remedies against the proprietors, and others, to which the injured party may by law be now entitled.—(Rev. Acts, Bill I., sect. 29.)

§ 2463 (c). *Disturbing congregation.*—If any person shall wilfully and maliciously distrub or interrupt any meeting, society, assembly or congregation, convened for the purpose of religious worship, or for any moral, social, literary, scientific, agricultural, horticultural or floral object, ceremony, examination, exhibition or lecture, such person shall, on conviction, be sentenced to pay a fine not exceeding fifty dollars, and suffer an imprisonment not exceeding three months, or both, or either, at the discretion of the court.—(Ibid. sect. 31.)

VIRGINIA.

§ 2464. *Duty of justices, &c., to disperse riots.*—All judges and justices may suppress riots, routs and unlawful assemblies within their jurisdiction. And it shall be the duty of each of them to go among, or as near as may be with safety, to persons riotously, tumultuously, or unlawfully assembled, and in the name of the law command them to disperse; and if they shall not thereupon immediately and peaceably disperse, such justice giving the command, and any other present, shall command the assistance of all persons present, and of the sheriff or sergeant of the county or corporation, with his posse, if need be, in arresting and securing those so assembled. If any white person present, on being required to give his assistance or depart, fail to obey, he shall be deemed a rioter.—(Code, chap. 195, sect. 1.)

§ 2465. *Persons arrested, &c., to be committed, &c.*—If a white person be arrested for a riot, rout or unlawful assembly, the judge or justice ordering the arrest, or any other justice, shall commit him to jail, unless he shall enter into recognizance, with sufficient security, to appear before the circuit court having jurisdiction of the offence, at its then next term, to answer therefor, and in the mean time to be of good behavior and keep the peace.—(Ibid. sect. 2.)

§ 2466. *Justice, &c., failing to do his duty, how to be punished.*—If any judge or justice have notice of a riotous, tumultuous or unlawful assembly in the county or corporation in which he resides, and fail to proceed immediately to the place of such assembly, or as near as he may safely, or fail to exercise his authority for suppressing it and arresting the offenders, he shall be fined not exceeding one hundred dollars.—(Ibid. sect. 3.)

§ 2467. *Justice may call in posse.*—If any person engaged in such assembly, being commanded as aforesaid to disperse, fail to do so without delay, any such judge or justice may require the aid of a sufficient number of persons, in arms or otherwise, and proceed, in such manner as he may deem expedient, to disperse and suppress such assembly, and arrest and secure those engaged in it.—(Ibid. sect. 4.)

§ 2468. *Homicide by officers under such act justifiable, of officers all rioters responsible for.*—If by any means taken under authority of this act to disperse any such assembly, or arrest and secure those engaged in it, any person present, as spectator or otherwise, be killed or wounded, any judge or justice exercising such authority, and every one acting under his orders, shall be held guiltless; and if the judge or justice, or any person acting under the orders of either of them, be

killed or wounded in taking such means, or by the rioters, all persons engaged in such assembly shall be deemed guilty of such killing or wounding.—(Ibid. sect. 5.)

§ 2469. *Pulling down building, &c.*—If any rioter, being free, pull down or destroy, in whole or in part, any dwelling-house, or assist therein, he shall be confined in the penitentiary not less than one or more than five years; and though no such house be so injured, every rioter, and every person unlawfully or tumultuously assembled, if free, shall be confined in jail not more than one year, and fined not exceeding one hundred dollars.—(Ibid. sect. 6.)

§ 2470. *Carrying concealed weapons.*—If a free person habitually carry about his person, hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, he shall be fined fifty dollars. The informer shall have one half of such fine.—(Ibid. sect. 7.)

OHIO.

§ 2471. *Riot.*—That if three or more persons shall assemble together, with intent to do any unlawful act, with force and violence, against the person or property of another, or to do any unlawful act against the peace, or being lawfully assembled, shall agree with each other to do any unlawful act, as aforesaid, and shall make any movement or preparation therefor, the persons so offending shall each, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and fed on bread and water only, not exceeding ten days.—(Act of March 8, 1831; Swan's Stat. sect. 5, 285.)

§ 2472. *Judges and other peace officers to warn rioters to disperse, and may call to their aid the power of the county.*—That whenever three or more persons shall be assembled as aforesaid, and proceed to commit any of the offences aforesaid, it shall be the duty of all judges, justices of the peace, and sheriffs, and all ministerial officers, immediately, upon actual view, or as soon as may be, on information, to make proclamation in the hearing of such offenders, commanding them, in the name of the state of Ohio, to disperse and depart to their several homes or lawful employment; and if, upon such proclamation, such persons shall not disperse and depart as aforesaid, it shall be the duty of such judges, justices of the peace, and sheriffs, and all other ministerial officers, respectively, to call upon all persons near, and, if necessary, throughout the county, to aid and assist in dispersing and taking into custody all persons assembled as aforesaid; and military officers and others, called on as aforesaid, and refusing to render immediate assistance, shall each, upon conviction thereof, be fined in any sum not exceeding twenty-five dollars.—(Ibid. sect. 6, 285.)

§ 2472 (*a*). *Carrying or wearing concealed weapons.*—Whoever shall carry a weapon or weapons, concealed on or about his person, such as a pistol, bowie knife, dirk, or any other dangerous weapon, shall be deemed guilty of a misdemeanor, and on conviction of the first offence, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail not more than thirty days; and for the second offence, not exceeding five hundred dollars, or imprisoned in the county jail not more than three months, or both, at the discretion of the court.—(Act of March 18th, 1859, sect. 1.)

§ 2472 (*b*). *When the jury shall acquit the accused.*—If it shall be proved to the jury, from the testimony, on the trial of any case presented under the first section of this act, that the accused was, at the time of carrying any of the weapon or weapons aforesaid, engaged in the pursuit of any lawful business, calling or em-

ployment, and that the circumstances in which he was placed at the time aforesaid, were such as to justify a prudent man in carrying the weapon or weapons aforesaid, for the defence of his person, property or family, the jury shall acquit the accused. —(Ibid. sect. 2.)

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

I. Offence generally.

§ 2473. Any tumultuous disturbance of the public peace by three persons or more, having no avowed, ostensible, legal or constitutional object, assembled under such circumstances, and deporting themselves in such a manner as to produce danger to the public peace and tranquillity; and which excites terror, alarm, and consternation in the neighborhood, is an unlawful assembly.[b]

An affray is the fighting of two or more persons in some public place, to the terror of citizens.[c]

§ 2474. A riot is a tumultuous disturbance of the public peace by three persons or more assembling together of their own authority with an intent mutually to assist one another against any who shall oppose them in the execution of some private object, and afterwards executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended is lawful or unlawful.[d]

§ 2475. In an indictment for a riot, it is necessary to aver, and on the trial to prove a previous unlawful assembly; and hence, if the assembly were unlawful, as, upon a summons to assist an officer in the execution of lawful process, the subsequent illegal conduct of the persons so assembled will not make them rioters.[e]

In an indictment for riot, it is not necessary to allege any other unlawful purpose than that of disturbing the peace.[f]

§ 2476. Evidence of riotous assemblages in previous years is not admissible, either for the purpose of rebutting a defence that this assemblage was peaceful, by comparing it with former assemblages, or of giving a character in the first instance to the assemblage in question.[g]

§ 2477. On an indictment for a riot, drawn conformably to the usual precedents, after a general verdict of guilty, it is, it was said in a case in South Carolina, wholly immaterial whether the facts proved establish that the defendants are guilty of a riot, rout, or unlawful assembly. They are kindred offences, it was said, and the greater includes the less. A general verdict of guilty, therefore, on an indictment for a riot, was supported, although the evidence established no more than an unlawful assembly.[h]

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[b] 4 Penn. Law Jour. 31; R. *v.* Hughes, 4 C. & P. 372; see article on "Riot," &c., Am. Law Mag. for July, 1844; 2 West. Law Jour. 49.

[c] 4 Blac. Com. 144; 3 Inst. 158; Com. *v.* Simmons, 6 J. J. Marshall, 615; Duncan *v.* Com., 6 Dana, 295; Com. *v.* Runnels, 10 Mass. 518; 1 Hawk. c. 65, s. 5.

[d] 1 Hawk. P. C. c. 65, s. 1; 1 Russ. on Cr. 265; State *v.* Conolly, 3 Rich. 337.

[e] State *v.* Saltcup, 1 Iredell, 30; see post, § 2501, &c.

[f] State *v.* Renton, 15 N. Hamp. 169.

[g] Ibid.

[h] State *v.* Brazil, et al., Rice, R. 258.

§ 2478. It must be shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror,[i] such as being armed, using threatening speeches, turbulent gestures, or the like.[j] If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit.[k] Where the parties are innocently and lawfully assembled, and on a sudden quarrel they fight together, this is not riot, but an affray merely; but if, upon a dispute arising, they form themselves into parties, with promises of mutual assistance, and then fight, it is riot; for in this latter case the design to break the peace is as premeditated as if they had originally met for that purpose.[l]

§ 2479. 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 backwards and forwards through the streets, shooting guns and blowing horns, to the terror and alarm of the inhabitants, it was held that the perpetrators were guilty of a riot, and a motion for a new trial was refused.[m]

It is a riot if a number of persons assemble in a town, in the dead of night, and by noise or otherwise disturb the peaceable citizens.[n]

§ 2480. Where there were five counts in an indictment for a riot and breaking into a smoke-house or out-house by an officer and others, proof that the smoke-house was within the curtilage, that the lock was broken off in a riotous manner, without any demand or refusal to admit, is competent and pertinent testimony under the count for riot; and, under either count, is admissible in aggravation of the offence, notwithstanding neither count charges the breaking into a house within the curtilage.[o]

§ 2481. It is immaterial, however, whether the act done be unlawful or not; doing it in a manner calculated to inspire people with terror, is equally punishable, whether it be lawful or otherwise.[p] If the object, however, of the assembly be lawful, it, in general, requires stronger evidence of the terror of the means to induce a jury to return a verdict of guilty, than if the object were unlawful; and it has even been 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,[q] unless threatening language or other misbehavior, in apparent disturbance of the peace, be at the same time used.[r]

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[i] R. *v.* Hughes, 4 C. & P. 272.
[j] 1 Hawk. c. 65, s. 5.
[k] Ibid.; Lamb. 178; Dalt. c. 137.
[l] 1 Hawk. c. 65, s. 3; State *v.* Snow, 18 Maine, 346; State *v.* Cole, 1 M'Cord, 117.
[m] State *v.* Brazil et al., Rice, R. 258; see Bankus *v.* State, 4 Indiana, 114.
[n] Penn'a *v.* Cribs et al., Add. 277.
[o] Douglass *v.* State, 6 Yerger, 525.
[p] 1 Hawk. c. 65, s. 7; State *v.* Brook, 1 Hill's S. C. 362.
[q] Dalton, c. 137.
[r] Ibid.

§ 2482. It is not necessary that the riot-act should be read to constitute a riot. Before the proclamation can be read, a riot must exist; and the effect of the proclamation will not change the character of the meeting, but makes those guilty of a felony who do not disperse within one hour after the proclamation is read.[s]

§ 2483. In riotous and tumultuous assemblies, all who are present and not actually assisting in their suppression, in the first instance, are, in presumption of law, participants; and the obligation is cast upon a person so circumstanced, in his defence, to prove his actual non-interference.[t] When, however, the sheriff of a county, the mayor of a city, or any other known public conservator of the peace, has repaired, in the discharge of his duty, to the scene of tumult, and there commanded the dispersion of the unlawful riotous assembly, and demanded the assistance of those present to aid in its suppression, from that instant there can be no neutrals. The line is then drawn between those who are for and those who are against the maintenance of order, and with the forces of the one or the other, all who see fit to remain must promptly arrange themselves. Those who continue looking on while the active rioters are resisting the public authorities, and daringly moving on to the consummation of their designs of destruction; who refuse to join with the authorities, and witness their defeat without striking one blow in aid of outraged law, are just as much rioters as those most active in the work of violence; and, in such circumstances, it will avail them nothing that they appear only passive lookers-on, instead of active rioters and incendiaries. Thus, in the Philadelphia riots of May, 1844, after the rioters had completed their work of mischief in Kensington, they proceeded to the city and collected in front of St. Augustine church, threatening its destruction. The Mayor of the city, placing himself at the head of a police force, repaired to the scene of violence. The keys of the church were delivered to him by that part of the congregation who previously had them in charge, and the church was left in the immediate custody of the law; no attempt or effort being made to otherwise defend it. The Mayor seeing no disposition in the multitude to retire, addressed them, urging and commanding them to depart in peace, and soliciting all good citizens to unite with him in accomplishing this so much to be desired object. He was received with insults and imprecations, and actually assaulted, his officers forcibly driven off, and the church, which had been given up to his protection, and that of the law, was set fire to and consumed amid felonious and incendiary shouts. It was held, that under such circumstances, all who composed the assembly, whether active participants or apparent spectators, were equally rioters [u]

§ 2484. While, however, it would be unwise for the court, in laying down the law to the jury, to relax the principle that presence implies par-

[s] R. *v.* Furzey, 6 C. & P. 81.
[t] See contra, State *v.* McBride, 19 Mo. 239.
[u] Per King, J., 4 Penn. Law Jour. 33.

ticipancy, it is not improper, should a conviction take place upon evidence of presence alone, for the court in grading its sentence, to recollect—to use the pertinent language of Judge Daly, on the trial of the Astor Place riots,—that "so strong is human curiosity, that even well disposed citizens are attracted by the excitement. To courageous minds there is a fascination in the very presence of danger, and a distinction must be carefully drawn between those who were mere lookers on, and those who were stimulating and encouraging the riot."[v]

§ 2485. Any executed association for the vindication, even of private rights, by violent and unlawful means, is a riot; for rights are not to be asserted, nor laws vindicated by a tumultuous mob. If any man or body of men, civil or religious, violate the law, the tribunals of the commonwealth are the proper sources to be applied to by those who are, or fancy themselves aggrieved. The justice of the country is not to be taken into the hands of unauthorized multitudes, who act under no responsibilities, and rarely are under any influences other than their own unbridled passions.[w] If several persons assemble together for such purpose, every man is guilty of all acts done in execution of, or contributing or tending to that purpose.[x]

§ 2486. It is not necessary, as has been noticed, that any person, in order to bring himself into the perilous position of a rioter, should be a chief actor in the transaction of which the riot is maintained to consist. "The common law," as was remarked by a learned judge, in a late charge to a grand jury,[y] "founded on the teachings of centuries, holds that if any person, seeing others actually engaged in the riot, joins himself to them, and assists therein, he is as much a rioter as if he had first assembled with them for that purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding 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 was in truth one of the first assembly, or had a previous knowledge of their design. Every person who encourages, or promotes and takes part in riots, whether by words, signs, or gestures, or by wearing the badges or ensign of the rioters, is himself to be considered such; for, in this crime, all concerned are principals." Where one of the persons indicted, though not proved to have been seen in the midst of the party, was seen coming from where they were assembled, in a state of intoxication, with a pistol in each hand, and spoke of himself as the head of the mob, it was held sufficient evidence to sustain a verdict of guilty against him.[z]

§ 2487. The defendants, three in number, went at midnight on a frolic to the house of a third person, where they shaved his horse's tail, and

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[v] 2 West. Law Jour. (N. S.) 75.
[w] 4 Penn. Law Jour. 31.
[y] King, J., 4 Penn. Law Jour. 33.
[z] State *v.* Brazil et al., Rice R. 258.
[x] Penn'a *v.* Cribs et al., Add. 277.

made some noise which disturbed his family, it was held that they were guilty of riot.[a]

§ 2488. Where it appeared that two white persons and a negro slave went together to where J. B. was at work, that upon their arrival there, one of the white persons cut a club, in the presence of the other two, used threatening language to J. B., and commanded his associates to cut up house-logs which had been prepared, which they did, it was held that these acts were sufficient to constitute a riot.[b]

§ 2489. An execution will not justify an officer in going to and breaking the door of a third person's house, in a disorderly and riotous manner, in order to levy it upon property belonging to the defendant in the execution; and the fact that the property did not belong to the defendant, is an aggravation, and a very serious one, if he was aware of the fact, or had good reasons to believe it.[c]

§ 2490. Three or more persons must be concerned in a riot to constitute the offence, but it is not necessary to have any previous concert; it is sufficient if they are together, and appear to act with the same view to disturb the public peace.[d]

§ 2491. If three or more persons commit a trespass on property, in the presence of a person in actual possession, their number makes it a riot, though actual force be not used.[dd]

§ 2492. A negro is one of the persons who, in contemplation of law, may, with white men, commit a riot.[e] The negro, however, in such case, must be a free agent, and not acting under his master's order. Thus, where it accidentally came out on examination, that the domestics (slaves) of one of the persons indicted for a riot, were present, and by his order took off some furniture; the court held the evidence was not such as would constitute them parties to the combination necessary to complete the offence of a riot.[f]

§ 2493. If several be indicted for a riot, and there be proof only against one, and the offence is not laid to have been committed with persons unknown, all must be acquitted.[g]

§ 2494. Under a count charging several defendants with a riot, and assault and battery, though there be a general acquittal of all of the riot, a conviction of one of the assault and battery will be sustained.[h]

§ 2495. The common law concerning the offence of riot is not in force

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[a] State *v.* Alexander, 7 Richards, 5.

[b] State *v.* Jackson. et al., 1 Spear, 13.

[c] Douglass *v.* State, 6 Yerger, 525.

[d] State *v.* Calder et al., 2 M'Cord, 562; see ante, § 431, 2339, post, § 2503.

[dd] State *v.* Fisher, 1 Dever. 504.

[e] State *v.* Thackman, 1 Bay, 358.

[f] State *v.* Calder et al., 2 McCord, 462.

[g] Penn'a *v.* Houston, Addison, 334; State *v.* O'Donald, 1 M'Cord, 532; State *v.* Alison, 3 Yerger, 428; Turpin *v.* State, 4 Blackf. 72; State *v.* Bailey, 3 Blackf. 209; Brazil *v.* State, Rice, R. 257; State *v.* Pugh, 1 Hayw. 55; Maxwell *v.* Carlile, 1 M'Cord, 534; 2 Hawk. c. 47, s. 8; R. *v.* Scott et al., 3 Burr. 1262; 1 W. Blac. 291, 350; R. *v.* Sadbury, 1 Ld. Raym. 484; 2 Salk. 593; ante, § 431.

[h] Shouse *v.* Com., 5 Barr, 83; ante, § 560-4, 627.

in Missouri,[i] and under the statute of that State, to constitute a riot, the act done, or attempted to be done, must be an unlawful act, and must be done or attempted, in an unlawful manner.[j]

§ 2496. An affray, as has been noticed, is the fighting of two or more persons in some public place, to the terror of the citizens.[k] There is a difference between a sudden affray and a sudden attack. An affray means something like a mutual contest, suddenly excited, without any apparent intention to do any great bodily harm.[l]

§ 2497. It is said that no quarrelsome or threatening words whatsoever shall amount to an affray;[m] and that no one can justify laying his hand on those who shall barely quarrel with angry words without coming to blows; yet it seemeth that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties.[n] There may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any except the parties concerned, in which case it cannot be said to be to the terror of the people.[o] So a casual quarrel by three strangers in a private field will not amount to an affray.[p] So also a party who uses insulting language to an assailant, but offers no resistance to an attack made upon him by the latter, is not guilty of an affray.[q] But although no bare words, in the judgment of law, carry therein so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by the statute. For by statute 2 Edw. 3, s. 3, in force in several of the United States, it is enacted, "that no man, of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring any force in an affray of peace, nor go nor ride armed by night or day in fairs or markets, or in the presence of the king's justices, or ministers, or elsewhere upon pain to forfeit their armor to the king, and their bodies to prison, at the king's pleasure." A man cannot excuse wearing such armor in public, by alleging that such a one threatened him, and that he wears it for the safety of his person against his assault; but it is clear that no one incurs

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[i] Smith *v.* State, 14 Miss. 147.

[j] Ibid.

[k] Com. *v.* Simmons, 6 J. J. Marshall, 615; State *v.* Simpson, 5 Yerger, 356.

[l] State *v.* Toohey, 2 Rice's Dig. 104.

[m] O'Neill *v.* State, 16 Alab. 45.

[n] 1 Hawk. c. 63, s. 2.

[o] Ibid., s. 1.

[p] Skains *v.* State, 21 Alab. 218; Taylor *v.* State, 22 Alab. 15; Hawkins *v.* State, 13 Georg. 322; but see State *v.* Perry, 5 Jones, N. C. 9, where it was held that if one person by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty of an affray, though he may be unable to return the blow.

[q] O'Neill *v.* State, 16 Alab. 65.

the penalty of the statute for assembling his neighbors and friends in his own house, against those who threaten to do him any violence therein, because a man's house is his castle.[r] In Tennessee, however, it was ruled, that the act of 1837–8, c. 137, s. 2, which prohibits any person from wearing any bowie-knife, or Arkansas tooth-pick, or other knife or weapon in form, shape, or size resembling a bowie-knife or Arkansas tooth-pick, under his clothes, or concealed about his person, conflicts with the twenty-sixth section of the first article of the bill of rights, securing to the free white citizens the right to keep and bear arms for their common defence.[s] The contrary rule, it would seem, has been laid down in Indiana, where it was held that a similar statute was in conformity with the federal and the state constitutions.[t] An act of the same character is in force in Virginia,[u] and Ohio.[uu] If a person, not being a traveller, carry a pistol concealed about his person, he is guilty of an indictable offence, under the revised statutes of Indiana, of 1843, and his motive for carrying the pistol is immaterial.[v]

If one person by such abusive language towards another, as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty of an affray, though he may be unable to return the blow.

It has been said generally, that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor at common law.[w] On the same general reasoning, it has been held indictable to drive a carriage through a crowded street, in such a way as to endanger the lives of the passers-by;[x] to disturb a congregation when at religious worship;[y] to beset a house, with intent to wound, tar and feather;[z] to raise a liberty pole in 1794, as a notorious and riotous expression of ill-will to the government;[a] to tear down forcibly and contemptuously an advertisement set up by the commissioners of a sale of land for county taxes;[b] to break into a house in the day-time, and disturb its inhabitants;[c] and to violently disturb a town-meeting, though the parties engaged were not sufficient in number to amount to riot.[d]

§ 2498. An indictment charged that two persons, with force and arms, &c., "did make an affray, by fighting," was held to be sufficiently certain and definite.[e]

§ 2499. An unlawful assembly may be dispersed by a magistrate whenever he finds a state of things existing, calling for an interference in order to the preservation of the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is

[r] 1 Hawk. c. 63, s. 8.
[s] Aymette *v.* State, 2 Humph. 154.
[t] State *v.* Mitchell, 3 Blackf. 229.
[u] Act of 1838, c. 101.
[uu] See ante, § 2472(*a*).
[v] Rev. *v.* Stat., p. 982; Walls *v.* State, 7 Blackf. 572.
[w] State *v.* Huntley, 3 Iredell, 418; but see State *v.* Simpson, 5 Yerger, 356.
[x] U. S. *v.* Hart, 1 Peters' C. C. R. 390.
[y] State *v.* Jasper 4 Dev. 323.
[z] Penn'a *v.* Cribs, Add. 277.
[a] Penn'a *v.* Morrison, Add, 274.
[b] Penn'a *v.* Gillespie, Add. 267.
[c] Com. *v.* Taylor, 5 Binney, 281.
[d] Com. *v.* Hoxey, 16 Mass. 385.
[e] State *v.* Benthal, 5 Humph. 519.

better to anticipate more dangerous results, by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. The magistrate has not only the power to arrest the offenders, and bind them to their good behavior, or imprison them if they do not offer adequate bail, but he may authorize others to arrest them by a bare verbal command without any other warrant; and all citizens present whom he may invoke to his aid are bound promptly to respond to his requisition, and support him in maintaining the peace.[f] A justice of the peace either present or called on such an occasion, who neglects or refuses to do his utmost for the suppression of such unlawful assemblies, subjects himself to indictment and conviction for a criminal misdemeanor.[g] Where, however, as was laid down in the Lord George Gordon riots by Lord Loughborough, and as has been held in this country in cases of late occurrence,[h] an unlawful assembly assumes a more dangerous form, and becomes an actual riot, particularly when life or property is threatened by the insurgents, measures more decisive should be adopted. Citizens may, of their own authority, lawfully endeavor to suppress the riot, and for that purpose may even arm themselves; and whatever is honestly done by them in the execution of that object will be supported and justified by the common law. It is the duty of every citizen to make such endeavor, and when the rioters are engaged in treasonable practices, the law protects other persons in repelling them by force.[i]

§ 2500. It seems that the unnecessary performance of secular labors on Sunday, in such a way as to disturb the worship of others, is indictable in Pennsylvania.[j]

II. Indictment.[k]

§ 2501. An indictment charging that the defendants, "with force and arms at the house of one S. R., situate, &c., did then and there wickedly,

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[f] 1 Hawk. P. C. c. 63, s. 16; Lamb. 272; Dalt. Co.; 4 Penn. Law J. 31.
[g] State *v.* Littlejohn, 1 Bay, 316.
[h] Annual Register, 1780, 277; 3 Penn. Law Jour. 345; 4 Ibid. 31.
[i] Respublica *v.* Montgomery, 1 Yea. 419.
[j] Com. *v.* Dupuy, 6 P. L. J. 223.
[k] For forms of indictment, see Wharton's Precedents, as follows:—
(849) General frame of indictment for riot.
(850) Affray at common law.
(851) Unlawful assembly and assault.
(852) Riot, and hauling away a wagon.
(853) Riot, in breaking the windows of a man's house.
(854) Riot, and disturbing a literary society, under Ohio stat.
(855) Riot, and pulling down a dwelling house in the possession of prosecutor.
(856) Riot, and false imprisonment.
(857) Disturbing the peace, &c., on land occupied by the United States for an arsenal.
(858) Disturbance of elections in Massachusetts.
(859) Another form for same.
(860) Interrupting a judge of the election in Pennsylvania.
[For corrupt interference with elections, see post, § 1016.]

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.[l] In another case, the indictment charged, in substance, "that the defendant 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.[m]

§ 2502. It is sufficient to allege that the defendants assembled "with force and arms," and, being so assembled, committed acts of violence, without repeating the words "force and arms"[n]

§ 2503. Where an indictment for a riot charged that the two defendants, who were named with divers other persons to the jurors unknown, to the number of ten, did assemble, &c., it was held sufficient to sustain a verdict of guilty against the two defendants, who were tried and convicted. It is not necessary, it was said, to allege that a riot was committed by three persons named in the indictment. It is sufficient to name those who are known, and to allege that the others were unknown.[o]

§ 2504. Where a riot took place at a religious meeting, it was held, under the Delaware act, that the rioters could not be indicted both for the riot and for disturbing the religious meeting, as the punishment of the former covered the latter offence.[p]

An indictment for an affray, to sustain a conviction for assault and battery, must contain all the substantial allegations necessary to let in proof of the assault and battery.[pp]

The subject of joinder of defendants and of joinder of counts in riot, has been considered under another head.[q]

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(861) Disturbing a religious meeting. under the Virginia statute.
(862) Same, under Rev. sts. Mass., ch 130, § 171.
(863) Disturbing a congregation worshipping in a church, at common law.
(864) Disturbing same in a dwelling house.
(865) Dressing in woman's clothes, and disturbing a congregation at worship.
(866) Going armed, &c., to the terror of the people, at common law.
(867) Carrying a dangerous weapon, under Indiana Rev. stat.
(868) Maliciously firing guns into the house of an aged woman, and killing a dog belonging to the house.
(869) Breach of peace, tumultuous conduct, &c., in Vermont.
(870) Refusing to aid a constable in quelling a riot.
(871) Refusing to assist a constable in carrying offender to prison.

[l] State *v.* Langford, 3 Hawks, 381; ante, § 2475.
[m] State *v.* Brazil et al., Rice R. 257.
[n] Com. *v.* Runnels, 10 Mass. 518; see ante, § 402–3.
[o] State *v.* Brazil et al., Rice, R. 257; ante, § 431, 2493.
[p] State *v.* Townsend, 2 Harr. 543.
[pp] Childs *v.* State, 15 Ark. 204, see ante, § 560, &c.
[q] Ante, § 429, 434, 414, 427, 2191.

CHAPTER V.

COMPOUNDING FELONY.

STATUTE.

PENNSYLVANIA.

2504 (*a*). *Compounding crimes.*—If any person having a knowledge of the actual commission of any misprision of treason, murder, manslaughter, rape, sodomy, buggery, arson, forgery, counterfeiting, burglary, house-breaking, robbery, larceny, receiving stolen goods or other property by persons knowing them to be stolen, kidnapping, bribery, perjury or subornation of perjury, shall take money, goods, chattels, lands or other rewards, or promise thereof to compound or conceal, or upon agreement to compound or conceal the crimes aforesaid, every person so offending shall be guilty of a misdemeanor, and on conviction thereof, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding three years.—(Rev. Act, 1860, Bill II., sect. 10.)

§ 2505. Compounding a felony is committed by agreeing to conceal a felony known to have been committed.[a] It has been held to have been completed where a party received a note, signed by a person guilty of larceny, as a consideration for not presenting him.[b] The barely taking of one's goods back again, however, is no offence, unless some favor is shown, or agreed to be shown, to the thief.[c]

§ 2506. On an indictment for compounding a felony, the record of the conviction is *prima facie* evidence of the felony, but not conclusive as against the compounder.[d]

§ 2507. Judgment was arrested on an indictment for compounding a felony, where the felony was laid on a day subsequent in date to that on which it was charged to have been compounded, although charged to have been compounded afterwards.[e]

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[a] 1 Hawk. P. C. c. 59, s. 5; 4 Blac. Com. 133; see for form, Wh. Prec. 895-6.
[b] Com. *v.* Pease, 16 Mass. 91; 1 Camp. 45; 2 M. & S. 201.
[c] R. *v.* Stone, 4 C. & P. 379; 1 Hawk. P. C. c. 59, s. 7.
[d] State *v.* Williams, 3 Harr. 532.
[e] State *v.* Dandy, 1 Brevard, 395.

CHAPTER VI.

EXTORTION AND MISCONDUCT IN OFFICE.

I. EXTORTION.
II. MISCONDUCT IN OFFICE.

I. Extortion.

Statute.

Pennsylvania.

§ 2507 (*a*). *Extortion.*—If any justice, clerk, prothonotary, sheriff, coroner, constable or other officer of this commonwealth, shall wilfully and fraudulently receive or take any reward or fee to execute and do his duty and office but such as is or shall be allowed by some act of assembly of this commonwealth, or shall receive or take, by color of his office, any fee or reward whatever, not, or more than is allowed as aforesaid, he shall be deemed guilty of a misdemeanor in office, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year.—(Rev. Act, 1860, Tit. II., sect. 12.)

§ 2508. Extortion, in its general sense, signifies any oppression by color of right; but technically, it may be defined to be the taking of money by an officer, by reason of his office; either where none is due, or where none is yet due.[f] Thus, where the defendant appeared before a justice on a summons returnable at 10 A. M., and waited till about 12, when the justice told him he must tax the plaintiffs with the costs, upon which the defendant departed; but the justice afterwards adjourned the cause to another day, and gave judgment as upon the summons, with three or four dollars costs; and afterwards the defendant paid to the justice the amount of the note on which the suit was brought, and the justice demanded the costs, which the defendant refused to pay in full, but paid the justice twelve and-a-half cents; this was held extortion in the justice, for which he might be punished criminally, it appearing from the evidence that the case had been substantially discontinued at the first hearing, and that subsequent proceedings were *coram non judice.*[g]

§ 2509. The summary penalties attached in each state to extortion, have not generally taken away the common law remedy.[h] In Pennsylvania, however, by an act of assembly already noticed,[d] it is provided that "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly, the directions of the said

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[f] People *v.* Whaley, 6 Cowen, 661; Williams *v.* State, 2 Sneed, (Tenn.) 160; 1 Hawk. c. 68, s. 1; Co. Lit. 363, b; Stevens *v.* Rothmel, 3 B. & B. 145.
[g] People *v.* Whaley, 6 Cowen, 661.
[h] Com. *v.* Bayley, 7 Pick. 279.
[d] Act of 21st March, 1806, 4 Smith, 332; Purd. 66; see ante, § 11.

act shall be pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect." Under this act, it was held, that as a *qui tam* action was given to an informer by the fee bill, in cases where a justice was guilty of extortion, the remedy at common law was absorbed.[e] To remedy this defect, an act was passed[f] restoring the common law provision.

Both by statute, and at common law, it is necessary that the taking should be wilful and corrupt.[g]

§ 2510. If an officer receive the fees due for collecting money upon an execution, when in fact he did not collect it, the money being paid to the plaintiff by the defendant, it is extortion, although he had the execution in his hands previous to the payment.[h]

§ 2511. In the indictment, the weight of authority in England is that the sum stated is not material; proof of a less sum will maintain the indictment.[i] In several of the United States it has been held that the indictment must aver particularly the sum received, and how much of it, if any, was a legal charge.[j] But such precision would not seem to be necessary in North Carolina.[k]

§ 2512. If an indictment charge that a defendant "unlawfully and extorsively, by color of his office, did demand and receive $2 45 cents, for certifying a deed of conveyance, of lawful money of the State of Tennessee;" whereas the lawful fee was twenty-five cents: and the proof is he received bank notes, such proof, it is said, will not sustain the indictment.[l]

§ 2513. The judgment will be arrested upon the finding of a jury, on an indictment against a constable for extortion, "that he oppressively sued out an execution," unless the facts which constituted the oppression are set forth in the indictment and found by the jury.[m]

II. Misconduct in office.[n]

Statutes.

Pennsylvania.

§ 2513 (*a*). *Misdemeanor of district attorney.*—If any district attorney shall

[e] Com. *v.* Evans, 13 Serg. & R. 426.

[f] 25th March, 1831; Pamph. 211; Purdon, 448.

[g] Com. *v.* Shed. 1 Mass. 228; Runnels *v.* Fletcher, 15 Mass. 525; Lincoln *v.* Shaw, 17 Mass. 410; Shattuck *v.* Woods, 1 Pick. 171; Com. *v.* Bayley, 7 Pick. 279; State *v.* Gardner, 2 Missouri, 22; State *v.* Porter, 3 Brevard, 175; People *v.* Coon, 15 Wendell, 277; Jacobs *v.* Com., 11 Leigh, 1709; per contra, State *v.* Dickens, 1 Haywood, 483.

[h] Cross *v.* State, 1 Yerger, 261.

[i] R. *v.* Burdett, 1 L. Raym. 149; and see R. *v.* Gilham, 6 T. R. 267; R. *v.* Higgins, 4 C. & P. 247.

[j] State *v.* Coggswell, 3 Blackford, 55; People *v.* Rust, 1 Caine's R. 130; State *v.* Halsey, 1 Southard, 324.

[k] State *v.* Dickens, 1 Haywood, 406.

[l] Garner *v.* State, 5 Yerger, 160; Johnson *v.* State, Martin & Yerger, 129.

[m] State *v.* Fields, Martin & Yerger, 137.

[n] See Wharton's Precedents, as follows:—

(897) Against a magistrate, for committing in a case where he had no jurisdiction.

wilfully and corruptly demand, take or receive any other fee or reward, than such as is prescribed by law, for any official duties required by law to be executed by him in any criminal proceeding; or if such district attorney shall be guilty of wilful and gross negligence in the execution of the duties of his office, he shall be guilty of a misdemeanor in office, and on conviction thereof, be sentenced to pay a fine

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(898) Against a magistrate for neglect of duty at a riot.
First count, for neglecting to read the riot act.
(899) Against a justice of the peace, for proceeding to the duties of his office in a state of intoxication.
(900) Against a justice of the peace, for issuing a warrant without oath, using falsely the name of a third party as prosecutor.
(901) Against a justice of the peace in Pennsylvania, for refusal to deliver transcript to a party demanding it.
(902) Against a justice of the peace in Massachusetts, for extortion generally.
(903) Against a justice of the peace for extorting fees for discharging a recognizance, and for not returning the same to the court from which it was taken.
(904) Against a constable for extorting money of a person apprehended by him upon a warrant to let him go at large.
(905) Against a constable for negleting to execute a warrant in a civil case.
(906) Against a constable for neglecting to execute a justice's warrant for the apprehension of a person.
(907) Against a constable for extorting and obtaining money under color of discharging a bench warrant.
(908) Against constable for neglecting to attend the sessions.
(909) Against a high constable for not obeying an order of sessions.
(910) Against a toll collector for extorting toll from a person who had compounded.
(911) Against an innkeeper for not receiving a guest, he having room in his inn at the time.
(912) Against an innkeeper refusing to entertain foot travellers.
(913) Against an attoney for buying a note, on New York stat., sess. 41, c. 259, &c.
(914) Against a master for neglecting to provide an apprentice of tender years with sufficient food, clothing, bedding, and other necessaries.
(915) Against a mistress, for not providing sufficient food for a servant, keeping her without proper warmth, &c.
(916) Against overseers for cruelty to a pauper.
(917) Against a juror for not appearing when summoned on a coroner's inquest.
(918) For refusing to serve the office of overseer of the poor.
(919) For refusing to execute the office of constable.
(920) For refusing to take the office of chief constable, being duly elected at the quarter sessions.
(921) Against a jailor for a voluntary escape.
(922) Same where the party escaping was committed by a judge as a fugitive from justice.
(923) Against a constable for a negligent escape.
(924) Against a prisoner for escape out of custody of constable.
(925) Inflicting cruel and unusual punishment on one of the crew of a vessel, &c.
(926) Against same for same, the punishment being beating, wounding, &c.
(927) Second count. Specifying the same more minutely.
(928) Confining a boy in run of a ship, &c.
(929) Second count. Refusing suitable food.
(930) Another form, withholding suitable food, &c.
(931) Forcing, &c., a seaman ashore in a foreign port.
(932) Second count. Same in another form.
(933) Third count. Leaving behind seaman.
(934) Leaving seaman in foreign port.
(935) Refusing to bring home a seaman.
(936) Another form for same.
(937) Against the captain of a vessel, for bringing into the port a person with an infectious disease, under the Pennsylvania act.
(938) Against a captain of a vessel, for not providing wholesome meat for his passengers.

not exceeding one thousand dollars, and to undergo an imprisonment not exceeding one year, and his said office shall be declared vacant. Upon complaint in writing, verified by the oath or affirmation of the party aggrieved, made to the court in which any district attorney shall prosecute the pleas of the commonwealth, charging such district attorney with wilful and gross negligence in the execution of the duties of his office, the said court shall cause notice of such complaint to be given to the said district attorney, and of the time fixed by the said court for the hearing of the same. If, upon such hearing, the court shall be of opinion that there is probable cause for the said complaint, they shall bind over or commit the said district attorney to answer the same in due course of law. If the court shall be of opinion that there is no probable cause for such complaint, they shall dismiss the same with reasonable costs, to be assessed by the court.—(Rev. Act, 1860, Tit. I., sect. 17.)

§ 2513 (*b*). *Mode of proceeding against such district attorney.*—If any district attorney shall be charged according to law, with any crime or misdemeanor, before, or bound over, or committed by any court, to answer for wilful and gross negligence in the execution of the duties of his office, it shall be the duty of the court to appoint some competent attorney thereof, to prepare an indictment against such district attorney, and to prosecute the same on behalf of the commonwealth, until final judgment, to whom a reasonable compensation, to be fixed by the court, shall be paid for his services, out of the county treasury; if such district attorney shall be convicted of any crime, for which he may be sentenced to imprisonment, by separate or solitary confinement at labor, in addition thereto, his said office shall be declared vacant by the court passing such sentence.—(Ibid. sect. 18.)

§ 2514. If a public officer, intrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizen and of safety to public rights.[o]

§ 2515. A justice of the peace is indictable for misbehavior in his office, when he acts partially, or oppressively, or from malicious or corrupt motives.[p] Wherever, on a justice or elsewhere, a public duty is imposed, a failure to perform it is indictable.[q] Thus, in New York, it was held clearly indictable to discharge an offender, without taking sufficient sureties, with intent to pervert the course of justice.[r] The law requires a justice of the peace to be active in suppressing riots; and an information was granted against a justice of the peace for want of such activity.[s]

§ 2516. By act of assembly in Pennsylvania, it is an indictable offence for a public officer to refuse to deliver up, at the expiration of his term, the records of his office.[t]

All acts of malfeasance in office, if done with corrupt intent, are indictable.[u]

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[o] State *v.* Glascow, Conf. R. 38.
[p] People *v.* Coon, 15 Wend. 277.
[q] Wilson *v.* Com., 10 Serg. & R. 475.
[r] People *v.* Coon, 15 Wend. 277.
[s] R. *v.* Montgomery, 1 Yeates, 419.
[t] Act of 3d April, 1804, s. 1, 2, 3; 4 Smith's Laws, 192; Hood on Ex. 47.
[u] Wickersham *v.* People, 1 Scam. 129.

§ 2517. Where a grand juror disqualified himself for the performance of his duties by habitual intoxication during the session of the grand jury, he was held indictable.[v]

§ 2518. Being intoxicated with spirituous liquors, while in the discharge of his official duties, is a sufficient misbehavior, for which a justice of the peace ought to be amerced and removed from office.[w]

A justice of the peace is indictable for not attempting to suppress a riot.[x]

§ 2519. A corrupt agreement between two justices of the peace, A. and B., viz., that A. will vote for C. as commissioner, in consideration that B. will vote for D. as clerk, and *vice versa*, and the actual voting of the said two justices, in pursuance of such corrupt agreement, though not an offence within the Virginia statute against buying and selling offices, because the corrupt bargains and sales prohibited by that statute are those by which the party bargaining or selling is to receive some profit, or some assurance of profit, directly or indirectly to himself, is a misdemeanor at common law, against which an information will lie.[y]

§ 2520. It is generally necessary, to constitute the offence, that the motive should be corrupt.[z] Thus, where a woman of color was convicted before a magistrate and two freeholders, of slandering and insulting a white woman, and sentenced to pay a fine of ten dollars and costs of prosecution, which fine was received by the magistrate, but not paid over by him within the time prescribed by law, it was held by the court, that as there was no evidence that the magistrate intended to keep the fine fraududently, its non-payment within the time limited could only be imputed to negligence.[a]

A sheriff is not liable to a criminal prosecution for a malfeasance in office committed by his deputy.[b]

§ 2521. In an indictment against an officer of justice, for misbehavior in office, it is necessary that an act imputed as misbehavior be distinctly and substantially charged to have been done, with corrupt, partial, malicious, or improper motives, and above all with knowledge that it was wrong, though there are no technical words indispensably required in which the charge of corruption, partiality, &c., shall be made.[c]

§ 2522. In an indictment against a justice, however, for corruptly taking insufficient securities, by which a defendant escaped justice, it is not necessary to state the offence with which the party suffered to escape was

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[v] Penn'a *v.* Keffer, Addison, 290.

[w] Com. *v.* Alexander, 4 Hening & Munford, 522. See for form Wh. Prec., 899.

[x] State *v.* Littlejohn, 1 Bay, 316; ante, § 2499.

[y] Com. *v.* Callaghan & Holloway, 2 Virg. Cases, 460.

[z] Jacobs *v.* Com., 11 Leigh, 709; People *v.* Coon, 15 Wendell, 277; State *v.* Porter, 3 Brevard, 175; State *v.* Gardner, 2 Missouri, 22; Shattuck *v.* Woods, 1 Pick. 171; Com. *v.* Bayley, 7 Pick. 279; Lincoln *v.* Shaw, 17 Mass. 410; Com. *v.* Shed, 1 Mass. 227.

[a] State *v.* Porter, 3 Brevard, 175. [b] Com. *v.* Lewis, 4 Leigh, 664.

[c] Jacob *v.* Com., 2 Leigh, 709; State *v.* Gardner, 2 Missouri, 22; People *v.* Coon, 15 Wendell, 277; State *v.* Buxton, 2 Swan. (Tenn.), 57.

charged, with the same formality and precision which would be necessary in an indictment against such offender; it is enough if it be shown that he was charged with a criminal offence, and that the proceeding against him was not utterly void. Thus, where it was alleged that the party suffered to escape had been charged with falsely and fraudulently obtaining the signature of a certain person to a promissory note, by means of certain false pretences, without particularly describing the note, or averring the signature to have been obtained with the intent to cheat or defraud, &c.; it was held, that this being matter of inducement, the indictment was not objectionable in this respect.[d] In such a case it must be directly and positively charged that the offender was discharged without taking sufficient sureties, or sureties in a sufficient sum for his appearance; it is not enough that it is alleged that the magistrate discharged the offender upon his finding sureties in a small and trifling sum, to-wit, fifty dollars. The offence cannot be charged argumentatively or inferentially.[e]

§ 2523. Innkeepers are considered public officers in such a sense as to make a refusal on their part to receive a traveller, indictable, they having room in their house at the time, and the price of entertainment being tendered.[f]

CHAPTER VII.

LIBEL.

A. STATUTES.

PENNSYLVANIA, § 3523(*a*).

OHIO.

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

B. OFFENCE GENERALLY.

I. LIBEL IN GENERAL, § 2525.
II. LIBELS AFFECTING INDIVIDUALS, § 2526.
III. LIBELS AFFECTING THE PUBLIC, PUBLIC OFFICERS AND BODIES OF MEN, § 2536.
1st. BLASPHEMOUS LIBELS, § 2536.
2d. OBSCENE LIBELS, § 2547.
3d. SEDITIOUS LIBELS, § 2550.
IV. PUBLICATION, § 2556.
V. WHAT COMMUNICATIONS ARE PRIVILEGED, § 2561.
1st. FROM THE RELATION OF THE PARTIES, § 2561.
2d. FROM PUBLIC POLICY, § 2572.
VI. TRUTH WHEN ADMISSIBLE, § 2523.
VII. MALICE, HOW PROVED AND REBUTTED, § 2594.
VIII. INDICTMENT, § 2598.

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[d] People *v.* Coon, 15 Wend. 277.

[e] Ibid.

[f] Hawk, P. C. 74, § 2; R. *v.* Luellin, 12 Mod. 445; R. *v.* Ivins, 7 C. & P. 213; Fell *v.* Knight, 8 M. & W. 269; Hall *v.* State, 4 Har. Del. 132; State *v.* Mathews, 2 Dev. & Bat. 424; Wh. Prec. 911-2.

A.—Statutes.

Pennsylvania.

§ 2523 (*a*). *Libel.*—If any person shall write, print, publish, or exhibit, any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt or ridicule, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, or undergo an imprisonment not exceeding twelve months, or both, or either, at the discretion of the court.[ff]—(Rev. Act, Bill I., sect. 24.)

Ohio.

§ 2524. *Libel.*—That if any person shall write, print or publish any false or malicious libel[a] of or concerning another, or shall cause or procure any such libel to be written, printed or published; every person so offending shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars, and, moreover, be liable to the party injured.—(Act of March 8, 1831. Swan's Stat., sect. 26, 287–8.)

B.—Offence generally.

I. Libel in general.

§ 2525. A libel is a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to injure society generally, or to blacken the memory of one dead, or the reputation of one living, and expose him to public hatred, contempt, or ridicule.[b] The malice of the publication is the essence of the offence.[c]

Libel is a crime by the common law.[d]

[ff] "This section merely puts the common law definition of a malicious and defamatory libel in a statutory form. The object of the Commissioners being to assign this crime a place in the statute laws, in order to admonish and instruct. The proviso authorizing the truth to be given in evidence, is a transcript of the act of the 13th May. 1856, entitled 'An Act relative to libels.' Pamphlet Laws, 574. Brightly's Digest, 1184, No. 1." Revisor's Report.

[a] "Where slander is written and published, it is denominated libel. A libel in reference to individual injury, may be defined to be, a false and malicious publication, against an individual, either in print or writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt, or ridicule." Wright. J. (Watson *v.* Trask, 6 Ohio, 532.)

When the publication complained of is libellous in itself, an averment in the declaration of plaintiff's official or professional character will not be ground of demurrer, although the libellous matter cannot apply to that official or professional character.

All inferences are to be taken most strongly against the pleader, and where the libellous matter imputes a dishonest, corrupt, or criminal intent, a plea of justification must show, not only that the facts alleged are true, but also that they were accompanied by the intent imputed. (Gage *v.* Robison, 12 Ohio, 250.)

Terms of general abuse, when printed and published, are not libellous. (Tappan *v.* Wilson, 7 Ohio, 190.

[b] People *v.* Cresswell, 3 Johns. C. 354; Root *v.* King, 7 Cowen, 613; Com. *v.* Clapp, 4 Mass. 163, 168; State *v.* Fraley, 4 M'Cord, 317.

[c] Com. *v.* Clapp, 4 Mass. 163; Com *v.* Snelling, 15 Pick. 337, 339; Jeffries *v.* Duncombe, 11 East, 227; Mayor of Northampton's case, 1 Strange, 422.

[d] Com. *v.* Holmes, 17 Mass. 336, 338; Com. *v.* Kneeland, 10 Pick. 206, 232; State *v.* Avery, 7 Connect. 268; 3 Swift's Dig. 340. "It is true that there is no statute of

II. Libels affecting individuals.

§ 2526. A libel on an individual is a malicious defamation of him, made

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the commonwealth declaring the writing or publishing of a written libel, or a malicious libel, by signs and pictures, a punishable offence. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law; it has been common to denominate this, "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England or those English statutes passed before the emigration of our ancestors, and constituting a part of that law by which as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

In addition to these sources of unwritten law, some usages growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long been in force as law, as for instance, the convenient practice by which, if a married woman join with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine required by the common law. Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate instead of the common law of England, which constitutes a part of it, to call it the common law of Massachusetts.

To a very great extent the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duties redressed and punished. Without its aid the written law, embracing the constitution and statute laws, would constitute but a lame, partial and impracticable system. Even in many cases where statutes have been made in respect to particular subjects, they could not be carried into effect and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter the statute declares the punishment, but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed it seems too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry as a system of municipal law.

It is not necessary here to consider at large the sources of the unwritten law, its authority as a binding rule derived from long and general acquiescence, its provisions, limits, qualifications and exceptions, as established by well authenticated usages and traditions. It is sufficient to refer to 1 Bl. Com. 63, et seq.

If it be asked, "How are those customs or maxims constituting the common law, to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer; By the judges in the several courts of justice. They are the depositories of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; and from being long personally accustomed to the judicial decisions of their predecessors." (1 Bl. Com. 69.)

Of course in coming to any decision, judges are bound to resort to the best sources of instruction, such as the records of the courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is argued that, in the range and scope of this unwritten law, there is no provision, which renders the writing or publishing, of a malicious libel punishable as a criminal offence. (Com. v. Chapman, 13 Metcalf, 68, Shaw, C. J.)

public, by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule.

§ 2527. An indictment will lie for all words spoken of another which impute to him the commission of some crime punishable by law, such as high treason, murder, or other felony, (whether by statute or at common law;) forgery, perjury, subornation of perjury, or other misdemeanor.[e]

§ 2528. Writings vilifying the character of persons deceased are libels, and may be made the subject of an indictment;[f] but the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the people against them, or to excite them to a breach of the peace,[g] otherwise it cannot be maintained.[h]

It is indictable to publish any thing of a man which renders him ridiculous,[i] or contemptible.[j]

§ 2529. An indictment will lie for all words spoken of another, which may have the effect of excluding him from society, as, for instance, to charge him with having an infectious disease, such as leprosy, the venereal disease, the itch, or the like.[k] But charging him with having had a contagious disease is not actionable; for, as this relates to a time past, it is no reason why his society should be avoided at present.[l]

In Connecticut, to charge a woman with libidinous habits, and with tempting another to commit adultery, is libellous.[m]

§ 2530. It is libellous to charge a man with declaring, in the convention that formed the constitution of a state, "that government had no more right to provide by law for the support of the worship of the Supreme Being, than for the support of the worship of the Devil," such a charge being calulated to exclude him from society, and to render him odious and contemptible.[n]

§ 2531. It has even been held libellous to charge a man with insanity,[o] and to call a woman a hermaphrodite.[p] It is indictable, also, to be con-

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[e] Stillwell *v.* Barter, 17 Wend. 487; Nash *v.* Benedict, 24 Wend. 434; Winson *v.* Sayward, 23 Pick. 402; Walker *v.* Winn, 8 Mass. 248; Hotchkiss *v.* Oliphant, 2 Hill, N. Y. R. 210; Cramer *v.* Riggs, 17 Wend. 209; Chaddock *v.* Briggs, 13 Mass. 248; Miller *v.* Parrish, 8 Pick. 384; Gay *v.* Homer, 13 Pick 535; Com. Dig. Action on the Case for Defamation, D. 1–10. F. 1–7, 12–18. 3 Wils. 186; 2 W. Bl. 750, 959; Cowp. 275; 2 Wils. 300; 6 T. R. 694; 9 East, 93; 5 Id. 463; 2 New Rep. 335; 4 Price, 46; 7 Tannt. 431.

[f] 5 Co. 125, *a.*

[g] R. *v.* Topham, 4 T. R. 127.

[h] Com. *v.* Taylor, 5 Binney, 281.

[i] 2 Wils. 403; 1 W. Bl. 294.

[j] Lord Churchill *v.* Hunt, 2 B. & Ald. 685; 4 Taunt. 355; Macgregor *v.* Thwaites, 4 D. & R. 695; 3 B. & C. 24; Cramer *v.* Riggs, 17 Wend. 209; Powers *v.* Dubois, 17 Wend. 63; Hotchkiss *v.* Oliphant, 2 Hill, N. Y. R. 510; White *v.* Delevan, 17 Wend. 49; Cooper *v.* Stone, 24 Wend. 434; Steel *v.* Southwick, 9 Johnson, R. 314; Dunning *v.* Hillhouse, 6 Connect. 391; Riggs *v.* Denniston, 3 Johns. C. 198; M'Corkle *v.* Binns, 5 Binn. 349; Barthelemy *v.* People, 2 Hill, N. Y. R. 248; Chaddock *v.* Briggs, 13 Mass.

[k] Com. Dig. Action on the Case for Defamation, (D. 28, 29,) (F. 11, 19;) 2 Bur. 930.

[l] 2 T. R. 473; Stevens *v.* Hayden, 2 Mass. 406; Bloss *v.* Tobey, 2 Pick. 320; Allen *v.* Hillman, 12 Pick. 101.

[m] State *v.* Avery, 7 Conn. 269.

[n] How *v.* Converse, 3 Connect.

[o] 10 Johnson R. 443.

[p] Malone *v.* Stewart, 15 Ohio, 319.

cerned in a publication which may impair or hurt a man in his trade or livelihood: as, for instance, to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like.[q]

§ 2532. It is libellous, to publish of one, in his capacity of a juror, that he agreed with another juror, to stake the decision of the amount of damages to be given in a cause then under their consideration, upon a game of draughts.[r]

§ 2533. Whatever, if made the subject of civil action, would be considered libellous without laying special damage, is indictable in a criminal court, and by this test, therefore, the law of libel, as expressed on actions for damages, is brought to bear on criminal prosecutions.[s] There are cases, however, in which an action would not lie without laying special damage, in which, nevertheless, an indictment is good. Thus, for instance, if a man write or print, and publish of another, that he is a scoundrel,[t] or villain,[u] it is a libel, and punishable as such; although if this were merely spoken it would not be actionable without special damage.[v]

§ 2534. No indictment, however, will lie for words not reduced to writing,[w] unless they be seditious, blasphemous, grossly immoral, or uttered to a magistrate in the execution of his office, or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge. The only reported exception to this rule is that of a case before the King's Bench, in 1760, where sentence was passed on an indictment charging two defendants with publicly singing in the street libellous and obscene songs, reflecting on the prosecutor's son and daughter with intention to discredit him with his children, and destroy his domestic peace. The reasons pressed in arrest of judgment were 1, that an indictment will not lie for publishing two distinct libels on two distinct persons; 2, that several distinct defendants, charged with several and distinct offences, cannot be joined in the indictment; 3, that there was a general verdict on the count, whereas the latter song contained in it was not libellous, which were severally overruled by the court. No exception was taken on the ground that the songs not having been written, could not have been libellous.[x]

§ 2535. Where a publication is malicious, and its obvious design and tendency is to bring the subject of it into contempt and ridicule, it will be a libel, although it imputes no crime liable to be punished with infamy.[y]

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[q] Finch, L. 186; Com. Dig. (D. 22-27,) (F. 9, 10; 2 W. Bl. 750; 3 Wils. 59, 187; 2 Stark. N. P. Rep. 245, 297; 4 Esp. 191; 3 B. & P. 372; 2 Str. 898; Fitzg. 121; 3 Bing. 184; 5 B. & C. 150; 1 C. & J. 143; 2 Ad. & E. 2.

[r] Com. *v.* Wright, 1 Cush. 46.

[s] 2 Starkie on Slander, 120.

[t] J'Anson *v.* Stewart, 1 T. R. 748.

[u] Bell *v.* Stone, 1 B. & P. 331.

[v] 2 H. Bl. 531.

[w] 2 Salk. 417; R. *v.* Langley, 6 Mod. 125.

[x] R. *v.* Benfield, 2 Burrows, 980.

[y] State *v.* Henderson, 1 Richardson, 180.

III. Libels affecting the public, public officers, and bodies of men.

1st. Blasphemous libels.

Statutes.

Pennsylvania.

2535 (*a*). *Blasphemy.*—If any person shall wilfully, premeditatedly and despitefully blaspheme, or speak loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth, such person, on conviction thereof, shall be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding three months, or either, at the discretion of the court.[yy]—(Rev. Acts, Bill I., sect. 30.)

§ 2536. Christianity is part of the common law of the land, and maliciously to revile it is an indictable offence.[z] Blasphemy against God, it was said in New York, and contumelious reproaches, and profane ridicule of Christ and the Holy Scriptures, are offences punishable at common law, whether uttered by words or writing. And it was determined that to revile the name of the Saviour, and wantonly and maliciously to ridicule his character, was indicitable.[a] To say "that the Holy Scriptures were a mere fable; that they were a contradiction, and that, although they contained a number of good things, yet they contained a great many lies," was held indictable in Pennsylvania;[b] and the same position was taken in Delaware, after an able and thorough examination by J. M. Clayton, C. J. In the latter case, the jury having found the defendant guilty on an indictment under the act against blasphemy, charging him with having proclaimed publicly, and maliciously, with intent to vilify the Christian religion and to blaspheme God, that the "Virgin Mary was a whore, and Jesus Christ was a bastard;" the court held the offence found to be blasphemy, and refused to arrest the judgment.[c] In another case, the court refused to arrest the judgment, where the defendant was charged with uttering the same words, on another occasion, with intent to vilify the Christian religion and to blaspheme God, and was found not guilty of the intent to blaspheme God, but guilty of the whole indictment with that exception.[d]

§ 2537. In Massachusetts, under Stat. 1782, c. 8, (Rev. Stat. c. 130, s. 15,) it is blasphemy to deny the existence of God, with an intent to impair and destroy the veneration due him, although no words of malediction,

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[yy] "This section is a transcript of the Province law passed in 1700, entitled 'An Act to prevent the grievous sins of cursing and swearing within this province and territories.' 1 Smith's Laws, 6. Brightly's Digest, 673, No. 1, except that the fine is increased from ten pounds to one hundred dollars." (Revisor's Note.)

[z] Com. *v.* Kneeland, 20 Pick. 206; Thacher's C. C. 346; People *v.* Ruggles, 8 Johnson, 290; Chapman *v.* Gillett, 2 Connect. 41; Updegraff *v.* Com., 11 Serg. & Rawle, 294; State *v.* Chandler, 2 Harrington, 553; 4 Black. Com. 60; Smith *v.* Sparrows, 4 Bing. R. 84, 88; Story's Miscellaneous Wri., 451; see for form, Wh. Prec. 965, &c.

[a] People *v.* Ruggles, 8 Johnson, 290. [b] Updegraff *v.* Com., 11 Serg. & R. 294.

[c] State *v.* Chandler, 2 Harrington, 553. [d] Ibid.

reproach or contumely are used;[e] and the statute is in accordance with the constitution.[f] It is not necessary, in the evidence, to prove every assignment of blasphemy set forth in the indictment; if one is sufficiently proved, it is enough.[g]

On an indictment for blasphemy for the following publication: "The Universalists believe in a God, which I do not; but believe that their God with all his moral attributes, (aside from nature itself,) is nothing else than a chimera of their imagination;" it was held that the intent to deny the existence of the Deity, in the sense of the statute, must be presumed to have been made out.[h] The same general view obtains in England;[i] and in the important case which settled the validity of Mr. Girard's will, the Supreme Court of the United States has placed the doctrine on a foundation, which cannot, on constitutional grounds at least, be shaken. It will be recollected that the heirs at law endeavored to set aside the will on the ground that as it provided for a system of education from which "ecclesiastics" were to be excluded, it was void at common law, and the charity fell. "We are compelled to admit," says Mr. Justice Story, in giving the opinion of the court, "that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, THAT ITS DIVINE ORIGIN AND TRUTH ARE ADMITTED, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers, or the injury of the public."[j] This view, Mr. Binney, on the part of the devisees, in that great argument which has assumed a judicial weight from its fairness as well as from its ability, did not dispute. "Christianity is a part of the law of Pennsylvania, it is true, but what Christianity, and to what intent? It is Christianity without particular tenets, Christianity with liberty of conscience to all, and to the intent that its doctrines should not be vilified, profaned, or exposed to ridicule. It is Christianity for the defence and protection of those who believe, not for the persecution of those who do not."[k]

The Constitution of the United States requires that all officers, "both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution. But no religious tests shall ever be required as a qualification for any office or public trust under the United States."

In reference to this clause, Judge Story, in his Commentaries on the Constitution, thus speaks: "It was not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test or affirmation. It had a higher object; to cut off, for ever, every pretence of any alliance between church and state in the national government."

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[e] Com. v. Kneeland, 20 Pick. 206. [f] Ibid. [g] Ibid, ante, § 616.
[h] Com. v. Kneeland, 20 Pick. 206; Thach. C. C. 346.
[i] R. v. Carlile, 3 B. & Ald. 161; R. v. Waddington, 1 B. & C. 26.
[j] 2 How. U. S. 198.
[k] Argnment, etc., in Vidale v. Girard, 103.

Afterwards comes the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

On this Judge Story proceeds: "Now there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally as a matter of sound policy as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, (if indeed that state be an exception,) did openly, by the whole course of its laws and institutions, sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period; without the slightest suspicion that it was against the principles of public law or republican liberty. Indeed, in a republic there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence, if it be what it has ever been deemed by its truest friends to be, the religion of liberty.

"Probably at the time of the adoption of the constitution, and of the amendment to it now under consideration, the general, if not the universal sentiment in America was that Christianity ought to receive encouragement from the state, so far as was not incompatible with the rights of conscience and the freedom of religious worship. An attempt to level all religion, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

"It yet remains a problem to be solved in human affairs, whether any free government can be permanent where the public worship of God and the support of religion constitutes no part of the policy or duty of the state, in any assignable shape. The future experience of Christendom, and chiefly of the American states, must settle this problem, as yet new in the history of the world, abundant as it has been in experiments in the theory of government.

"But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the conscience of other men, or to punish them for worshipping God in the manner which they believe their accountability to him requires." . . . "The rights of conscience are indeed beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority without a criminal disobedience of the precepts of natural as well as of revealed religion.

"The real object of the amendment was not to countenance, much less to advance, Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to an hierarchy

the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the apostles to the present age."[kk]

§ 2538. The disputes of learned men, however, on controverted points, cannot, unless a malicious intent is shown, be charged as blasphemy.[1] It is immaterial whether the publication be oral or written.

§ 2539. The difficulties which have attended the consideration of the inquiry how far Christianity is a part of the common law, have arisen from a confusion of the two main relations in which the one comes in contact with the other. These relations are,

§ 2540. (*a.*) The Spiritual, in which Christianity claims and obtains simply that protection which any religious institution, adhered to by a respectable portion of the community, is entitled to receive.

§ 2541. (*b.*) The Moral and Economical, in which Christianity is the basis of our whole legal and political system, infringements of its laws being punished by the secular authorities to the same effect as offences prohibited by statute.

§ 2542. (*a.*) *The Spiritual.*—Under this head may be ranked a class of cases which are often, though erroneously, cited as proof of the elementary position of the incorporation of Christianity in the common law, viz.: those in which it is held indictable to disturb Christian congregations when in the act of worship; to publicly and grossly blaspheme our Lord Jesus Christ or the Holy Spirit; to publish any scandalous libel on the Christian religion; or to be guilty of any public and voluntary labor on the Lord's day, in such a way as to interfere with the general quiet. But when these cases are analyzed, it will be found, that though, in most of them, the courts throw out the declaration that Christianity is part of the common law, yet

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[kk] The provisions in several of the State Constitutions have thus been summed up: "The Constitution of Vermont declares it to be the duty of all her citizens to observe the Sabbath, and maintain public worship, according to the will of God, revealed in the Bible. The Constitution of Massachusetts assigns, as a reason for some of her acts, that they tend to the honor of God and the advantage of the Christian religion. The Constitution of New Jersey makes infidels, pagans and Jews ineligible to office. That of Maryland provides 'that no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of office as may be prescribed, &c., and a declaration of belief in the Christian religion' That of North Carolina declares, 'no person who shall deny the being of a God, or the truth of the Christian religion, or the Divine authority of the Old and New Testament, or who shall hold religious principles incompatible with the freedom or safety of the State, shall be capable of holding any office or place of trust, or profit, in the civil department within this State.' That of South Carolina exempts 'ministers of the Gospel from public duties of an official or secular nature, on the ground that they are dedicated to the service of God and the care of souls, and ought not to be diverted from the great duty of their sacred functions.'"

[1] R. *v.* Woolstan, 2 Str. 83; R. *v.* Atwood, Cro. Jac. 421; R. *v.* Taylor, Ven. 293; R *v.* Clendan, Str. 789; R. *v.* Hale, Str. 416; R. *v.* Sline, Dig. L. L. 83; R. *v.* Annett, 2 Burn, E. L. 781; R. *v.* Wilkes, 2 Starkie, Sl., 141; R. *v.* Williams, Ib.; R. *v.* Eaton, Id. 142; R. *v.* Carlile, 3 B. & Ald. 161; R. *v.* Waddington, 1 B. & C. 26; R. *v.* Taylor, 2 Stark. on Slander, 143.

they all of them rest on grounds independent of this general position; for it is a common nuisance, and punishable as such by indictment at common law, to disturb the religious worship of others, or flagrantly or indecently insult their religious belief, no matter what be their creed. Thus, it would be held indictable to wantonly disturb a congregation of Mormons, of Jews, or even of Mohammedans, when peaceably engaged in their religious rites. The point on which the decisions turn, has been very sharply but clearly stated in a recent case, where it was held that if a political, religious, or social meeting, not forbidden by the laws, is called by those favorable to its objects, persons unfavorable to those objects have no right to attend for the purpose of defeating them. That the same distinction holds good in cases of blasphemy, is clear from the fact that infidel and skeptical opinions are only held indictable when publicly and grossly expressed, in such a way as to become a common nuisance, or to provoke a breach of the peace. In this view the discussions of the learned, even though involving denial of a belief in God, have been held not amenable to common law discipline. We may therefore conclude that, while the spiritual element in Christianity is protected by the common law, the former does not so enter into the latter as to place matters of religious faith within the jurisdiction of the civil authority, either for vindication or enforcement.

§ 2543. (*b.*) *The moral and economical.*—In this view, Christianity underlies the whole common law. To illustrate this, the following points may be noticed:

(1.) The family and social relation.

(2.) The marital relation.

(3.) The judicial relation.

§ 2544. (1.) *The family and social relation.*—As to this there can be no question. In the most polished nations of antiquity, before the introduction of Christianity, and now, in all classes of non-Christian countries, no law existed, or exists, to exact the nurture of parents and of young children; or, in other words, the maintenance of the home system. Even in the language of most of these nations, the very word HOME has no place. And the same hard temper exhibits itself in the merely social relations. Great philosophers, indeed, there have been, who declared it to be immoral to refuse aid to dependants, when such aid is necessary to preserve life; to be guilty of negligence in the discharge of trusts or offices, whereby injury accrues to others; or to violate the decencies and sanctities of life or of death. But these opinions of philosophers were purely speculative and eccentric, nor was it pretended that there was any law to enforce them, unless such law should be made for the specific purpose. Thus, the parent could with impunity disband his family and cast his children to the winds, or the child could refuse succor to an aged and destitute parent. There was no obligation recognized in the community to support the sick or the incapable, of which a striking proof is found in the fact that, until the propagation of Christianity, no such thing as a

HOSPITAL was known. Even in the most refined classical eras, no violation of social or domestic duty was held punishable, unless it fell within the very few overt acts which were prohibited by statute. Now, observe how different it is with the common law of England and America. With us it is held indictable for any one to refuse succor to another to whom he is bound by social or domestic ties: *e. g.*, child to parent, parent to child, husband to wife, master to servant, or even—when, by peculiar circumstances, the duty of protection is created from one to the other—stranger to stranger. Few criminal cases are now more frequent than those in which the law steps in and enforces these very duties. The master who refuses to supply his apprentice with suitable food, the husband who neglects the proper nurture of his wife, the stranger who lets a helpless infant starve at his gate, have each, when injuries ensue, been held penally responsible. Now, on what principle do these cases rest? Certainly not on statute, because there is no statute on the subject. They are sustained on that broad principle of common law that, when a duty is violated, a penalty will be imposed. But what is there to declare the duty?—And the only method of solving this difficulty is by resort to the great substratum of Christian ethics, on which the common law, as declared judicially by the English courts, from whence we took it, is founded.

§ 2545. (2.) *The marital relation.*—This stands on still stronger grounds. Offences against the marital relation, involving, in fact, the whole class of offences against chastity, even when unaccompanied by force, have been held indictable in this country at common law; while in England, except when amounting to public nuisances, they are only cognizable in the ecclesiastical courts. And this is an extremely important fact. In England, not only is Christianity established by law, but, to enforce its moral code, a special range of courts, the ecclesiastical, is provided. Now, with us, Christianity, as a spiritual system, is not established by law, but, as a moral and economical, it is; and, to enforce it in this relation, we have borrowed all the economical and moral jurisdiction of the ecclesiastical tribunals, and worked it into our common law courts. If we search, therefore, for the source from whence we derive the authority to declare that offences against the marital relation are penal, we trace it directly through the ecclesiastical courts of England to the moral code of the New Testament, which these courts were established to enforce.

§ 2546. (3.) *The judicial relation.*—The whole sanction of public justice rests on religion; and, unless there be a positive conscientious dissent, on Christianity. On the Bible must all witnesses, judges, and jurors be sworn before entering on their duties, unless they have conscientious scruples against such an oath. In all cases where such scruples do not definitely and affirmatively exist, the law takes the responsibility, and requires the invocation of the God of the Bible before it will permit its officers to enter on their functions, or witnesses, brought to testify before these officers, to be heard. And it punishes with tremendous severity a

violation of this oath. For that it is the *oath* that becomes an essential element in the crime of perjury, is obvious from the fact that, if the oath was not administered regularly, the offence is not proved, though the false statement got to the jury and had been acted on by them. It cannot be disputed, therefore, that while, on the one hand, the Bible is not forced upon conscientious dissent, it is, nevertheless, at the foundation of our whole judicial system, so far as the great question of the execution of justice is concerned.

The prisoner's mere confession that he used the words charged will not authorize a conviction for blasphemy. The prosecutor must show that some one must have heard the words.[l]

2d. Obscene libels.

Statute.

Pennsylvania.

§ 2546 (*a*). *Obscene libel.*—If any person shall publish or sell any filthy and obscene libel, or shall expose to sale, or exhibit or sell any indecent, lewd and obscene print, painting or statute; or if any person shall keep and maintain any house, room or gallery, for the purpose of exposing or exhibiting any lewd, indecent and obscene prints, pictures, paintings or statutes, and shall be convicted thereof, such person shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year.—(Rev. Acts, Bill I., sect. 40.)

§ 2547. It is an indictable offence at common law to publish an obscene book or print;[m] or to publicly utter obscene language;[n] and so of any offence tending to corrupt the morals of the people.[o] It is not necessary, in such a case, to aver the offence to be a *common nuisance;* the indictment being for an action of evil example.[p] And any public show or exhibition which outrages decency, shocks humanity, or is *contra bonos mores,* is punishable at common law.[q]

§ 2548. The *obtaining* and *procuring* of obscene prints, with intent to sell them, is equally a misdemeanor; but the mere keeping of them with that intent is not.[r]

In the indictment, when the offence consists of words *spoken,* it would seem that the averment is sufficiently exact, if it preserve a general conformity between the words *laid,* and those *proved.*[s] As has already been noticed, it is not necessary, when the indictment is for a libel, to set out

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[l] People *v.* Porter, 2 Parker, C. R. (N. Y.) 14.

[m] Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 Serg. & Rawle, 91; Knowles *v.* State, 3 Day's Cases, (Conn.) 103; State *v.* Brown, 1 Williams, (Vermont,) 619.

[n] Bell *v.* State, 1 Swan, (Tenn.) 42; Barker *v.* Com., 7 Harris, 412.

[o] Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 Serg. & Rawle, 91; Knowles *v.* State, 3 Day's Cases, (Conn.) 103.

[p] Knowles *v.* State, 3 Day's Cases, (Conn.) 103.

[q] Knowles *v.* State, 3 Day's Cases, (Conn.) 103; see R. *v.* Sedley, 2 Str. 791; R. *v.* Hill, Id. 790; R. *v.* Read, Fost. Rep. 98; R. *v.* Curl, 2 Str. 788; R. *v.* Wilkes, 4 Burr. 2527, 2574.

[r] Dugdale *v.* R., 1 Dears. C. C. 64.

[s] Bell *v.* State, 1 Swan, (Tenn.) 42; see ante, § 351-2.

the obscene language in full; it is enough to aver the fact of the obscenity of the writing, and to give this as an excuse for not setting it forth.[t]

A count in an indictment charging defendant with having possession of indecent prints, with intent afterwards to sell them, is bad;[u] but a count charging defendant with procuring indecent prints with intent to sell is good, as the act procuring is an act done.[v]

In Virginia the following statute exists:

§ 2549. If a free person import, print, publish, sell or distribute any book or other thing containing obscene language, or any print, picture, figure or description, manifestly tending to corrupt the morals of youth, or introduce into any family or place of education, or buy or have in his possession any such thing for the purpose of sale, exhibition or circulation, or with intent to introduce it into any family or place of education, he shall be confined in jail not more than one year, and fined not exceeding two hundred dollars.—(Code, 1849, ch. 196, sect. 11.)

3d. Seditious libels.

§ 2550. Every man may publish temperate investigations on the nature and form of government; such matters are proper for public information; but if such publication is seditiously, maliciously, and wilfully, aimed at the independence of the United States, or the constitution thereof, or of any other state, the publisher is guilty of a libel.[w] Important as is the privilege of liberty of the press, if it be so employed as to disturb the peace of families, or the quiet of society, even when the truth alone is uttered, it becomes subject to indictment.[x]

§ 2551. In England it has been said, in illustration of the same doctrine that if a man curse the Queen, wish her ill, give out scandalous stories concerning her,[y] or do any thing that may lessen her in the esteem of her subjects, may weaken her government, or may raise jealousies between her and her people; or, if he deny the Queen's right to the throne, in common and unadvised discourse, (for if it be by advisedly speaking, it amounts to *præmunire*,) for all these are sedition.[z] It was said by Lord Ellenborough, that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, &c., are

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[t] Com. *v.* Holmes, 17 Mass. 331; Com. *v.* Sharpless, 2 Serg. & Rawle, 91; People *v.* Girardin, 1 Mann, (Mich.) 90; State *v.* Brown, 1 Williams, (Vt.) 619; ante, § 311, post, § 2611. For form, see Wharton's Prec. 968.

[u] R. *v.* Heath, R. & R. C. C. 184.

[v] See R. *v.* Fuller, R. & R. C. C. 308; R. *v.* Dugdale, 20 L. S. 219.

[w] R. *v.* Dennie, 4 Yeates, 270; 2 Campbell, 402.

[x] 3 Johnson's Cases, 70; Lord Raymond, 418; 3 Term. R. 428; 2 Wills. 275; Hawk. P. C. c. 73, s. 7; King *v.* Bear, 12 Mod. 221; King *v.* Lawrence, 12 Mod. 311; Queen *v.* Bedford, Gilbert's Cases, 297; Queen *v.* Tutchin, St. Tr. 5, 527; King *v.* Franklin, St. Trials, 9, 276; King *v.* Horn, Ibid.; Thomas *v.* Croswell, 7 Johnson, 267; King *v.* Root, 4 Wend. 113; Cramer *v.* Riggs, 17 Wend. 209; Robbins *v.* Treadway, 2 J. J. Mars. 540. See for forms, Wh. Prec. 953, &c.

[y] See R. *v.* Harvey et al., 2 B. & C. 257; 3 D. & R. 464.

[z] 4 Blac. Com. 423.

punishable.[a] Whether the defendant really intended, by his publication, to alienate the affections of the people from the government, or not, is not material; if the publication be calculated to have effect, it is a seditious libel.[b] In the language of a still greater authority, "If men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavor to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished."[c]

§ 2552. Libels on the legislature are severely punished, not only as tending to breaches of the peace, but as high breaches of privilege.[d]

Intemperate reflections on the proceedings of courts of justice have always been held libellous.[e] It is libelleous even to publish a correct account of judicial proceedings, if accompanied with comments and insinuations tending to asperse a man's character.[f]

§ 2553. Seditious words, though not in writing, are in themselves indictable.[g] Great particularity, however, as indictments for obscene or profane words, is requisite. Thus, any variance in substance will be fatal, as where the words were set out in the indictment in the third person, "*He is*," &c., and proved to have been spoken in the second person, "*You are*," &c.,[h] and where the words set out imported they were spoken of a thing, then present, and the words were proved to have been spoken of a thing not present at the time.[i]

§ 2554. Where the alleged libellous writing reflects on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is almost in all cases either directly or impliedly admitted by the libel itself[j] proof that he was in the habit of acting as such officer or professional man, would in that case be sufficient; but if the gist of the libel is, that the prosecutor had acted in a particular office without proper appointment, it is said to be essential to prove such appointment.[k]

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[a] R. *v.* Cobbett, Holt on Libel, 114; Starkie on Libel, 522.

[b] R. *v.* Burdett, 4 B. & Ald. 95; R. *v.* Harvey et al., 2 B. & C. 257; 3 D. & R. 464.

[c] Per Lord Holt, R. *v.* Tutchin, 5 St. Trials, 532; Holt on Libel, 424.

[d] See Sir W. W. Wynne, in the House of Commons; see, also, 1 Mod. 144; 2 Lord Raymond, 938; 1 Wills. 299; 8 Term R. 314; 14 East, 1. And see, in this country, Wm. Ketalta's case, Journ. Assembly of New York, 1795; George Clarke's case, Ibid., 1810, Journ. of Senate; Jefferson's Parliamentary Practice, sect. 3; Anderson's case, Journ. of Congress, Jan. 1818.

[e] Holt's Law of Libel, 170; 1 Hawk, c. 73, s. 8; 1 Campb. 359; Sir Wm. Jones, 431; 8 Term. R. 296; 1 Bos. & Pul. 525; 7 East, 503; 5 Esp. 123; see Wh. Prec. 944.

[f] Com. *v.* Blanding, 3 Pick. 304; Thomas *v.* Croswell, 7 Johnson, 264. A fair and strict report, however, is no libel: Lewis *v.* Walter, 4 B. & Ald. 605; see post, § 2577.

[g] Cro. Jac. 407; Maitland *v.* Golney; Campagnon *v.* Martin, 2 East, 433; Per Lawrence, J., 2 W. Blac. 790; ante, § 351; for form, see Wh. Prec. 961.

[h] R. *v.* Berry, 4 Term R. 217.

[i] Walters *v.* Mace, 2 B. & Ald. 756; Updegraff *v.* Com., 11 Serg. & R. 294.

[j] 4 Term R. 366; 1 New Rep. 196, 208; Jones *v.* Stevens, 11 Price, 235; Pearce *v.* Whale, 5 B. & C. 38.

[k] Smith *v.* Taylor, 1 New Rep. 196; 11 Mod. 308; 4 M. & S. 548; 1 Ad. & El. 695; 3 Bing. 432.

§ 2555. Slanderous words spoken to a magistrate, when in the execution of his office, are of themselves indictable.[l]

IV. Publication.

§ 2556. Evidence which shows that a libel came to the hands of the person libelled, or to the hands of another person, who read it, will be a sufficient proof of publication.[m]

The transmission of a sealed letter by mail, containing libellous matter, is indictable. The indictment, in such case, must charge that it was sent with the intention of provoking a breach of the peace, or other misdemeanors.[n] The defendant in such case, may be indicted for a publication either in the county in which the letter was mailed, or that to which it was directed.[o] If a libel is written in one county, and sent by post, addressed to a person in another county, or its publication in another county be in any way consented to, this is evidence of a publication in the latter county.[oo] Thus, if a libellous letter is sent by the post, addressed to a party out of the county in which the venue is laid, but it is first received by him within that county, this is a sufficient publication.[p] It was said however, that the post-mark of a particular place within the county, upon a letter containing the libel, is no evidence of a publication in that county; for the post-mark might be forged.[pp] But it would seem that post-marks are evidence that the letters on which they are, were in the office to which the post-mark belongs, at the date thereby specified.[q] The better opinion is, that the post-mark is *prima facie* evidence that the letter was put into office at the place denoted by the mark,[r] and that it was received by the person to whom it was addressed.[s]

§ 2557. The possession of a libel which has been published, is evidence to prove a publication of it by the possessor, but of no one else; though the handwriting of the maker of it is prima facie evidence of the publication of it against him.[t]

§ 2558. Selling the libel to the agent of the person libelled, is publication.[u]

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[l] R. v. Polocke, 2 Str. 1157; R. v. Watty, 2 Camp. 142; 2 Salk. 698; ante, § 351.

[m] Swindle v. State, 2 Yerger, 581; 2 Camp. 583; R. v. Burdett, 4 B. & A. 95; State v. Avery, 7 Conn. 269.

[n] R. v. Wegoner, 2 Starkie R. 245; Hodges v. State, 5 Humph. 112; 1 Hawk. c. 73, s. 11.

[o] R. v. Burdett, 4 B. & A. 95; U. S. v. Worrall, 2 Dall. 388; Whart. St. Tr. 189; ante, § 601–5.

[oo] Seven Bishops' case, 12 Howell, St. Tr. 331, 332.

[p] R. v. Watson, 1 Campbell, 215.

[pp] Ibid.

[q] See R. v. Plumer, R. & R. 264; R. v. Johnson, 7 East, 65.

[r] R. v. Johnson, 7 East, 65; Fletcher v. Braddyll, 3 Starkie, 64; 2 Starkie on Slander, 36, 38.

[s] Shipley v. Todhunter, 7 C. & P. 680; Warren v. Warren, 4 Tyrw. 850; Callan v. Gaylord, 3 Watts, 321; 2 Greenl. on Ev. s. 416.

[t] Gibson, C. J., Hazleton Coal Co. v. Megargel, 4 Barr, 324.

[u] Brunswick v. Harmer, 14 Q. B. 185.

It has been said that a party who communicates libellous matter to another, with a view to its publication, is guilty of publishing.[v]

Printing is not sufficient proof of publication, as the writer may have acted as compositor and pressman himself.[w]

Where a libel was published in a newspaper printed in the state of Rhode Island, but which usually circulated in a county in Massachusetts, and the number containing the libel was actually circulated in such county, it was held that this was conclusive evidence of a publication in such county.[x]

The identical libel published must be produced; though where it is in the prisoner's exclusive possession, or has been lost or destroyed, and perhaps in some other cases, where its production is out of the power of the prosecutor, then, as in other cases, secondary evidence is admissible of its contents.[y]

§ 2559. Evidence of the libel having been purchased in a bookseller's shop, or at a newspaper office, or the office of a news-vender, of a servant there, in the course of business, will maintain a count, charging the master with having published it,[z] even although it be proved that the master was not privy to it.[a] So, the delivery of a newspaper to the officer of the stamp-office, is a sufficient publication to sustain an indictment for a libel in that paper, inasmuch as the officer would at all events have an opportunity of reading the libel himself.[b]

§ 2560. The admission of the defendant himself, of the fact of his concern in the publication, is abundant,[c] but does not prove that he published it in a particular county.[d]

V. What communications are privileged.

1st. From the relation of the parties.

§ 2561. A publication, though defamatory, yet if written *bona fide*, or in confidence, or with a view of investigating a fact in which the party making it is interested, is not a libel.[e] Thus a letter from a son-in-law to his mother-in-law, volunteering advice about her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication, and not actionable, unless malice be shown.[f]

§ 2562. A person has a right to communicate to any other any informa-

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[v] Adams *v.* Kelly, R. & M. N. P. C. 157.
[w] R. *v.* Lovett, 9 C. & P. 462.
[x] Com. *v.* Blanding, 3 Pickering, 304.
[y] Johnson *v.* Hudson, 7 Ad. & El. 233; Huff *v.* Bennett, 2 Sand. 120; ante, § 608, 657.
[z] 4 Bac. Abr. Libel, b. 2; R. *v.* Almon, 5 Burr, 2686; see Com. *v.* Gillespie, 7 Serg. & R. 469, per Duncan, J.; see ante, § 151-4, 597-9.
[a] R. *v.* Walter, 3 Esp. 21; R. *v.* Gutch, M. & M. 433; A. G. *v.* Sidden, 1 C. & J. 229.
[b] R. *v.* Amphlit, 6 Dowl. & Ryl. 126; 4 B. & C. 35.
[c] Com. *v.* Guild, Thacher's C. C. 329.
[d] Seven Bishops' case, 12 Howell, St. R. 183.
[e] See Moore *v.* Ferall, 4 B. & Adol. 871; 1 N. & M. 559, S. C.
[f] Todd *v.* Hawkins, 2 M. & R. 20; 8 C. & P. 888, S. C.

tion he is possessed of in a matter in which they have a mutual interest; and it is a perfectly legal and justifiable object for one to induce another to become a party to a suit, as to a subject-matter in which both have an interest, and it is not because strong or angry language is used in such a communication that it will be a libel; the jury must go further, and see not merely whether expressions are angry, but whether they are malicious.[b]

§ 2563. Where B., a tradesman, is dismissed from serving A., one of his customers, A. stating as the reason of it, that B. charged for goods never delivered, and B. after this writes a letter to A. vindicating himself, and imputing the dishonesty to a servant of A., this is a privileged communication, if it be done *bona fide*, and without malice.[c]

In a case where A. had sold goods to B., a tradesman, and before the delivery of them, C., without being asked or solicited in any way to do so, speaks words injurious to the credit of B., as a tradesman, this was held not a privileged communication; but if he had been asked by A., as to the credit of B., it would have been so.[a]

§ 2564. Where A. is going to have dealings with B., and he makes inquiries of C., who gives A. information respecting B., this is a privileged communication, as every one is quite at liberty to state his opinion, *bona fide*, of the respectability of a party thus inquired about.[e] A letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character, in the management of certain concerns with which they entrusted him, and in which B., the writer of the letter, was likewise interested, was holden not to be a libel.[f]

§ 2565. It is a privileged communication where a master gives a correct character of a servant, upon any inquiry made to him relative to the character, and no action lies for it.[g]

§ 2566. Where the character was given maliciously, it was held otherwise. Thus, a master, in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of that charge stated that she had borrowed money when she came into his service, and repaid it before she had received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant, in consequence of her loss of character, might have gone on the town, he answered, "what is that to us?" It was held that this conduct was evidence to go before the jury (though slight) that the communication made to the intended master was made maliciously.[h]

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[a] Shipley *v.* Todhunter, 7 C. & P. 680.
[c] Coward *v.* Wellington, Id. 531.
[d] King *v.* Watts, 8 C. & P. 614.
[e] Story *v.* Challands, Id. 234.
[f] M'Dougall *v.* Claridge, 1 Campbell, 267.
[g] Hargrave *v.* Le Breton, 4 Burr. 2425; Pattison *v.* Jones, 2 Man. & R. 101; 8 B. & C. 574; Child *v.* Affick, 9 B. & C. 403; 4 Man. & R. 338, S. C.; 1 M. & P. 33, 61, 692.
[h] Kelly *v.* Partington, 4 B. & Ad. 700; 2 N. & M. 460, S. C.

§ 2567. If a letter written confidentially by the correspondent of a foreign mercantile house, contain very strong expressions concerning third persons engaged in mercantile transactions, imputing to such persons "notoriety for everything but fair dealing and a strict adherence to their engagements;" those expressions will take away the privilege often attached to such communications, and make the letter a libel.[i]

§ 2568. If a person originate false reports prejudicial to a tradesman, and being called by the employers of the tradesman to examine the matters complained of, repeat to them the false statements, such statements are not privileged communications.[j]

§ 2569. Communications made to a member of a dissenting congregation respecting an individual about to be appointed a minister of that congregation, are privileged communications and not libellous, if made *bona fide*, and without malice.[k]

Volunteer communications made by one member of a charitable association to another, on the other hand, reflecting on the conduct of the medical attendant of the establishment, are not privileged.[l]

§ 2570. A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication.[m] If such letter state particular facts it will not be a libel, though some of the persons receiving it believe that it was sent to intimate that the parties mentioned in it were common sharpers and swindlers. It is a question for the jury, at all events, whether the society really and *bona fide* intended to give the particular information which the letter contains. If the letter contain a general statement, such as that the party mentioned in it is considered as an improper person to be balloted for as a member of the society, it is otherwise.[n]

§ 2571. The following publication was held to be no libel—"*Notice.*—Any person giving information where any property may be found belonging to H. G., a prisoner in the King's Bench Prison, but residing within the rules thereof, and 3, 4 and 5 Portland-place, Borough road, shall receive five per cent. upon the goods recovered, for their trouble, by applying to Mr. Levy, Fetter-lane, Fleet street."[o] It was also there held that the following innuendo, "thereby meaning that the plaintiff had been, and was guilty of concealing his property, with a fraudulent and unlawful intention," was an addition, and not explanatory only of any previous matter alleged in the notice. Though it may be the duty of all persons to give information to the proper officer of the government concerning abuses, it was said, yet if one writes of another in a letter to such officer that he is

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[i] Ward *v.* Smith, 6 Bing. 749; 4 M. & P. 595; 4 C. & P. 302, S. C.
[j] Smith *v.* Matthews, 1 M. & Rob. 151.
[k] Blackburne *v.* Blackburne, 4 Bing. 395; 1 M. & P. 33, 63; 3 C. & P. 146, S. C.
[l] Martin *v.* Strong, 1 N. & P. 29; 5 Ad. & El. 535.
[m] Getting *v.* Foss, 3 C. & P. 160. [n] Ibid.
[o] Gomperty *v.* Levy, 1 P. & D. 214.

doing something to the prejudice of the government, which is not true, this is sufficient evidence of a malicious intention, and where no excuse is set up by the defendant, the jury may well find him guilty, though there be no other publication, and no further proof of malice.[p]

2d. From public policy.

§ 2572. The defendant may show, in England, that the alleged libel formed part of a speech delivered by him as a member of parliament; but this privilege extends only to his speaking in the house; for if he afterwards publish his speech he is amenable for it in the same manner as any other person.[q] So he may prove that the matter alleged to be libellous was contained in a petition to the Legislature, and published to its members only, or contained in articles of the peace, or in some other regular proceeding in a court of justice.[r]

§ 2573. Communications to a governor of a libellous character, respecting an officer, are excusable, if they do not originate in malice, or without probable cause.[s] A petition of parties interested to the proper authorities, against the appointment of one on the ground of his bad character, as disqualifying him for the appointment, is not actionable as a libel.[t] So, no action will lie for charges against a public officer, contained in a petition to the council of appointment, praying his removal from office, although the words used are false and actionable in themselves, without proving express malice, or that the petition was actually malicious and groundless, and presented merely to injure the plaintiff's character.[u] Even to publish the truth with good motives and justifiable ends, though it reflect on government, is not libellous.[v]

§ 2574. An officer in the navy has no right to make communications upon subjects with which he becomes acquainted in his professional capacity, except to the government; and, therefore, a letter written to Lloyd's Coffee-house, about the conduct of the captain of a transport ship, by a lieutenant, who was superintendent on board, is not a privileged communication.[w]

§ 2575. The delivery of a pamphlet by the governor of a distant province to his attorney-general, not for any public purpose, but in order that he might peruse it, is such a publication as will make him responsible if the pamphlet be a libel.[x]

A discourse delivered pending the canvass for an election of a member

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[p] Robinson *v.* May, 2 Smith, 3.

[q] R. *v.* Creevy, 1 M. & Sel. 273; R. *v.* Lord Abingdon, 1 Esp. 226; Coffin *v.* Coffin, 4 Mass. 1, 31; but see Com. *v.* Blanding, 3 Pick. 310.

[r] 1 Hawk. c. 73, s. 7, or the like; see Fairman *v.* Ives, 1 D. & R. 252; R. *v.* Lee, 5 Esp. 123; M'Gregor *v.* Thwaites, 3 B. & C. 24; 5 Dowl. & Ry. 447; Com. *v.* Clapp, 4 Mass. 163, 169; Com. *v.* Morris, 1 Virg. Cases, 176.

[s] Gray *v.* Pentland, 2 S. & R. 23, S. C.; 4 S. & R. 420.

[t] Harris *v.* Harrington, 2 Tyler, 129.

[u] Thorn *v.* Blanchard, 5 Johns. 508; Tappan *v.* Wilson, 4 Hammond, part 1, 190

[v] R. v. Dennie, 4 Yeates, 267.

[w] Harwood *v.* Green, 3 C. & P. 141.

[x] Wyatt *v.* Gore, Holt, 299.

of Congress, upon the opinion and decision of a commissioner of the Circuit Court of the United States, remanding a fugitive from service, under the fugitive slave law, aud upon the expediency and constitutionality of such a law, aud containing passages accusing the commissioner of "legal Jesuitism," of prejudice and want of feeling, of "a partisan and ignoble act," and comparing him to Pilate and Judas, is not a privileged communication.[xx]

A communication to the public at large, in a newspaper, in respect to the qualifications of a candidate for office, the appointment to which is made by a board of limited number, does not stand on the same footing of privilege, as if addressed to the appointing power.[y]

§ 2576. Counsel, in the discharge of their duty, and in matters relative to the issue, may make observations injurious to individuals,[yy] but the publication of such slanderous matter is not justifiable, unless it be shown that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence.[z] Thus, it was held indictable for a member of the bar, in an affidavit filed of record, wantonly to charge J. G. with fornication.[a] So where one acting as counsel for the plaintiff in a justice's court, prepared and presented a declaration in an action of trespass for breaking the plaintiff's close and killing, and otherwise injuring his sheep, in which, among other provoking expressions concerning the defendant, were inserted allegations that the defendant was "reputed to be fond of sheep, bucks and ewes, and of wool, mutton and lamb," and to be "in the habit of biting sheep;" and it was added, that "if guilty, he ought to be hanged or shot;" it was held that an indictment charging such matter as libellous, and alleging malice, was good on demurrer.[b]

§ 2577. It is lawful, also, to publish the history of the case, consisting of the facts in the case, and of the law as applied to those facts. The editor of a paper has a right to publish the fact that an individual was arrested, and upon what charge, but he has no right, while the charge is in the course of investigation, to assume that the accused is guilty.[c] The privilege of the publisher, however, does not work, unless the evidence itself, and not the result of the evidence, should be given.[d] And a publication of proceedings in a court of justice, containing defamatory matter, would be a libel, if the account be highly-colored or false;[e] or be commented upon with scandalous remarks and insinuations;[f] or where it does

[xx] Curtis *v.* Mussey, 6 Gray, (Mass.) 261.
[y] Hunt *v.* Bennett, 5 Smith, (N. Y.) 173.
[yy] Hedgson *v.* Scarlett, 1 B. & Ald. 232.
[z] Flint *v.* Pike, 6 Dowl. & R. 528; 4 B. & C. 473; Com. *v.* Culver, 2 Penn. Law Jour. 359; Com. *v.* Clapp, 4 Mass. 163, 169.
[a] Com. *v.* Culver, 2 Penn. Law J. 365.
[b] Gilbert *v.* People, 1 Denio, 41.
[c] Usher *v.* Severance, 20 Maine R. 9.
[d] Lewis *v.* Walker, 4 B. & Ald. 606; see Roberts *v.* Brown, 10 Bingh. 523.
[e] Waterfield *v.* Bishop of Chichester, 2 Mod. 118; Stile *v.* Nokes, 7 East, 493.
[f] Com. *v.* Blanding, 3 Pick. 304; Thomas *v.* Croswell, 7 Johns. 264; Lewis *v.* Clement, 3 B. & Ald. 702, S. in error; 7 Moore, 200; 2 B. & B. 257; 1 Price, P. C. 181;

not set forth all the material evidence ;[g] or where the publication is not for the mere purpose of publishing the account, but expressly for libelling the party, or for the vehicle of blasphemy, indecency, or the like.[h] The fairness of the report is a question for the jury.[i]

§ 2578. Every man has a right to give every public matter a candid, full, and free discussion ; but although other people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult ; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel ; but if a paper go beyond that, and be calculated to excite tumult, it is a libel.[j]

§ 2579. Where a member of a church had consented that the church should investigate any complaint which might be preferred against him in writing, by a person not a member ; it was held, that such a complaint would not be libellous, unless shown to have been made without probable cause, or as a pretence and cover for the design of slandering.[k]

The publication by a member of the Massachusetts Medical Society, of a true account of the proceedings of that Society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the Society and its members on account of such expulsion, is privileged ; although it speaks of the expelled member as " the offender" and remarks that " the Society has vindicated its action in this case, and its right to act in all parallel cases."[kk]

The publication by the directors of an incorporated society for promoting female medical education, in their annual report, of a " caution to the public" against trusting a person who had formerly been employed to obtain and collect subscriptions in their behalf, but has since been dismissed, is justified so far, only as it is made in good faith, and required to protect the corporation and the public against false representations of that person ; and the questions, whether the directors have acted in good faith, and have not exceeded their privilege are for the jury.[l]

§ 2580. Evidence that the object of the defendant in publishing the alleged libel was, to attack the vicious persons and establishments injurious to public morals, was held inadmisible to rebut the presumption of malice.[ll]

§ 2581. It was considered to be a libel, where a public officer published in a report of an official investigation into his conduct, the following comment upon the testimony of a witness before the commissioners of inquiry :

Stile *v.* Nokes, 7 East, 493 ; R. *v.* Fleet, 1 B. & Ald. 379 ; R. *v.* Fisher, 2 Camp. 570 ; R. *v.* Lee, 5 Esp. 123.

[g] Saunders *v.* Mills, 6 Bingh. 213 ; 3 N. & P. 520, C.

[h] R. *v.* Carlisle, 3 B. & Ald. 167 ; R. *v.* Creevy, 1 M. & Sel. 279 ; Lake *v.* King, 1 Saund, 131, 133.

[i] Cooper *v.* Lawson, 1 P. & D. 15 ; 8 A. & Ell. 746, S. C.

[j] R. *v.* Collins, 9 Car. & P. 456.

[k] Pennington *v.* Congdon, 2 Pick. 315 ; see Bradley *v.* Heath, 12 Pick. 163.

[kk] Barrows *v.* Bell, 7 Gray, Mass. 301.

[l] Gassett *v.* Gilbert, 6 Gray, Mass. 94.

[ll] Com. *v.* Snelling, 15 Pick. 337.

"I am extremely loath to impute to the witness, or his partner, improper motives in regard to the false accusations against me; yet I cannot refrain from the remark, that if their motives had not been unworthy of honest men, their conduct in furnishing materials to feed the flame of calmuny has been such as to merit the reprobation of every man having a particle of virtue or honor. They have both much to repent of for the groundless and base insinuations they have propagated against me."[m] So where a member of a school district wrote a letter to the school committee, accusing a teacher of want of chasity, and remonstrating against her appointment,—it was held, that the communication was libellous, if shown to have been made with express malice, or without probable cause.[n]

§ 2582. Though it may sometimes be necessary for the purposes of justice to hear or read matter of a scandalous, blasphemous, or indecent nature; yet it is not lawful, under the pretence of publishing that trial to re-utter or circulate such matter.[o] And the same as to the reports of proceeding (particularly *ex parte* proceedings) before magistrates.[p]

VI. Truth when admissible.

§ 2583. In Massachusetts, it has been lately provided by statute, that "In every prosecution for writing or for publishing a libel, the defendant may give evidence, in his defence upon a trial, the truth of the matter contained in the publication, charged to be libellous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall further be made to appear on the trial, that the matter, charged to be libellous, was published with good motives, and for justifiable ends."[q] Under this section, the burden is on the defendant, not only to prove the truth of the matter so charged, but also that it was published with good motives and for justifiable ends.[r]

§ 2584. In New York, no reporter, editor, or proprietor of any newspaper, shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper, of any judicial, legislative, or other public official proceedings, of any statement, speech, argument or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication."[s]

"Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor or proprietor, from an action or indictment for any libellous comments or remarks superadded to and interspersed or connected with such report."[t]

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[m] Clark *v.* Binney, 2 Pick. 113.
[n] Bodwell *v.* Osgood, 3 Pick. 379.
[o] R. *v.* Carlile, 3 B. & Ad. 167. and see 1 M. & Sel. 281; per Bayley, J.
[p] See R. *v.* Fisher, 2 Camp. 563; R. *v.* Fleet, 1 B. & A. 379; Duncan *v.* Thwaites, Dowl. & Ryl. 447; 3 B. & C. 583.
[q] Rev. Stat. Mass. c. 133, sect 6.
[r] Com. *v.* Bonner, 9 Met. 410.
[s] Laws of N. Y. 1845, chap. 130, p. 314.
[t] Ibid. sect. 2.

§ 2585. The constitution of New York requires, "In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."[u]

Similar provisions exist in the constitutions of Mississippi and Michigan.

§ 2586. In Pennsylvania, "In prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the truth published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."[v]

§ 2587. And by an act passed in 1856, "On the trial of indictments for writing or publishing a libel, the truth of the matter charged as libellous may be given in evidence; and if the jury, in any such case, shall find that the same was written or published from good motives and for justifiable ends, and the matter so charged was true, it shall operate to the acquittal of the defendant or defendants."[w] This was repealed, however, in 1860, by the revised act.[ww]

In Ohio:—"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted."[x]

In Maine, Kentucky, Illinois, Delaware, Indiana, and Arkansas, statutory provisions exist of the same general character.[y]

§ 2588. At common law, the general rule is, that the truth is inadmissible as a defence in a criminal prosecution for a libel,[z] though the doctrine was doubted by Kent, J., and Thompson, J., in a celebrated case in which the Supreme Court of New York were equally divided, and which led to the passage of the act of 6th April, 1805, afterwards incorporated in the constitution.[a] In those states where there is no statutory or constitutional limitation, the common law doctrine remains in force.[b] The malice of the publication, or the intent to defame the reputation of another, being the essence of the offence, the truth of the libel, as it does not negative this

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[u] Art. 7, sect. 8.
[v] Constitution, Art. 9, sect. 8.
[w] Act 13 May, 1856, § 1, P. L. 574.
[ww] For general statute, see ante, § 2523(*a*).
[x] Swan's Stat. p. 11.
[y] See 2 Starkie on Slander, by Wendell, 221, note.
[z] R. *v.* Burdett, 4 B. & Ald. 95; R. *v.* Halpin, 9 C. & C. 65; Doug. 387.
[a] People *v.* Croswell, 3 Johnson's Cases, 337.
[b] 3 Pick. 312; Davis' Va. Criminal Law, 276; State *v.* Allen, 1 M'Cord, 525; State *v.* Lehre, 2 Brevard, 446; Com. *v.* Sanderson, 3 Penn. Law Jour. 269; State *v.* Burnham, 9 New Hamp. 34.

intention, cannot be shown in defence.[c] But as it may be shown that the publicatian was for a justifiable purpose, and not malicious, nor with the intent to defame, so there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, where such evidence will tend to negative the malice and intent to defame.[d] But it will be noticed, that to make the truth, even with the intent to rebut malice, admissible, it must be first shown, "that the publication was for a justifiable purpose, and not malicious, nor with intent to defame any man." Thus, where the alleged libel consists in an admonition from father to son; or, in the necessary animadversions of a judge himself, when commenting, in a charge, on the course of the parties before him; or in the character given by a master of a servant;[e] where a neighbor gives what he conceives to be a correct character of the credit and solvency of a tradesman;[f] where a client makes confidential representations injurious to an attorney's professional character in the management of certain concerns, to other persons jointly interested;[g] where a memorial is presented to a board of excise, remonstrating against the granting of a license to a particular individual to keep a tavern, injurious to the character of a party seeking a license;[h] where words are spoken by a party or counsel in good faith, in the course of judicial proceedings;[i] where the officer of an election, in the discharge of his duties, charges a voter with voting twice;[j] where charges are made against a public officer, contained in a petition addressed to the legislature or to council of appointment for his removal;[k] where the editor of a sectarian paper, having published an obituary notice, in which it was stated that the deceased never used profane language, the editor of another sectarian paper contradicts the fact, and states the deceased to be a profane swearer;[l] in these, as well as in other cases, which have been already noticed under another head, it would seem admissible to show that the alleged libel was published under a sincere sense of duty, and, in most cases, for the purpose of doing so, to prove the truth of the charges. It may be objected that the cases above cited refer chiefly to actions for damages in civil courts, in which it has been laid down, that if a writing, although injurious to another's character, be published, not maliciously, or with intent to defame, but in the honest discharge of a conscientious duty, it is not libellous.[m] But there are decisions, both in England and in this country, which go to extend the same doctrine to criminal proceedings; and indeed, such would seem to be the true position, as it would be strange if a

[c] Com. *v.* Clapp, 4 Mass. 153, 168; Com. *v.* Blanding, 3 Pick. 304; Com *v.* Snelling, 15 Pick. 337, 339; Com *v.* Morris, Virginia, General Court June, 1811; see Wheeler's C. C. 465.

[d] Com. *v.* Clapp, 4 Mass. 163, 169.

[e] Bul. N. P. 8; 4 Bur. 2425; 1 Term R. 110; 3 B. & P. 587. [f] Bul. N. P. 8.

[g] 1 Camp. 227, [h] Vanderveer *v.* M'Gregor, 12 Wend. 545.

[i] Hoar *v.* Wood, 3 Metcalf, 193. [j] Bradley *v.* Heath, 12 Pick. 163.

[k] Thorn *v.* Blanchard, 5 Johnson, 508; Com *v.* Morris, (Virginia,) 2 Wheeler's C. C. 465; O'Donahue *v.* M'Govern, 23 Wend. 26.

[l] Com. *v.* Batchelder, Thacher's C. C. 191, *sed quæres.*

[m] See also Delany *v.* Jones, 4 Esp. 191; Brown *v.* Croom, 2 Stark. N. P. C. 297; R.

man should suffer penal consequences in one court for a publication which is judged innocent, and even praiseworthy, in another. "Cases," it has been said by a high authority, "may occur wherein circumstances extrinsic of the meaning published, may rebut the presumption of *malice* in publishing matter in a certain degree detracting."[n] In a case determined in Massachusetts before the truth was there made admissible by statute, it was said, "Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge by proving that the publication was for a justifiable purpose, and not malicious nor with the intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame."[o] In another case in the same state, the same rule was recognized, though it was held that it must, in the first place, be shown, from the position of the parties, or from extrinsic evidence, that the object of the publication was the discharge of a public or private duty.[p] And in a later case, in Philadelphia, after a careful review of the authorities, it was held that where a guest in a public hotel had given out in the newspapers that he had been robbed of his money at the hotel, in the night-time, and the proprietor replied to the publication by a counter statement, in which he denied that the robbery charged had been committed at his house, and narrated facts which reflected unfavorably on the prosecutor, the truth was admissible to rebut the legal presumption of malice.[q]

§ 2589. It must be observed, however, that though the words be true, and though they may have been uttered under a sense of duty, the defendant, if the language and tenor be malicious, is guilty of a libel.[r]

§ 2590. In those States in which the truth is admissible by statute either in every case, or in particular classes of cases, the same principle is laid down as holds, at common law, in cases where, by the action of the court, it is admitted. If a person publish defamatory matter of another, without any lawful occasion for making a publication, and where the sole end is to gratify a spirit of detraction, or to bring the subject of it into contempt and disgrace, the proof of truth on trial does not justify or excuse the publication; and in such cases an indictment may be sustained, whether the allegations are true or false. If the end to be attained by a publication is justifiable, *e. g.*, the removal of an incompetent officer, or to prevent the election of an unsuitable one, or to give useful information to

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v. Bayley, Andr. 229; Fairman *v.* Ives, D. &. R. 252; and see, 1 Russell on Crimes, 224.

[n] George on Libel, 153; 1 Starkie's Law of Slander, 292, and the cases there cited. And see State *v.* Bainham, 9 New Hampshire, R. 34.

[o] Com. *v.* Clapp, 4 Mass. 169; and see further, Coffin *v.* Coffin, 4 Mass. 1, 31.

[p] Com. *v.* Buckingham, 2 Wheeler's C. C. 438.

[q] Com. *v.* Sanderson, 3 Penn. Law J. 269.

[r] King *v.* Salisbury, 1 Maule & Sel. 273; Lord Raymond. 341; Com. *v.* Sanderson, 3 Penn. Law Jour. 259; People *v.* Star, per Kent, J., 5 Boston Law Reporter, 153.

the community, or to those who have a right and ought to know, the occasion is lawful; and the occasion being one in which matter of such a nature may properly be published, the party making the publication may either justify or excuse it. Where, however, there is merely the color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretence to publish and circulate defamatory matter, he is liable in the same manner as if no such pretence existed.[s]

§ 2591. When the defendant attempts to justify by proving the truth, the justification must be as broad as the charge. The verification of part will not be enough. But if he justifies by showing that there was a lawful occasion for the publication, and that the matter published was true, his motives in making the publication are immaterial. If he cannot justify, he may excuse the publication by showing that it was made on a lawful occasion, on probable cause, and with good motives. But if the motive be malicious, it is no defence that there were probable grounds to believe the libellous matter to be true.[t]

§ 2592. In an indictment for a libel in charging one as being a "murderer and foresworn," it is not competent for the defendant to prove that there had been a general report in the neighborhood that such person was a murderer and foresworn.[u]

§ 2593. Under the Massachusetts statute the defendant cannot show, short of proving the truth, that the information upon which he acted came from so creditable a source, and under such circumstances, as to leave no doubt upon his mind of its truth.[v] Under the same statute, upon an indictment for a libel imputing general misconduct to a magistrate, it is competent for the court to order the defendant to elect whether he will give the truth in evidence; and upon his making his election to do so, to file a bill of particulars, specifying the particular instances of misconduct which he purposes to prove, and to hold him strictly to the proof of the particular specification.[w]

VII. Malice how proved and rebutted.

§ 2594. To constitute malice, in the publisher of a libel, it is not necessary that personal ill-will to the person libelled should be shown.[x]

Publication of a libel is not excused by the publisher's ignorance that it contains libellous matter.[xx]

§ 2595. In England, by the passage of Mr. Fox's bill, libels were put on the same basis as all other criminal offences, and the question of mali-

[s] Com. *v.* Snelling, 15 Pick. 337; Sterling *v.* Sherwood, 30 Johns. R. 204; Stow *v.* Converse, 4 Connect. 17; Root *v.* King, 7 Cowen, 613.
[t] State *v.* Burnham, 9 New Hamp. R. 34; Usher *v.* Severance, 20 Maine R. 50.
[u] State *v.* White, 7 Iredell, 180.
[v] Com. *v.* Snelling, 15 Pick. 337; Thacher's C. C. 318.
[w] Com. *v.* Snelling, 15 Pick. 321; Thacher's C. C. 318.
[x] Com. *v.* Bonner, 9 Metc. 410. [xx] Curtis *v.* Mussey, 6 Gray, (Mass.) 261.

cious intent was opened to the decision of the jury. With the exception of a single case, already referred to, where the Supreme Court of New York was equally divided,[y] the law in this country has uniformly been, even in those States where there is no statutory guarantee, that the jury have a right to give their verdict on the whole issue, and decide the question whether the matter charged be libellous or not, as well as the question of fact as to the publication, and the truth of the innuendoes.[z]

Evidence of the defendant's having published other copies of the same libel,[a] or other libels,[b] provided they expressly refer to the subject of the libel set out in the indictment,[c] is receivable, in order to prove the malicious or seditious intent.[d] But, if such publications are *posterior* to the one complained of, it would seem, they are not admissible.[e]

§ 2596. Libellous writings, found on the defendant's person, cannot, it seems, be put in evidence, without in some way showing that he knew or approved of their contents.[f]

§ 2597. The defendant, it is said, has a right to have the whole of the publication read from which the alleged libellous passage is an extract.[g] Two articles, however, not simultaneously published in the same paper or book, cannot be coupled together in order to ascertain whether or not the sense of one of them is libellous.[h]

VIII. Indictment.[i]

§ 2598. It is necessary that the *publication* should be expressly averred, as it is doubtful whether the mere composition and writing is an offence.[j]

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[y] People *v.* Croswell, 3 Johns. Cases. 337.

[z] State *v.* Lehre, 2 Brevard, 446; State *v.* Allen, 1 M'Cord, 525; 1 Virg. Cases, 180; Davis' Virg. Crim. Law, 280.

[a] Plunkett *v.* Cobbett, 5 Esp. 136.

[b] R. *v.* Pierce, Peake, 75; see ante, 631–5, 639–41.

[c] Finnety *v.* Tipper, 2 Camp. 72; Com. *v.* Harmon, 2 Gray, 289.

[d] Com. *v.* Snelling, 15 Pick. 337; Thacher's C. C. 318.

[e] Thomas *v.* Croswell, 7 Johnson, R. 270; U. S. *v.* Crandall, 4 Cranch C. C. R. 683; see generally, ante, § 631–5, 639–41.

[f] U. S. *v.* Crandall, 4 Cranch C. C. R. 673.

[g] Cook *v.* Hughes R. & M. 112; see Thornton *v.* Stephen, 2 M. & R. 45.

[h] Usher *v.* Severance, 20 Maine R. 50.

[i] For forms, see Wh. Prec., as follows:—

(939) General frame of indictment.
(940) Libel on an individual generally.
(941) Publishing generally.
(942) Posting a man as a scoundrel, &c.
(943) Libel upon an attorney, contained in a letter.
(944) Publishing an *ex parte* statement of an examination before a magistrate for an offence with which the defendant was charged.
(945) Information for writing and publishing a libel against the king and government.
(946) For publishing the same in other newspapers.
(947) Libel on the President of the United States.
(948) Another form for same.
(949) Libel on a judge and jury when in the execution of their duties.
(950) Libel on a sheriff, attributing to him improper motives and conduct, in

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[j] R. *v.* Burdett, 4 B. & Ald. 95.

§ 2599. The alleged libellous matter, also must be set out accurately, any variance being fatal.[k]

An indictment charging that the defendant published a libel on the twenty-first of the month, may be supported by a publication on the nineteenth of the same month. It is otherwise, however, if the indictment has alleged that the libel was published in a paper dated the twenty-first of the month.[kk]

§ 2600. Where parts are 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 in a certain other part, &c., &c.[l] If the libel be in a foreign language, it must be set out in such language, verbatim, together with a correct translation.[m]

§ 2601. The manner in which the libellous instrument must be set forth

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getting up petitions, &c., for the locating of the seat of justice in a particular county.

(951) Libel on a justice of the Police Court in Boston, &c.

(952) Libel on an officer, said libel consisting of a paper alleged to have been read by the defendant at a public meeting, but which was in the defendant's possession, or destroyed, and consequently was not produced to the grand jury.

(953) Seditious libel. The libellous matter consisting in an address to the electors of Westminster, of which the defendant was the representative, charging the government with trampling upon the people, &c.

(954) Publishing at a time of popular commotion resolutions attacking the government as blood-thirsty, &c.

(955) Libel in German, in the Circuit Court of the United States.

(956) Libel in French against a foreign potentate.

(957) Sending a letter to a commissioner of revenue in the United States containing corrupt proposals.

(958) Writing a seditious letter with intent to excite fresh disturbance in a district in a state of insurrection.

(959) Hanging a man in effigy.

(960) Insulting a justice in the execution of his office.

(961) For seditious words.

(962) Another form for same.

(963) Uttering blasphemous language as to God.

(964) Same under Rev. stat. Mass., ch. 130, s. 15.

(965) Blaspheming Jesus Christ.

(966) Blaspheming the Holy Ghost.

(967) Composing and publishing blasphemous libel.

(968) Obscene libel. First count, not setting forth libellous matter.

(969) Second count. Publishing an obscene picture.

(970) Exhibiting obscene pictures.

(971) Against the printer of a newspaper for publishing an advertisement by a married woman, offering to become a mistress.

(972) Indictment for threatening to accuse of an infamous crime.

(973) Sending a letter, threatening to accuse a person of a crime. Mass. Rev. sts., ch. 125, § 17.

(974) Sending a letter threatening to burn a dwelling-house. Mass. Rev. sts., ch. 125, § 17.

(975) Sending a threatening letter.

[k] Cartwright *v.* Wright, 1 D. & R. 230; Walsh *v.* State, 2 M'Cord, 285; Wright *v.* Clements, 3 B. & Ald. 503; see antea, § 305–13, 606–9.

[kk] Commonwealth *v.* Varney, 10 Cush. (Mass.) 402.

[l] See 1 Camp. 350, per Lord Ellenborough; Archbold's C. P. 494.

[m] Zenobio *v.* Axtel, 6 T. R. 162; ante, § 313.

has been heretofore considered.[n] It is enough now to say that if the indictment does not profess on its face to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient, on demurrer, or in arrest of judgment.[o] It is not sufficient to profess to set it forth according to its substance or effect.[p] Where the indictment charged that the libel "contained, amongst other things, in substance, the following false, malicious and libellous matters and things, according to the tenor and effect following, that is to say," &c., it was held that this averment professed to set forth the substance and not the words of the libel, and was therefore invalid.[q] And the same view was taken where the indictment alleged, that the defendant published, &c., unlawful and malicious libel, *according to the purport and effect, and in substance* as follows: the words between *libel* and *as follows*, cannot be rejected as surplusage.[r]

§ 2602. And so where the indictment charged that the defendant "did write a certain false, malicious and defamatory libel, of and concerning the said E. K., which said false, malicious, and defamatory libel, is of the following purport and effect, that is to say," and then set out with inverted commas, what the evidence showed to be an exact copy of the libel. On a motion in arrest of judgment, it was held, that the indictment was bad, because it did not profess to set out the libel in *hæc verba*.[s]

§ 2603. Where it does not appear from the paper itself who was its author, or the persons of and concerning whom it was written, or the purpose for which it was written, each of these should be explicitly averred, as facts for the consideration of the jury.[t]

§ 2604. It is not necessary, however, to set out the date and signature at the foot of the libel.[u]

If the libellous matter be not direct, but only libellous by allusion or reference, the fact understood must be stated by introduction, and must be pointed at by explanatory innuendoes.[v]

§ 2605. When the statement of an extrinsic fact is necessary in order to render the libel intelligible, or to show its libellous quality, such extrinsic fact must be averred in the introductory part of the indictment; but where it is necessary merely to explain a word by reference to something which has preceded it, an innuendo is used.[w]

§ 2606. Where the persons, alleged to have been libelled, are alluded to in ambiguous and covert terms, it is not sufficient to aver generally, that the paper was composed and published "of and concerning," the persons alleged to have been libelled, with innuendoes, accompanying the covert terms, whenever they occur in the paper as set out in the indictment, that

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[n] See ante, § 305-13, 606-9.
[o] Ante, § 306-7; State *v.* Twitty, 2 Hawks. 284; State *v.* Goodman, 6 Rich. 387.
[p] Com. *v.* Tarbox, 1 Cushing, 66; Com. *v.* Wright, 1 Cush. 46; State *v.* Brownlow, 7 Humph. 63.
[q] Ibid.
[r] Com. *v.* Wright, 1 Cush. 46; ante, § 306-7.
[s] State *v.* Goodman, 6 Richardson, 387.
[t] State *v.* Henderson, 1 Rich. 179.
[u] Com. *v.* Harmon, 2 Gray, 289.
[v] State *v.* Niesce, N. C. Term. R. 270.
[w] Bradley *v.* State, 1 Walker, 156.

they meant those persons, or were allusions to their names. There should be a full and explicit averment, that the defendant, under and by the use of the covert terms, wrote of and concerning the persons alleged to be libelled.[x]

Under a declaration which alleges the publication of a certain "libel concerning the plaintiff" but contains no innuendoes, colloquiums or special averments of fact to connect the publication with the plaintiff, if no evidence is offered to connect him therewith, except the publication itself, the question, whether the publication refers to the plaintiff, is for the court and not for the jury.[xx]

§ 2607. An allegation that the defendant published a libel, "tending to blacken the honesty, virtue, integrity, and reputation of the said A. B., and thereby to expose him to public hatred, ridicule, and contempt, in which said false, scandalous, malicious, defamatory, and libellous matters of and concerning the character, honesty, virtue, integrity and reputation of the said A. B., &c.," is a sufficient allegation that it was "of and concerning A. B."[y]

The court will regard the use of fictitious names and disguises, in a libel in the sense they are commonly understood by the public.[z]

§ 2608. 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.[a] Thus in an action for the words "He is a thief," the defendant's meaning in the use of the word "he," cannot be explained by an innuendo "meaning the said plaintiff," or the like, unless something appear previously upon the record to ground that explanation; but, if the words had previously been charged to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for when it is alleged that the defendant said of the plaintiff "He is a thief," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "he."[b] The indictment must set forth matter libellous on its face, of which the court is to judge, or matter not libellous on its face, and allege that it was intended by the prisoner to be so, in which case the question of intent is for the jury to determine.[c]

§ 2609. Where the plantiff 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 these appellations the plaintiff, it was held, notwithstanding the innuendo, that the declaration was bad, for want of an averment that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying them to him, or something to that effect.[d]

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[x] State *v.* Henderson, 1 Rich. 179.
[xx] Barrows *v.* Bell, 7 Gray, (Mass.) 301.
[y] Taylor *v.* State, 4 Georgia, 14.
[z] State *v.* Chace, 1 Walker, 384.
[a] See 2 Salk. 512; Cowp. 684; Mix *v.* Woodward, 12 Connect. 262; Van Vechten *v.* Hopkins, 5 Johns. 211.
[b] Archbold's C. P. 494.
[c] State *v.* White, 6 Iredell. 418.
[d] Miller *v.* Maxwell, 16 Wend. 9; see, also, 2 Hill, 472, and 12 Johns. 474.

§ 2610. In another case, in an action on the case against a man for saying of another "he has burnt my barn," the plaintiff cannot, by way of innuendo, say "meaning my barn full of corn;"[e] because this is not an explanation derived from any thing 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 that barn, he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete.[f]

On the trial it is necessary to prove the averments or application of the libellous matter, where the meaning is not clear.[g]

§ 2611. Whether the libel was published of and concerning the plaintiff, is a question of fact for the jury.[h] 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.[i]

On an indictment for a libel against J. C., 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. C. It was held that it was not necessary to prove that the prosecutrix was the only daughter.[j]

How a lost or destroyed instrument is to be pleaded, has been already discussed.[k] It is not necessary that obscene language should be set out in full—a general averment of its nature will be sufficient.[l]

CHAPTER VIII.

ESCAPE AND BREACH OF PRISON.[a]

Statutes.

Pennsylvania.

§ 2611 (*a*). *Escape in criminal cases.*—If any person arrested and imprisoned, charged with an indictable offence, shall break prison, or escape, or shall break

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[e] Barham's case, 4 Co. 20, a.

[f] Archbold's C. P. 494; 4 R. Ab. 83, pl. 7, 85, pl. 7; 2 Ro. Rep. 244; Cro. Jac. 126, 89; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, n. 3; Golstein *v.* Foss, 9 Dowl. & Ryl. 197; 6 B. & C. 154; Clement *v.* Fisher, 1 Mann. & Ryl. 281; 7 B. & C. 459; Alexander *v.* Angle, 1 C. & J. 143; R. *v.* Tutchin, 5 St. T. R. 532.

[g] State *v.* Perrin, 2 Brevard, 474. [h] Van Vechten *v.* Hopkins, 5 Johnson, R. 211.

[i] Com. *v.* Buckingham, Thacher's C. C. 29.

[j] State *v.* Perrin, 1 Tr. Con. Rep. 446; 3 Brevard, 152.

[k] Ante, § 311, 608. [l] Ante, § 311, 2548.

[a] See Wharton's Precedents, as follows:

(633) Escape. Indictment for a conspiracy to

(923) Negligent indictment, against constable for

prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed, was a crime or misdemeanor punishable on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable on conviction, by simple imprisonment without labor; if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offence, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offence, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison, although no actual escape was made by him.—(Rev. Act, 1860, Bill I., sect. 3.)

§ 2611 (*b*). *Aiding a prisoner to escape.*—If any person shall aid or assist a prisoner, lawfully committed or detained in any jail for any offence, to make or to attempt to make his escape therefrom, although no escape be actually made, or if any person shall convey, or cause to be delivered, to such prisoner, any disguise, instrument or arms proper to facilitate the escape of such prisoner, although no escape or attempt to escape be actually made, he shall, on conviction, be deemed guilty of a misdemeanor, and be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding two years; and if any person shall aid or assist any prisoner to escape, or attempt to escape from the custody of any sheriff, constable, officer or other person who shall have the lawful charge of such prisoner, every person so offending, shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or simple imprisonment, as the court may direct, not exceeding two years.—(Ibid. sect. 4.)

§ 2611 (*c*). *Voluntary escape by officers in criminal cases.*—If any sheriff, coroner, keeper of any jail, constable or other officer, having any offender, convicted or accused of any crime, in his lawful custody for such crime, shall voluntarily permit or suffer such offender to escape and go at large, every such sheriff, coroner, keeper of jail, constable or other officer so offending, shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding five years, and shall moreover by the said sentence be dismissed from office.—(Ibid. sect. 5.)

§ 2611(*d*). *Escape by negligence of officers or keepers of prisons.*—If any keeper, jailor, sheriff, or other officer having a prisoner in his custody or charge, under a criminal conviction, sentence or charge, shall suffer such prisoner through gross negligence to escape, he shall be guilty of a misdemeanor, and on conviction, be sentenced to an imprisonment, not exceeding one year, and to pay a fine not exceeding five hundred dollars.—(Ibid. sect. 6.)

§ 2611 (*e*). *Refusal by an officer to arrest or receive an offender, or voluntarily*

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(921) Voluntary indictment against jailor for
(924) Escape. Indictment against prisoner for
(1053 4) Attempt to facilitate a third party, indictment for

permitting him to escape when in custody.—If any sheriff, coroner, or keeper of a jail, constable or other officer, shall wilfully, and without reasonable cause, refuse to execute any lawful process directed to him, requiring the apprehension or confinement of any person charged with, or convicted of, a criminal offence, or shall wilfully, and without reasonable cause, omit to execute such process, by which such person shall escape, he shall be guilty of a misdemeanor, and on conviction, be sentenced to an imprisonment not exceeding two years, and a fine not exceeding five hundred dollars.[aa]—(Ibid. sect. 6.)

§ 2612. In the several states, with but a few partial exceptions, severe penalties are prescribed against both keeper and prisoner in case of escape. At common law it is held that every liberty given to a prisoner, not authorized by law, is an escape.[b]

In Pennsylvania it is a felony at common law for the keeper of a prison voluntarily to suffer a prisoner charged with felony to escape.[bb]

It is not necessary to prove negligence in the defendant, the law implies it;[c] but if the escape were not in fact negligent, if the prisoner by force rescued himself, or was rescued by others, and the officer made fresh pursuit after him, but without effect, and took throughout every precaution in his power; all this must be shown on the part of the defendant. And so severe is the policy of the law in this respect, that it is held that nothing but the act of God, or of irresistible adverse force, will be an excuse.[d] It is enough also to prove that the warrant on which the prisoner was convicted was legal; it is not requisite for the prosecutor to prove that he actually committed the offence with which he was charged.[e] On a charge

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[aa] "The provisions of these sections against escapes by prisoners; voluntary or negligent escapes of prisoners suffered by officers; aiding or facilitating the escape of prisoners; rescuing prisoners in lawful custody; resisting, assaulting, or beating officers attempting to arrest parties charged with crime; refusing to aid officers in the arrest of such parties, or in the maintenance of the public peace; and neglects and refusals of officers to execute lawful process,—are new to our statute law, although punishable at common law. They will be found to provide against a series of offences which either defeat or seriously impede the administration of criminal justice. A wide range of discretion in the punishments of these crimes is necessarily given to the courts, because they are so varied in their nature, and so different in their intrinsic magnitude, that it would be impossible to make even an approximate approach to the extent of penalty which should be applied to each particular case as it arises. The common law punishments now attached to them, of fine and imprisonment, have no limits other than the discretion of the court. Those prescribed by these sections restrain this general power as far as it has seemed to us to be judicious or practicable. The only existing statutory penalties against these crimes are found in the thirty-first and thirty-second sections of the Act of April 5, 1790, entitled 'An Act to reform the penal laws of this State.'' 2 Smith's Laws, 541. Brightly's Digest, 402, Nos. 4, 5; and the sixth section of an Act, entitled 'A further supplement to the penal laws of this State,' passed the 4th of April, 1807. 4 Smith's Laws, 394. Brightly's Digest, 403, No. 9. These laws punish negligent escapes, suffered by jailors, with fines, and make escapes by prisoners, sentenced to hard labor, punishable with such additional hard labor and corporeal punishment, not extending to life or limb, as the court, before whom such escaped prisoner shall have been convicted, shall adjudge and direct; a discretion in the application of punishment certainly sufficiently liberal." (Revisors' Note.)

[b] Colby *v.* Sampson, 5 Mass. 310, 312.

[bb] Weaver *v.* Commonwealth, 29 Penn. State R. 445.

[c] See 1 Hale, 600.

[d] State *v.* Halford, 6 Rich. 58.

[e] 2 Hawk. c. 28, s. 16.

against the prisoner for breach of prison, the same principle obtains; though if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him;[f] or if he have been subsequently indicted for the offence and acquitted, this will be a sufficient defence to the indictment for breach of prison.

§ 2613. A person confined in jail, who attempts to escape by breaking of the prison, in consequence of which a fellow-prisoner, confined for felony, escapes, is indictable under the New York act.[g]

§ 2614. Aiding and assisting to escape from jail a person committed on suspicion of having been accessory to the breaking the house of S. with intent to commit felony, is not indictable under a repealed statute of New York,[h] because the prisoner was not committed on any distinct and certain charge of felony.[i] Lying in wait near a jail, by agreement with the prisoner, and carrying him away, is not an offence against the same statute, that is a misdemeanor at common law.[j]

§ 2615. An indictment against a jailer for permitting a prisoner in his custody to have an instrument in his room with which he might break the jail and escape, and for failing carefully to examine, at short intervals, the condition of the jail, and what the prisoner was engaged in at the said jail, in consequence of which the prisoner escaped, does not state an indictable offence.[k]

CHAPTER IX.

POLYGAMY, BIGAMY, INCEST, &c.

A. STATUTES.
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NEW YORK.
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[f] 1 Hale, 610, 611.
[g] People *v.* Rose, 12 Johnson, 339.
[h] Sess. 24, c. 58, s. 12, 13; 1 N. R. L. 411.
[i] People *v.* Washburn, 10 John. 160.
[j] People *v.* Tompkins, 9 Johnson, 70.
[k] Connell's case, 3 Gratt. 587.

III. PARTIES BEYOND SEAS OR ABSENT, § 2629.
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VII. SECOND WIFE, WHEN ADMISSIBLE WITNESS, § 2637.
VIII. INDICTMENT, § 2638.

A.—Statutes.

Massachusetts.

§ 2616.—*Polygamy.*—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 in the state prison, not more than five years, or in the county jail, not more than three years, or by fine not exceeding five hundred dollars.—(Rev. Stat. ch. 130, sect. 2.)[a]

§ 2617. *Exceptions.*—The provison of the preceding section shall not extend to any person whose husband or wife shall have been continually remaining beyond sea, or shall voluntarily have withdrawn from the other, and remained absent for the space of seven years together, the party marrying again not knowing the other to be living within that time, nor to any person who has been legally divorced from the bonds of matrimony, and was not the guilty cause of such divorce.—(Ibid. sect. 3.)

New York.

§ 2618. *Bigamy.*—Every person, having a husand or wife living, who shall marry any other person, whether married or single, shall, except in the cases specified in the next section, be adjudged guilty of bigamy; and upon conviction, shall be punished by imprisonment in a state prison for a term not exceeding five years.—(2 Rev. Stat. ch. 687, sect. 8.)[aa]

§ 2619. *Exceptions.*—The last section shall not extend to the following persons or cases:

1. To any person, by reason of any former marriage, whose husband or wife, by such marriage, shall have been absent for five successive years, without being known to such person, within that time, to be living: nor,

2. To any person, by reason of any former marriage, whose husband or wife, by such marriage, shall have absented himself or herself from his wife or her husband, and shall have been continually remaining without the United States for the space of five years together: nor,

3. To any person, by reason of any former marriage, which shall have been dis-

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[a] See for forms, Wh. Prec. 987.

[aa] In an indictment under the Rev. Sts. c. 130, s. 2, for continuing to cohabit in this State with a second wife, the defendant having a former wife living, it is a sufficient statement of the time when the offence was committed to allege that the second marriage was on a certain day, and that the defendant "afterwards did cohabit and continue to cohabit with said S. J. at L., in said county, for a long space of time, to wit, for the space of six months." (Commonwealth *v.* Bradley, Cushing, 553-4.)

If a woman who has a husband living marry another person she is punishable, though her husband has voluntarily withdrawn from her, and remains 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. (Com. *v.* Marsh, 7 Met. 472; see Com. *v.* Hunt, 4 Cush. 49.)

solved by the decree of a competent court, for some cause other than the adultery of such person: nor,

4. To any person, by reason of any former marriage, which shall have been pronounced void by the sentence or decree of a competent court, on the ground of the nullity of the marriage contract: nor,

5. To any person, by reason of any former marriage contracted by such person within the age of legal consent, and which shall have been annulled by the decree of a competent court: nor,

6. To any person, by reason of any former marriage with a husband or wife, who shall have been sentenced to imprisonment for life.—(Ibid. sect. 9.)

An indictment may be found against any person for a second, third, or other marriage herein prohibited, in the county in which such person shall be apprehended; and the like proceedings, trial, judgment and conviction may be had in such county, as if the offence had been committed therein.—(Ibid. sect. 10.)

§ 2620. *Punishment.*—If any unmarried person shall knowingly marry the husband or wife of another, in any case in which such husband or wife would be punishable according to the foregoing provisions, such person, upon conviction, shall be imprisoned in the state prison, not more than five years, or in a county jail, not more than one year, or shall be fined not more than five hundred dollars, or shall be subject to both such fine and imprisonment, in the discretion of the court.—(Ibid. sect. 11.)[b]

§ 2621. *Incest.*—Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall, upon conviction, be punished by imprisonment in a state prison for a term not exceeding ten years.[d]—(Ibid. sect. 12.)

PENNSYLVANIA.

§ 2622. *Bigamy.*—If any person shall have two wives or two husbands at one and the same time, he or she shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate and solitary confinement at labor, not exceeding two years, and the second marriage shall be void: *Provided*, That if any husband or wife, upon any false rumor, in appearance well founded, of the death of the other, (when such other has been absent for two whole years,) hath married, or shall marry again, he or she shall not be liable to the penalties of fine and imprisonment imposed by this act.—(Rev. Acts, Bill I., sect. 34.)

If any man or woman, being unmarried, shall knowingly marry the husband or wife of another person, such man or woman shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years.[d]—(Ibid. sect. 35.)

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[b] After the dissolution of marriage, for adultery, the marriage contract is at an end, and the relation of husband and wife no longer exists between the parties; and if the guilty party marries again, he is not within the penalty of the act against bigamy. But the second marriage being absolutely prohibited by the 47th section of the act concerning divorce, is punishable as a misdemeanor under the 45th section of the title of the revised statutes, relative to misdemeanors. (People *v.* Hovey, 5 Barbour, 117; see Baker *v.* People, 2 Hill, 325.)

[c] See, for construction of this statute, People *v.* Harriden, 1 Parker C. C. 344.

[d] "This section is a consolidation and amendment of the Province law of 1705, entitled 'An Act against bigamy.' 1 Smith's Laws, 29. Brightly's Digest, 90, No. 1; and of fourth section of the act of 5th April, 1790, entitled 'An Act for the reform

VIRGINIA.

§ 2633. *Bigamy.*—Any white person, being married, who, during the life of the former husband or wife, shall marry another person in this state, or, if the marriage with such other person take place out of the state, shall thereafter cohabit with such other person in this state, shall be confined in the penitentiary not less than one nor more than five years.—(Code 1849, ch. 196, sect. 1.)

§ 2624. *Exceptions.*—The preceding section shall not extend to a person whose former husband or wife shall have been continually absent from such person for seven years next before the marriage of such person to another, and shall not have been known by such person to be living within that time; nor to a person who shall, at the time of the subsequent marriage, have been divorced from the bond of the former marriage, or whose former marriage shall at that time have been declared void, by the sentence of a court of competent jurisdiction.—(Ibid. sect. 2.)

OHIO.

§ 2625. *Bigamy.*—That if any married person, having a husband or wife living, shall marry any other person,[dd] every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than seven years, nor less than one year; but nothing contained in this section shall be construed to extend to any person whose husband or wife shall be continually and wilfully absent for the space of five years together, and unheard from, next before the time of such marriage.—(Act of March 7, 1835, sect. 7; Swan's Stat. 269.)

§ 2626. *Incest.*—That if any step-father shall have sexual intercourse with his step-daughter, knowing her to be such; or if any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship; or any father shall have sexual intercourse with his daughter, knowing her to be such; or if any brother and sister, being of the age of sixteen years or upwards, shall have sexual intercourse together, having knowledge of their consanguinity; every step-father, step-mother, step-son, father, brother, or sister, so offending, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, not more than ten nor less than three years.—(Act of March 7, 1835, sect. 8; Swan's Stat. 270.)

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of the penal laws of this State.' 4 Smith's Laws, 530. Brightly's Digest, 90, No. 2. The latter being the law under which the crime has been heretofore punished, since the reform of the penal code.

"Section 35. This section is part of the act of 1705, 'against bigamy,' above referred to, and is separated from it for more convenient arrangement." (Revisors' Note.)

[dd] By the statute of Ohio, says Mr. Warren, C. L. 333, the age of consent for males is established at eighteen years, for females at fourteen years. (Swan's St. 569.) The contract of marriage, when entered into by a person under the age fixed by law, is void, as well for the want of capacity in the infant to make it, as being opposed to sound policy and the positive requirements of the land. (Per Ranney, J., Shaffer *v.* Ohio, 20 Ohio R. 6.) Such a marriage may, however, be confirmed by cohabitation after such age, and unless so confirmed, a subsequent marriage will not amount to the crime of bigamy. And in such case, the State must prove such confirmation; the defendant is not bound to prove that he dissented from the contract after arriving at such age. Evidence of two marriages, the former of which is void, will not sustain an indictment for bigamy. (Ibid.)

In Ohio *v.* Peter Moore, 3 Wes. L. Jr. 134, it appeared that the defendant had been married three times. The second time, whilst his first wife was still living; the third time, after the death of his first wife, but while the second wife was still living. He was indicted for bigamy in marrying the third wife during the life of the second; but

B.—Offence generally.

I. Second marriage must be within the jurisdiction.

§ 2627. The American acts are founded in principle upon the English statute of 1 Jac. 1, c. 11; the established and known construction of which, as is remarked by Mr. Davis, may be considered as also adopted.[e] If the first marriage be abroad, and the second in England, the case is within the English act; but if the first marriage be in England, and the second abroad, it is not within the act; because the second marriage, which alone constitutes the offence, is a fact done within another jurisdiction, and though inquirable here for some purposes, like all transitory acts, is not, by the rule of the common law, cognizable as a crime. It has been also held, that if, in a foreign country, a man marries a second wife in the lifetime of his first, and after the death of his first wife, but the second living, marries a third time in England, the case is not within the statute; because the second marriage was simply void.[f] The same point has been expressly held in New York.[ff]

II. Where the first marriage was voidable or void.

§ 2628. Though the first marriage be contracted under any of those disabilities or impediments which render it *voidable*, yet a second marriage, whilst the former is subsisting in fact, comes within the statute, for the first is a marriage in judgment of law, until it is avoided.[g] But should the first marriage be contracted under any of those disabilities or incapacities which render it void *ab initio*, or be not contracted in due form of law, the case is otherwise.[h]

Thus in Ohio, a marriage contracted by parties, either of whom are

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this was held not to amount to bigamy, for the reason that the second marriage was unlawful, being entered into whilst the first wife was still alive; he was therefore acquitted; but being indicted again, for marrying the second wife whilst his first and only lawful wife was living, he was convicted.

Evidence.—The first indispensable step to be taken by the prosecution, is, to establish the fact that the person prosecuted is a married person, and has, or had at the time of the second marriage, a husband or wife living. To do this, a valid marriage in fact must be shown. The law will not presume it, as it will in civil cases. (Per Ranney, J., Shaffer *v.* Ohio, 10 Ohio Rep. 3; Arch. Gr. Pl. 476; Whar. Am. Cr. Law, 755.)

The testimony of a witness, present at the time of the first marriage, is abundant evidence of the fact. (The State *v.* Kean, 10 New Hamp. 347; Wolverton *v.* Ohio, 16 Ohio Rep. 176.) In New Hampshire a copy of the record of the marriage, from the clerk's office, duly certified, with proof of the identity of the party, is proper evidence; and where a marriage has taken place in a country wherein marriages are the subject of public record, a copy of the record, duly authenticated, is evidence. And the defendant's own admissions, made by him while living with his first wife, as to his marriage to her, may be proved against him to establish the fact of such marriage. (Wolverton *v.* Ohio, 16 Ohio Rep. 176.)

[e] Davis' C. L. 134.

[f] 1 Hale, 693; 1 East, P. C. 466; though see, under Vermont statute, State *v.* Palmer, 18 Vt. (3 Washb.) 570.

[ff] People *v.* Mosher, 2 Parker C. R. (N. Y.) 195. [g] 1 East, P. C. 466.

[h] 1 Russ. 290.

under the age of consent, and not confirmed by cohabitation after arriving at that age, will not subject a party to punishment for bigamy, for contracting a subsequent marriage, while the first husband or wife is still living;[i] and generally, if a boy under fourteen, or a girl under twelve, contract matrimony, it is void, unless both husband and wife consent to confirm the marriage after the minor arrives at the age of consent.[ii]

If a man whose wife has been divorced from him, marries again, and cohabits with a second woman, without having obtained a divorce from the first, he cannot be found guilty of adultery, either at common law or by the statutes of this State.[j]

It seems that in South Carolina a marriage of a nephew to an aunt is valid, and if he subsequently marry another, he is indictable for bigamy.[jj]

III. Parties beyond seas or absent.

§ 2629. It has been held, that the first exception, that the statute shall not extend "to any person or persons, whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, applies, though the party marrying have notice that the other is living.[k]

§ 2630. The second exception, that the statute shall not extend to any person or persons "whose husband or wife shall absent himself or herself, the one from the other, by the space of seven years together, in any part within the (United States of America) or elsewhere, the one of them not knowing the other to be living within that time," according to its express words, only applies when the party marrying again has no knowledge that the former husband or wife is alive. Whether the party be not bound to use reasonable diligence to inform himself of the fact; and still more, whether, if he neglect or refuse to avail himself of palpable means of acquiring such information, he will stand excused, are questions deserving of mature consideration, but which do not appear to be settled.[l]

IV. Proof of marriage and of illicit intercourse.

[*As to further proof of illicit intercourse, see post* § 2653.]

§ 2631. There is no branch of evidence more affected by the *lex loci* than that which relates to marriage, and there are few in which there has been a greater latitude of decision. Marriage, according to the settled practice of the criminal courts, may be satisfactorily proved in several ways, with the qualification that, where the first marriage was celebrated abroad, the prosecution must show not only a marriage in fact, but a marriage valid by the foreign law.[m] In those countries where a contract

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[i] Shafher *v.* State, 20 Ohio, 1.
[ii] Co. Lit. 79; see R. *v.* Gordon, R. & R. 48.
[j] State *v.* Weatherby, 43 Maine, 258.
[jj] State *v.* Barefoot, 2 Rich. 209.
[k] 1 Hale, 693; 1 East, P. C. 466.
[l] 1 East, P. C. 467; Davis' C. L. 136.
[m] People *v.* Lambert, 5 Mich. 349.

in writing is, by the law of the country, made essential to the marriage, it should be produced.[m] In New Hampshire, a copy of the record of the marriage, from the clerk's office, duly certified, with proof of the identity of the party, is proper evidence.[n] In England, the register of the parish is admissible for the same purpose.[o] In Illinois, it is competent, on a trial for bigamy, to prove the first marriage, or either marriage, by producing a copy of the marriage-license, with the certificate of the justice, endorsed on the license, that he had solemnized the marriage, and a certificate of the clerk of the County Commissioners' Court of the County, that the same was a true copy, transcribed from the original on file in his office.[p]

§ 2632. In Vermont, where it was proved that parties appeared before a magistrate, or one acting as such, in New York, and declared their consent to a marriage, and this was followed by cohabitation and recognition of each other as man and wife, it was held to be sufficient proof *prima facie* of such marriage.[q]

The testimony of a witness, present at the time of marriage, is abundant evidence of the fact.[r]

§ 2633. In Maine, Pennsylvania, Delaware, Virginia, South Carolina, Georgia, Alabama, and Ohio, as well as in England, the defendant's admissions as to a former marriage, may be given in evidence to prove the fact of such marriage.[s]

§ 2634. In Massachusetts, Connecticut and New York, however, a contrary doctrine has been expressed.[t]

When the marriage was in a foreign country, such evidence has frequently been considered conclusive.[tt]

It was held not enough, however, to prove a marriage, that the defendant, about twenty years before the offence was committed, stated, when hiring a house, that he had a wife and child, and afterwards moved into the house with a woman whom he called *Miss* Ham, and with whom, for several years, he lived as his wife.[u]

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[m] 1 Camp. 61.

[n] State *v.* Wallace, 9 New Hamp. 514.

[o] 2 Bacon's Ab. Ev. F. Gilb. Ev. 72; 1 Greenleaf on Ev. sects. 484, 493, 544, 545.

[p] Jackson *v.* People, &c., 2 Scam. 232.

[q] State *v.* Rood, 12 Verm't, 396.

[r] State *v.* Kean, 10 New Hamp. 347; 1 Greenleaf on Ev. sects. 484, 493, 544, 545; Warner *v.* Com. 2 Virg. Cas. 95; Com. *v.* Putnam, 1 Pick. 136.

[s] Cook *v.* State, 11 Georg. 53; State *v.* Lash, 1 Harring. 280; Cayford's case, 7 Greenl. 57; State *v.* Hodgkins, 19 Maine, 155; Com. *v.* Murtagh, 1 Ashmead, 272; Forney *v.* Hallacher, 8 S. & R. 159; Warner's case, 2 Va. Cases, 95; State *v.* Hilton, 3 Rich. 434; State *v.* Britton, 4 M'Cord, 256; R. *v.* Simmonston, 1 Car. & Kir. 167; Wolverton *v.* State, 16 Ohio, 173; Langtry *v.* State, 30 Alab. 536.

[t] Com. *v.* Littlejohn, 15 Mass. 163; State *v.* Roswell, 6 Connect. 446; People *v.* Miller, 7 Johnson, 314; Clayton *v.* Wardell, 4 Comst. 230; Gahagan *v.* People, 1 Harris, C. C. 383.

[tt] Cayford's case, 7 Greenl. 57; Trumman's case, 1 East, P. C. 470; Rigg *v.* Curgenven, 2 Wils. 399; see per contra, People *v.* Miller, 7 Johnson, 314.

[u] State *v.* Roswell, 6 Connect. 446; Ham's case, 2 Fairf. 391.

In Massachusetts it is now provided by statute that circumstantial and presumptive evidence may be received to prove the fact of marriage.[v]

In the trial of an indictment for bigamy, it is sufficient evidence of the authority of the justice or clergyman who performed the marriage, that he professed and was generally understood to have such authority.[vv]

The admission of the defendant in an indictment for incest, that the person with whom he had sexual intercourse, was his daughter by a former wife, is admissible on trial of the indictment.[w]

V. Consummation not necessary.

§ 2635. Marriage is in law, complete when parties able to contract and willing to contract, have actually contracted to be man and wife in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity.[ww]

VI. Subsequent divorce.

§ 2636. It is no defence that *subsequent* to the second marriage, the defendant was divorced from the first.[x] If the divorce be anterior, the law is otherwise.[y]

VII. Second wife when admissible.

§ 2637. When the first marriage is proved, the second wife is admissible as a witness either for or against the prisoner.[z]

VIII. Indictment.[a]

§ 2638. An indictment for polygamy, under the statute of Vermont, which alleges that both marriages were had in another state, and that the respond-

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[v] Suppl. Rev. Stat. 166–7, 184.

[vv] State *v.* Abbey, 3 Williams, (29 Vt.) 60, see § 713, 1041.

[w] Berger *v.* People, 17 Ill. 426.

[ww] State *v.* Patterson, 2 Iredell, 246.

[x] Baker *v.* People, 2 Hill, N. Y. 320.

[y] People *v.* Hovey, 5 Barbour, 117.

[z] State *v.* Patterson, 8 Iredell, 346; 1 Hale, 693; 1 East, P. C. c. 12, s. 9; 1 Hawk. c. 42, s. 8; see ante, § 767–72.

[a] For forms of indictment, see Wh. Prec., as follows :—

(984) [So far as these offences approach open lewdness and lasciviousness, they are examined, ante, 705–776, where the general principles applying to them as such are considered.]

(985) Bigamy generally.

(986) Polygamy in Massachusetts.

(987) For polygamy, by continuing to cohabit with a second wife, in Mass. Rev. sts. of Mass., ch. 130, § 2.

(988) Bigamy in New York.

(989) Bigamy in Pennsylvania, against the man.

(990) Bigamy in Pennsylvania, against the woman.

(991) Bigamy. Where the first marriage took place in Virginia, under the Ohio statute.

(992) Bigamy. Where the first marriage took place in another county of Ohio.

(993) Bigamy in North Carolina.

(994) 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.

ent has feloniously contracted with his second wife in Vermont, must allege the second marriage was unlawful in the state where it was had; and if this allegation is omitted, judgment will, on motion, be arrested.[b]

An indictment on the North Carolina statute of 1790, averring that the first wife was alive at the second marriage, is sufficient without alleging that the first marriage then subsisted.[c]

The exceptions in the act, *e. g.*, divorce, &c., need not be negatived.[d]

An indictment for incest averred as follows:—A., late of said country, on the first day of December, 1849, at the county of Adams aforesaid, unlawfully did have sexual intercourse with his daughter B., the said B. then and there knowing that she was his, the said A.'s daughter; it was held that the indictment was bad in not averring that A. had intercourse with his daughter, knowing her to be such, the word "unlawfully" not being equivalent to that allegation.[e]

The time of the first marriage need not be specially averred.[f] It is enough if a prior existing marriage be stated. But if an averment be attempted, and the date be left blank, this is fatal.[g]

CHAPTER X.

ADULTERY.

A. STATUTES.

MASSACHUSETTS, § 2639.
PENNSYLVANIA.
Adultery, § 2640.
Birth of a child during husband's absence, evidence of, § 2641.
Fine for, where to go, § 2641.
Imprisonment, § 2641.
VIRGINIA.
Adultery, § 2642.
Lascivious cohabitation, § 2643.
Intermarriage with negro, § 2644.
Officiating at such marriage, § 2645.

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(995) Adultery in Massachusetts, under Rev. stat. 130, s. 1, against both parties jointly.
(996) Adultery by married men with married women, in Massachusetts.
(997) Adultery in Pennsylvania, against the man.
(998) Same against the woman.
(999) Living in a state of adultery, under Ohio statute. A married woman deserting her husband, &c.
(1000) Against an uncle and niece for an incestuous marriage, as a joint offence, in Virginia.
(1001) Adultery in North Carolina, against both parties jointly.
(1002) Fornication and bastardy in South Carolina, against the man.
(1003) Same in Pennsylvania.
(1004) Same against a woman.

[b] State *v.* Palmer, 18 Vt. (2 Washb.) 570.
[c] State *v.* Norman, 2 Dev. 222.
[d] Murray *v.* R., 7 Q. B. 700; ante, § 378–80.
[e] Williams *v.* The State, 2 Carter, (Ind.) 439.
[f] State *v.* Bray, 13 Iredell, 289.
[g] State *v.* LaBore, 26 Vt. 765.

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

B. OFFENCE GENERALLY.
I. IN WHAT ADULTERY CONSISTS, § 2648.
II. EVIDENCE, § 2652.
III. CUSTOMS OF THE COUNTRY NO DEFENCE, § 2656.
IV. INDICTMENT, § 2657.
V. SOLICITATION, § 2666.

A.—STATUTES.

MASSACHUSETTS.

§ 2639. *Adultery.*—Every person who shall commit the crime of adultery, shall be punished by imprisonment in the state prison not more than three years, or in the county jail not more than two years, or by fine not exceeding five hundred dollars; and when the crime is committed between a married woman and a man who is unmarried, the man shall be deemed guilty of adultery, and be liable to the same punishment.[a]—(R. S. chap. 130, sect. 1.)

PENNSYLVANIA.

§ 2640. *Adultery.*—If any married man shall have carnal connection with any woman, not his lawful wife, or any married woman have carnal connection with any man, not her lawful husband, he or she so offending shall be deemed guilty of adultery, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.[aa]—(Rev. Acts, Bill I., sect. 36.)

§ 2641. *Birth of child during husband's absence, evidence of.*—If any married woman within this province shall be convicted of having a child born of her body,

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[a] Before the revised statutes an unmarried man having sexual intercourse with a married woman, would not be guilty of adultery; (Com. *v.* Call, 21 Pick. 509, 512,) but under this section, an unmarried man having sexual intercourse with a married woman is guilty of adultery, although he did not know that she was married, and therefore such knowledge need not be averred. (Com. *v.* Elwell, 2 Metc. 190.) Where a husband obtained a divorce from the bonds of matrimony, for the cause of utter and wilful desertion by the wife, for five years consecutively, without his consent, and the wife afterwards went into another state, and was there married to another man, with whom she returned to Massachusetts, and there lived and cohabited, it was held, that if the wife was guilty of any offence under the Massachusetts Rev. Stat. c. 1, s. 130, she was indictable under the second section, for unlawful cohabitation, and not under the fourth section, for lewd and lascivious behaviour. (Com. *v.* Hunt, 4 Cushing, 49.) See, also, Com. *v.* Reardon, 6 Cush. 79. See for forms of indictment, Wh. Prec. 995.

For indictments under this act, see Com. *v.* Reardon, 6 Cushing, 78; Moore *v.* Com., 6 Metcalf, 243; Com *v.* Thompson. 2 Cushing, 551; post, § 2657, &c.

[aa] "This section is an amendment and revision of the first section of the act of 1705, entitled "An Act against adultery and fornication." 1 Smith's Laws, 27. Brightly's Digest, 35, No. 1; and of the seventh section of the act of the 23d September, 1791, entitled "A supplement to the penal laws of this commonwealth." 3 Smith's Laws, 37. Brightly's Digest, 35, No. 2. The changes in phraseology have been introduced by some recent differences of opinion in the criminal courts, as to whether an unmarried person can be convicted of adultery. As early as 1791, the Supreme Court, in Respublica *vs.* Roberts, 2 Dallas, 124, ruled that no conviction of adultery could take place where the defendant was not a married person, declaring such to have been the uniform practice of eighty-five years. To produce uniformity in the administration of the criminal law in this respect, has been the object of this change of phraseology. The punishment which by the act of 1791, is a fine not exceeding fifty pounds, and imprisonment not less than three nor more than twelve months, is changed to a fine not exceeding five hundred dollars, and imprisonment not exceeding one year." (Revisors' note.)

in the absence of her husband, and shall not be able, by credible evidence, to prove that her husband has cohabited or been in company with her, or has been in some of the queen's colonies or plantations in this continent, betwixt the easternmost parts of New England and southernmost parts of North Carolina, within twelve months next before the birth of such child, such woman shall be punished as an adultress.—Act of 1705, sect. 4.)

§ 2641 (*a*). *Fine for, where to go.*—One moiety of all fines which shall hereafter be imposed on any person convicted of the said offence, by virtue of the said act, shall be to and for the use of the governor of this province, for the time being, and the other moiety, to the overseers of the poor of the city, district or township where the offender shall reside at the time of committing the fact, to the use of the poor thereof.—(Act 21st March, 1772, sect. 1; 1 Dallas, 638; 1 Smith, 388; 6th ed. Pur. 61.)

VIRGINIA.

§ 2642. *Adultery.*—If a free person commit adultery or fornication, he shall be fined not less than twenty dollars. Adultery or fornication with a slave is a violation of this act.[b]—(Code 1849, ch. 196, sect. 6.)

§ 2643. *Lascivious cohabitation.*—If any white persons, not married to each other, lewdly and lasciviously associate and cohabit together, or whether married or not, be guilty of open and gross lewdness and lasciviousness, they shall be fined not less than fifty dollars.—(Ibid. sect. 7.)

§ 2644. *Intermarriage with negro.*—Any white person who shall intermarry with a negro shall be confined in jail not more than one year, and be fined not exceeding one hundred dollars.—(Ibid. sect. 8.)

§ 2645. *Officiating at such marriage.*—Any person who shall perform the ceremony of marriage between a white person and a negro, shall forfeit two hundred dollars, of which the informer shall have one-half.—(Ibid. sect. 9.)

OHIO.

§ 2646. *Living and cohabiting in adultery.*—That if any married woman shall hereafter desert her husband, and live and cohabit with another man, in a state of adultery, she shall, upon conviction thereof, be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding thirty days; and if any married man shall hereafter desert his wife, and live and cohabit with any other woman, in a state of adultery; or if any married man, living with his wife, shall keep any other woman, and notoriously cohabit with her, in a state of adultery; or if any unmarried man shall live and cohabit with a married woman, in a state of adultery, every person so offending, shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread and water only, not exceeding thirty days, at the discretion of the court.—(Act of March 8, 1831; Swan's Stat. sect. 24, 287.)

§ 2647. *Fornication.*—That if any unmarried persons shall live and cohabit together in a state of fornication, such persons so offending, shall each, on conviction thereof, be fined in any sum not exceeding one hundred dollars, and be imprisoned in the cell or dungeon of the county jail, not exceeding ten days.—(Ibid. sect. 25.)

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[b] Jones' case, 1 Grattan, 555

B.—Offence generally.

I. In what adultery consists.

§ 2648. Whether adultery is an offence in this country at common law, is a matter of some doubt.[bb] In Connecticut,[c] New Hampshire,[d] and North Carolina,[e] the inclination of the courts seem to have been so to hold it, but in Vermont,[f] Virginia,[g] and in South Carolina,[h] the contrary has been expressly determined.

§ 2649. In Pennsylvania the rule has been to indict only married persons for adultery,[i] and such was the rule in Massachusetts, before the adoption of the Revised Statutes.[j] In New Hampshire, the carnal intercourse of an unmarried man with a married woman is held adultery; the gist of the offence being held to be the corruption of the course of descent; and it was doubted whether an indictment would hold against a married man as such for carnal intercourse with an unmarried woman.[k]

§ 2650. But whatever may be the balance of authority, there is certainly much reason, if the question be still open, to attach the heavier penalties to the invasion of social right and the disturbance of the course of descent, which are the incidents of illicit intercourse with a married woman.[l]

§ 2651. In Georgia, a married man who has criminal intercourse with his own daughter, she being a single woman, is guilty of incestuous adultery, and she of incestuous fornication.[m]

In Delaware a married man is not guilty of adultery in having carnal intercourse with an unmarried woman,[n] though, as has been seen, it is otherwise in Massachusetts.[o]

In Maine adultery can only be committed by parties, one of whom at least was unmarried, and who were not married to each other.[oo]

In Vermont, where a wife was divorced for the fault of the husband, and he married another, and cohabited with her, without having obtained a like divorce, he is guilty of adultery neither by common law nor statute.[p]

II. Evidence.

§ 2652. The evidence of marriage in case of adultery is the same as in bigamy, and may be proved by confession of the party.[pp]

[bb] See Crouse *v.* State, 16 Ark. 566.
[c] State *v.* Avery, 7 Connect. 267.
[d] State *v.* Wallace, 9 New Hamp. 518.
[e] State *v.* Cox, N. C. Term R. 165.
[f] State *v.* Cooper, 16 Verm. 551.
[g] Anderson *v.* Com., 6 Rand 627; Com. *v.* Isaacs, 5 Rand. 634.
[h] State *v.* Brunson, 2 Bailey, 149.
[i] R. *v.* Roberts, 2 Dallas, 124; 1 Yeates, 6; Com. *v.* Wentz, 1 Ashmead, 269; Helfrick *v.* Com., 9 Casey, (Pa.) 68.
[j] Com *v.* Call, 21 Pick. 509.
[k] State *v.* Wallace, 9 New Hamp. 518.
[l] See, on this point, the ingenious and learned remarks of Judge Lewis; Lewis, C. L. 41.
[m] Cook *v.* State, 11 Geo. 53.
[n] State *v.* Lash, 1 Harring. 280, 292, 301.
[o] Com. *v.* Call, 21 Pick. 509; Com. *v.* Thompson, 2 Cush. 551; Rev. Stat. 130, § 1.
[oo] State *v.* Weatherby, 43 Maine, 258.
[p] Ibid.
[pp] Cameron *v.* State, 1 Alab. 546; State *v.* Hilton, 3 Richard. 434; Wolverton *v.* State, 16 Ohio, 173; Cook *v.* State, 11 Georg. 53; ante, § 2631–34.

§ 2653. There has been some difference of opinion as to the extent to which evidence of improper familiarities, other than that charged in the indictment is admissible. On the one hand, it has been said that in all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony,[q] and if treated as an offence, would be barred by the statute of limitations.[qq] In point of fact, as evidence of adultery is almost always circumstantial, and as even when it is direct, corroborative evidence is admissible to support it, it is difficult to see how evidence of prior improper familiarities can be rejected.[r] On the other hand, evidence of improper conduct by the defendant, with other parties than those charged in the indictment, is clearly inadmissible,[s] and evidence of guilt with the same party *subsequent* to the finding of the indictment is inadmissible, unless to corroborate facts proved to have taken place *before*.[t] And it is plain that evidence of a propensity to commit the particular offence is inadmissible.[u] Suspicions of the wife,[v] and rumors in the neighborhood,[w] are both inadmissible.

§ 2654. Where a man and woman are jointly indicted, and tried for living together in fornication, the confessions of the woman are admissible evidence against herself.[x]

The party with whom the prisoner is alleged to have committed the offence, is a competent witness for the prisoner.[y]

§ 2655. By the laws of Virginia, since the passage of the criminal code, Session Acts of 1847–48, one credible witness is sufficient to authorise a conviction of a person of adultery or fornication.[z]

III. Customs of the country no defence.

§ 2656. The religious or social usages of a country are no defence to an indictment for adultery or lascivious cohabitation.[a]

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[q] State *v.* Marvin, 35 N. H. 22; People *v.* Jenness, 5 Mich. 305.

[qq] Lawson *v.* State, 20 Alab. 66; ante, § 631–6, 639–41, etc.

[r] Com. *v.* Call, 21 Pick. 509; Searls *v.* People, 13 Illinois, 597; see ante, § 631–6, 639–41, 647–52.

[s] State *v.* Bates, 10 Connect. R. 372.

[t] Com. *v.* Horton, 2 Gray, 354; State *v.* Crowley, 13 Alab. 172; see ante, § 631–6, 639–41, 647–52.

[u] See ante, § 539, 641.

[v] State *v.* Crowley, 13 Alab. 172.

[w] Belcher *v.* State, 8 Hump. 63.

[x] Lawson *v.* State, 20 Alab. 66.

[y] State *v.* Crowley, 13 Alab. 172.

[z] Com. *v.* Cregor, 7 Grat. 591.

[a] At the July Term (1856) of the First Judicial District Court for Utah Territory, held at Genoa, in Carson county, Judge Drummond charged the Grand Jury as follows, upon the following, among other sections of the Criminal Code:—

"And now, gentlemen of the Grand Jury, it becomes my duty to call your special attention, with strict care, to the following section, viz.: Sect. 33, found on page 187 of the Revised Statutes of the United States, for A. D. 1855, which reads as follows:

"'If any man or woman, not being married to each other, lewdly and lasciviously associate and cohabit together; or if any man or woman, married or unmarried, is guilty of open and gross lewdness, and designedly make any open and indecent expo-

IV. Indictment.

§ 2657. On an indictment for adultery, it has been said in Indiana and Alabama there can be no conviction for fornication ;[b] but in Pennsylvania and North Carolina the contrary has been held.[c]

§ 2658. An indictment which alleges that P. M., on a certain day, and at a certain place, "did commit the crime of adultery with one M. S., by then and there having carnal knowledge of the body of the said S., she, the said M. S., then and there being a married woman, and having a husband alive," is not sufficient to support a conviction. These allegations do not show, with certainty, that M. S. was not the wife of P. M.[d] Where, however, there was a distinct averment that the defendant R. committed

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sure of his or her person, every such person so offending shall be punished by imprisonment, not exceeding ten years and not less than six months, and a fine of not more than a thousand dollars, or both, at the discretion of the court.'

"You will now remember that you have each taken a solemn oath before God and those witnesses, that you would 'true presentment make of all such matters and things as should be given you in charge, or otherwise come to your knowledge, touching the present service.' This section, therefore, I give you in charge, with an ardent desire that you will cast off all priestly yokes of oppression, and studiously and honestly do your duty, without fear, favor or affection, wholly unbiassed. As there is no statute law in the Territory regulating marriage, or touching the subject directly or indirectly, it only remains for me to say that all these ceremonies by the people of this Territory called 'sealing,' are anything other, in the eyes of the law, than a legal marriage ceremony. In the foregoing section, the legislature has thought proper to pass a stringent law of a criminal character, for the punishment of open lewdness ; this, indeed, was wise and humane on the part of those legislators, and to us it seems that the legislature thereby intended to provide a remedy for the correction of that crying and most loathsome, barbarous, cruel, black and degrading evil, which seems to be one of the cardinal doctrines of the church prominent in power in this Territory—polygamy ; or, at least, if they did not intend it, they have virtually done what should have been done many years since. The law is found in the book, and you as well as I are solemnly bound to give it force and utility.

"It is wholly useless and noonday madness for the legislature to pass laws, and for the Federal Government to send judges and attorneys here to execute those laws, if the mandate of one man, clothed with a priestly power and wholly unlearned in the science of the law, is to be permitted to thwart, not only the action of the legislature of the Territory, but boldly and openly bid open defiance and sportive rebellion against the federal authority of the United States, and dictate to Grand Juries when to find bills of indictments and when not. These things cannot be endured in a republican government. All these men, therefore, who have a multiplicity of women residing with them at the same house, or at the same harem, are subjects for your investigation. I have already instructed you, that there is no law in this Territory authorizing the issuing of marriage license, or authorizing any one to perform marriage ceremonies, either in or out of the Church ; and much as you may regret to do so, it is nevertheless your duty to respect the law of the land, and prefer bills of indictment against all such as have not been legally married in some other country, and particularly when two or more women are cohabiting with the same man. These instances are too often seen, and too much encouraged by the Church here, to insure respect from the civilized world, either at home or abroad ; and even barbarous minds in your own country revolt at the sickening and truly heart-rending spectacle of the masses of this Territory. Duty follows you, gentlemen, in all the walks of life, at home and abroad, in the family circle, at the ballot-box, at your daily Christian devotions, and prominently here, where the interest of the crushed and down-trodden appeal, in thunder tones, for relief at the hands of the law."

[b] State *v.* Pearce, 2 Blackford, 218 ; Smitherman *v.* State, 27 Alab. 23 ; ante, § 628.

[c] R. *v.* Roberts, 2 Dallas, 124 ; S. C. 1 Yeates, 6 ; Com *v.* Dickey, 5 Harris, 126 ; State *v.* Cowell and Williams, Iredell, 231 ; see ante, § 561.

[d] Moore *v.* Com., 6 Met. 243.

adultery with C. A. S., "then the lawful wife of P. J. S.," this was held enough.[e] In Maine, an indictment, found October, 1852, charging that the defendant, "at Avon, on the 25th March, 1851, did commit the crime of adultery with one E. K., the wife of one S. H. W., she, the said E. W. being a married woman, and the lawful wife of said S. H. W.," was held insufficient.[f] The ground taken was the want of an averment of time to the fact of E. W. being married. Subsequently, however, an indictment was sustained in the same state, which averred that the defendant, "being then and there a married man and having a lawful wife alive, did commit the crime of adultery with L. H., the wife of one M. H., by having carnal knowledge of the body of her, the said L. H."[g]

It is sufficient to state that the defendant having a wife, M. A. H., in full life, did commit adultery with one M. M., without otherwise alleging carnal knowledge, and without averring that M. M. was not his wife.[gg]

§ 2659. The indictment may charge the offence to be "with a certain woman whose name is to said jurors unknown," the defendant being then and there a married man, and then and there having a lawful wife alive, other than said woman whose name to said jurors is unknown as aforesaid.[h]

An indictment for adultery is good in Alabama, although the offence is not laid with a *continuando*.[i]

§ 2660. If one of the persons charged with the offence of adultery is known by the name charged in the indictment, the other is not entitled to an acquittal by showing that it is not the true name.[j]

§ 2661. An indictment for living in open and notorious adultery is not sustained by evidence of occasional illicit intercourse between the parties.[k]

§ 2662. An indictment under the statute of North Carolina, for fornication and adultery, may be simply for "bedding and cohabiting together;" and the charge will be sustained by showing an habitual surrender of the person of the woman to the gratification of the man.[l]

In Alabama in an indictment for adultery, the marriage of either party need not be specially alleged.[m]

§ 2663. In Pennsylvania, it is said that the name of the husband of the woman with whom the defendant committed adultery, must be alleged.[n]

§ 2664. The parties may be indicted jointly.[o] One may be convicted and punished without, or before, any conviction of the other.[oo]

§ 2665. In an indictment against an unmarried man for adultery with a married woman, it is not necessary to aver that he knew her to be married.[p]

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[e] Com *v.* Reardon, 6 Cush. 78.
[f] State *v.* Thurston, 35 Maine, (5 Red.) 205.
[g] State *v* Hutchinson, 36 Maine, 263.
[gg] Helfrich *v.* Com., 9 Casey, Pa. 68.
[h] Com. *v.* Thompson, 2 Cushing, 551; ante, § 251, &c.
[i] State *v.* Glaze, 9 Alab. 283; ante, § 2639.
[j] Ibid; ante, § 236.
[k] Wright *v.* State, 5 Blackf. 358.
[l] State *v.* Jolly, 3 Dev. & Bat. 110.
[m] State *v.* Hinton, 6 Alab. 864.
[n] Com. *v.* Corson, 2 Par. 475.
[o] Com. *v.* Elwell, 2 Metc. 190; Lawson *v.* State, 20 Alab. 667.
[oo] State *v.* Parham, 5 Jones, (N. C.) 416.
[p] Com. *v.* Elwell, 2 Met. 190; see ante, § 297, 1066.

V. Solicitation.

§ 2666. Solicitation to commit adultery is, it seems, an offence at common law.[q]

CHAPTER XI.

FORNICATION.

A. STATUTES.
Massachusetts.
Lascivious cohabitation, § 2668.
Fornication, § 2669.
Pennsylvania.
Fornication, § 2670.
Evidence, etc., § 2671.
Virginia, § 2672.

§ 2667. It is not proposed to treat, in this place, of the proceedings established by the statutes of the several states in cases of bastardy. They partake essentially of the character of civil process, and though in one or two instances they assume the shape of prosecutions, they cannot be regarded as taking a place among the subjects of criminal action. Fornication, as an individual offence, however, has been said to be a misdemeanor at common law,[a] and though the better opinion would seem to be that unless the offence partakes of the nature of public and offensive lewdness, it is not in itself indictable,[b] yet the question has been put to rest, in several states, by express statutory prescription. The nature of the evidence in cases of sexual intercourse, has been already noticed under the head of adultery.

Statutes.

Massachusetts.

§ 2668. *Lascivious cohabitation.*—If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior, every such person shall be punished by imprisonment in the state prison, not more than three years, or in the county jail not more than two years, or by fine not exceeding three hundred dollars.—(R. S. chap. 130, sect. 4.)

§ 2669. *Fornication.*—If any man shall commit fornication with any single woman, each of them shall be punished by imprisonment in the county jail, not more than two months, or by fine not exceeding thirty dollars.—(Ibid. sect. 5.)[c]

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[q] State *v.* Avery, 7 Connect. 267; ante, § 7, 8; post, § 2696.

[a] State *v.* Cox, N. C. Term R. 165.

[b] Smith *v.* Miner, Coxe's R. 16; Anderson *v.* Com., 6 Randolph, 627; Com. *v.* Isaacs, 5 Rand. 634; Com. *v.* Jones, 2 Gratt. 555; State *v.* Brunson, 2 Bailey, 249; Brooks *v.* State, 2 Yerger, 482; see Crouse *v.* State, 16 Ark. 566.

[c] By cohabiting, in the first section above given, must be understood a dwelling or

PENNSYLVANIA.

§ 2670. *Fornication and bastardy.*—If any person shall commit fornication, and be thereof convicted, he or she shall be sentenced to pay a fine not exceeding one hundred dollars, to the guardians, directors or overseers of the poor of the city, county or township where the offence was committed, for the use of the poor of such city, county or township; and any single or unmarried woman having a child born of her body, the same shall be sufficient to convict such single or unmarried woman of fornication; and the man by such woman charged to be the father of such bastard child, shall be the reputed father, and she persisting in the said charge, in the time of her extremity of labor, or afterwards, in open court, upon the trial of such person so charged, the same shall be given in evidence, in order to convict such person of fornication; and such person being thereof convicted, shall be sentenced, in addition to the fine aforesaid, to pay the expenses incurred at the birth of such child, and to give security, by one or more sureties, and in such sum as the court shall direct, to the guardians, directors or overseers of the poor of the city, county or township where such child was born, to perform such order for the maintenance of the said child, as the court before which such conviction is had shall direct and appoint.—(Rev. Code, sect. 37.)

Place of trial for the offence.—If a bastard child is begotten out of the state, and born within the state, or begotten within one of the counties of this state, and born in another, in the latter case, the prosecution of the reputed father shall be in the county where the bastard child shall be born, and the like sentence shall be passed as if the bastard child had been or shall have been begotten within the same county, and in the former case, viz: of a bastard begotten without the state and born within it, the like sentence shall be passed, except in the imposition of a fine, which part of the sentence shall be omitted.—(Ibid. sect. 38.)

§ 2671. *Incestuous fornication.*—If any person shall commit incestuous fornication or adultery, or intermarry within the degrees of consanguinity or affinity, according to the following table, (established by law, he or she shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years; and all such marriages are hereby declared void.

The table of degrees of consanguinity and affinity is as follows:

DEGREES OF CONSANGUINITY.

A man may not marry his mother.
" " father's sister.
" " mother's sister.
" " sister.
" " daughter.
" " the daughter of his son or daughter.

A woman may not marry her father.
" " father's brother.
" " mother's brother.
" " brother.
" " son.
" " the son of her son or daughter.

living together, and not a single act of criminal intercourse; the design of the statute, in this provision, being to prevent evil and indecent examples tending to corrupt the public morals. (Com. *v.* Calef, 10 Mass. 153.)

DEGREES OF AFFINITY.

A man may not marry his father's wife.
" " son's wife.
" " son's daughter.
" " wife's daughter.
" " the daughter of his wife's son or daughter.

A woman may not marry her mother's husband.
" " daughter's husband.
" " husband's son.
" " the son of her husband's son or daughter.[d]—(Ib. sec. 39.)

VIRGINIA.—(See ante, § 2642.)

CHAPTER XII.

SEDUCTION.

STATUTES.

NEW YORK.

§ 2672. *Seduction.*—Any person who shall, under promise of marriage, seduce and have illicit connexion with any unmarried woman of previous chaste character,[a] shall be guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in a state prison not exceeding one year: *Provided*, That no conviction shall be had under the provisions of this act on the testimony of the female seduced, unsupported by other evidence, nor unless indictment shall be found within two years after the commission of the offence: *And provided further*, That the subsequent marriage of the parties may be pleaded in bar of a conviction.—(Laws of 1848, chap. 111.)

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[d] "These sections are the consolidation and amendment of the second, third and eighth sections of the act of 1705, entitled 'An Act against adultery and fornication.' 1 Smith's Laws, 27. Brightly's Digest, 394, Nos. 1, 2 and 4, and of the sixth section of the act 23d September, 1791, entitled 'A supplement to the penal laws of this State.' 3 Smith's laws, 37. Brightly's Digest, 395, No. 6." (Revisors' note.)

"Section 39. This section is a revision of the act of 1705, entitled 'An Act against incest.' 1 Smith's Laws, 26. Brightly's Digest, 425, Nos. 1, 2. The degrees of consanguinity and affinity within which marriages are forbidden by this act, have not been changed. But the punishment has been made more accordant with the gravity of the crime. The act of 1705 assigns to it the same punisment as fornication and adultery, with the addition of a fine to the value of one-third of the estates of the offenders." Ibid.

[a] "Previous chaste character," has been construed, when used in the abduction statute, to mean that the prosecutrix was chaste and pure in conduct and principles, up to the time of the commission of the offence. It was said, however, that if she had previously been unchaste, but had reformed, and had then been "abducted," she was within the act. (Carpenter *v.* People, 8 Barbour, 603.)

Such is the view that has been taken in Pennsylvania. (Com. *v.* M'Carty, 4 Penn. Law Journ. 136.)

The law does not presume the previous chastity of the female, such a presumption being inconsistent with that of the prisoner's innocence, but such chastity must

PENNSYLVANIA.

§ 2673. *Seduction.*—The seduction of any female of good repute, under twenty-one years of age, with illicit connexion under promise of marriage, is hereby declared to be a misdemeanor; and any person who shall be convicted thereof, shall be sentenced to pay a fine not exceeding five thousand dollars, and to undergo an imprisonment, either at labor by separate or solitary confinement, or imprisonment without labor, not exceeding three years, or both, or either, at the discretion of the court: *Provided*, That the promise of marriage shall not be deemed established, unless the testimony of the female seduced is corroborated by other evidence, either circumstantial or positive.[b]—(Rev. Acts, Bill I., sect. 41.)

OHIO.

§ 2673(*a*). *Seduction.*—That any person over the age of eighteen years, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of eighteen years, shall be deemed guilty of seduction, and upon conviction, shall be imprisoned in the penitentiary for not less than one nor more than three years, or be imprisoned in the county jail not exceeding six months; but in such case, the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury.—(Act of April 4, 1859, sect. 1.)

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be proved by the government, it being essential to the constitution of the offence charged. (West *v.* State, 1 Wis. 209.)

To establish "unchaste" character, it is not necessary to show that the party had been guilty of illicit sexual intercourse. (Andre *v.* State, 5 Iowa, (Clarke,) 389; Boak *v.* State, Ibid. 430.

It seems that it is a good defence that the prosecutrix knew at the time that the defendant was a married man. (People *v.* Algee, 1 Harris, C. C. 333. Crozier *v.* People, 1 Harris, C. C. 453; Safford *v.* People, Ibid. 474.)

[b] "This section is the revision and re-enactment of the first section of the act of the 19th April, 1843, entitled 'An Act to punish seduction, and to afford a more adequate civil remedy for the injury.' Pamphlet Laws, 348. Brightly's Digest, 740, No. 1. By this act the crime is punished by a fine not exceeding five thousand dollars, and by imprisonment by solitary confinement at labor, not less than one, nor more than three years, or simple imprisonment, at the discretion of the court. The only alteration proposed is the abolition of the minimum punishment in accordance with the general principles of the bill." (Revisors' Report.)

To constitute the penal offence of seduction, under the act of April 19th, 1843, there must be illicit connection, and the female must be drawn aside from the paths of virtue, which she was honestly pursuing at the time the defendant approached her; but a single error on the part of the female, will not place her beyond the protection of the act, if she has repented her error, and is walking in the path of virtue, and enjoying the esteem of her acquaintance, when she is led astray. (Ibid.)

A female of bad reputation at the time the defendant obtained connexion with her, whether the reputation was acquired by crime, or imprudence only, is not within the protection of the act. (Ibid.) See Crozier *v.* People, 1 Harris. C. C. 453; Safford *v.* People, (Ibid. 474.)

A female who has been seduced, and after the birth of a child, married, and deserted by her seducer, is not a competent witness against him on an indictment for seduction. (Com. *v.* Eicher. 1 Amer. Law Journ. 551.)

Such a marriage, although after seduction, and followed by immediate desertion by the husband, is a defence against an indictment for seduction, under the act of 1843. (Ibid.)

An *acquittal of seduction*, is a bar to an indictment for fornication and bastardy, where the subsequent indictment was founded on the same substantive act as received the acquittal. After stating the principle, that on an indictment for adultery, the defendant could be convicted of fornication, Chief Justice Black proceeded: "There is no reason why the same should not prevail in a case of seduction. Fornication is included in that offence, as certainly as it is in adultery or incest. It is as clearly implied by the word *seduce*, as it is by any word employed in an indictment for adultery.

CHAPTER XIII.

CHALLENGING TO FIGHT.[a]

Statutes.

Pennsylvania.

§ 2673(*b*). In cases arising under the laws of this commonwealth for the restraint of the horrid practice of duelling, it shall be sufficient to form an indictment generally against either of the principals for challenging another to fight at deadly weapons, and notwithstanding it may appear on the trial that the defendant only accepted the challenge, it shall be sufficient to convict and render him liable to the penalties of the law; and in like manner an indictment against the seconds may be framed generally, for carrying and delivering a challenge, and proof of the mere act of fighting, and the defendant being present thereat, shall be sufficient to convict the defendant upon an indictment so framed; and if the duel shall take place within this commonwealth, the mere fact of fighting shall be full and complete evi-

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Seduction, as used in an indictment, does not mean an enticement to any other sin than a surrender of chastity. No woman is seduced within the meaning of the statute, until fornication has been committed on her body. Again, the illicit connection averred in the indictment, means fornication, and cannot, by any amount of perverseness, be supposed to mean any thing else. But this is not all. The indictment recited in this plea, charges that the defendant did *debauch*, *deflower*, and *carnally know* the prosecutrix. This surely puts it past the power of doubt, if the plainest words in the English Language can do so.

"Fornication then, was a substantive offence, charged against the plaintiff in error, in the indictment for seduction. He might have been convicted of the former offence, on the indictment for the latter. He was, therefore, tried for fornication on the first indictment, and if the judgment pronounced against him on the second, be permitted to stand, he must suffer for an offence of which there is conclusive evidence that he was acquitted before, and twice put in jeopardy for a cause which the commonwealth, by the demurrer, admits to be the same." (Dinkey *v.* Com., 5 Harris, 126; ante, 255.)

[a] For forms of indictments, see Wharton's Precedents, as follows:

(1028) Sending a challenge at common law. First count, sending the letter containing the challenge.
(1029) Second. Provoking another to fight a duel.
(1030) Provoking a man to send a challenge.
(1031) Writing and delivering a challenge at the instance of a third person.
(1032) Second count. For delivering a written challenge as from and on the part and by the desire of E. F.
(1033) Third count. For provoking and inciting the prosecutor to fight.
(1034) For a verbal challenge.
(1035) Giving a challenge in the presence of a justice of the peace.
(1036) For sending a challenge in Pennsylvania.
(1037) Accepting a challenge.
(1038) Engaged in a duel, under Ohio statute.
(1039) Being second in a duel, under Ohio statute.
(1040) Against a second for carrying a challenge, under the South Carolina statute.
(1041) Second count. Omitting to set out letter.
(1042) For being a second in a duel.
(1043) Sending a written message to a person, to fight a duel. Rev. sts. of Mass. ch. 125, § 6.
(1044) Posting another for not fighting a duel. Rev. sts. of Mass., ch., 125, § 8.
(1045) Challenging and posting at common law.

dence of the charges, respectively, of giving or receiving, or of carrying or delivering a challenge, without other proof thereof.—(Rev. Act, Bill I., sect. 24.)

§ 2673 (*c*). *Sending a challenge to fight.*—If any person within this commonwealth shall challenge another by word or writing to fight at sword, rapier, pistol or other deadly weapon, or if any person so challenged shall accept the said challenge, in either case such person so giving or sending or accepting any such challenge shall be guilty of a misdemeanor, and being convicted thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.—(Ibid. sect. 25.)

§ 2673 (*d*). *Carrying or delivering a challenge.*—If any person shall willingly and knowingly carry and deliver any written challenge, or shall verbally deliver any message purporting to be a challenge, or shall consent to be a second in any such intended duel, every such person so offending shall be guilty of a misdemeanor, and being convicted thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years.—(Ibid. sect. 26.)

§ 2673 (*e*). *Concealing the knowledge of a challenge.*—If any person shall have knowledge of any challenge to fight with any deadly weapon, given or received, or in any manner be witness to the fact of such challenge, duel or fighting, not being a second thereat or a party thereto, and shall conceal the same and do not inform thereof, he or she shall guilty of a misdemeanor, and being convicted thereof, shall be sentenced to pay a fine not exceeding fifty dollars, and to undergo an imprisonment not exceeding twelve calendar months.—(Ibid. sect. 27.)

§ 2673 (*f*). *Posting another for not accepting a challenge.*—If any person shall, in any newspaper or handbill, written or printed, or otherwise, post, publish or proclaim any other person or persons as a coward or cowards, or use any other opprobrious and abusive language towards such person for not accepting a challenge, or fighting a duel, such person or persons so offending, shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding one year. —(Ibid. sect. 28.)[aa]

§ 2674. At common law, it has been held a misdemeanor to challenge another to fight with fists,[b] or in fine to challenge another to fight under any circumstances, whether constituting the statutory offence or otherwise.[c]

[aa] "Sections 25, 26, 27 and 28. These sections are re-enactments of the act of the 31st March, 1860, entitled 'An Act to restrain the horrid practice of duelling.' 4 Smith s Laws, 353. Brightly's Digest, 266, Nos. 1, 2, 3, 4, 5, 6. The changes recommended are in the punishments. The challenger, and party accepting a challenge, are made subject to confinement at labor not exceeding three years, instead of one; the second, or bearer of a challenge, to two years instead of one; and the person concealing his knowledge of a challenge, to one year's simple imprisonment instead of nine months. The punishment, by imprisonment at labor, for posting a person for not accepting a challenge, remains the same. The present Constitution of the Commonwealth, article sixth, section tenth, deprives any person who shall fight a duel, or send a challenge for that purpose, or be aider or abetter in fighting a duel, of the right of holding any office of trust or profit in the State. The Commissioners have, therefore, thought it unnecessarily severe to continue in force that clause of the act of 1808, which deprives a party convicted of challenging, or accepting a challenge of all rights of citizenship for seven years thereafter." (Revisors' Report.)

[b] Com. *v.* Whitehead, 2 Boston Law Rep. 148.

[c] State *v.* Farrier, 1 Hawks, 487; State *v.* Taylor, 2 Brevard, 243.

No set phrase is necessary to constitute a challenge to fight with deadly weapons.[d]

§ 2675. The note or letter, sent by one party to the other, and parol testimony, in explanation, are admissible as evidence. The jury is to decide whether, from all the circumstances, there has been a challenge within the statute.[e]

To provoke another to send a challenge is indictable at common law.[f]

§ 2676. A challenge to fight a duel in another State is as much indictable as a challenge to fight a duel in a State where the challenge was sent.[g]

§ 2677. If a jury believe a letter, inviting to a meeting, though on its face it purports to be a challenge, is merely empty boast, and in ridicule to the party to whom it is addressed, they may acquit; though it is otherwise if they deem it in earnest.[h]

T., in a letter to N., uses expressions amounting to a challenge to fight a duel, and by a postscript refers N., the challenged party, to one H., (the bearer of the letter,) if any further arrangements were necessary. It was held that the letter was only evidence of the challenge, and need not be put on record; and that N. might give testimony of the conversation between H., the bearer of the letter and himself.[i]

§ 2678. In an indictment for sending a challenge, it is not necessary to set out a copy of the challenge; and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, no way altering the sense, it seems, such variance, under the North Carolina statute, is not fatal, and, after verdict, it is cured.[j]

§ 2679. Where a statute makes it a misdemeanor to challenge another, the indictment must charge that the defendant challenged; it is not enough that he wrote, sent, and offered a paper he intended as a challenge.[k] A challenge, within the meaning of the statute against duelling, it was said, is a requisition, demand, or request, to fight with deadly weapons; expressing a readiness to accept a challenge, does not amount to challenging.[l]

§ 2680. "Challenges to break the peace by fighting," says Mr. Talfourd, in his late edition of Dickinson's Quarter Sessions,[m] "are indictable as misdemeanors, as well in those who send, as those who knowingly carry

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[d] Com. *v.* Hart, 6 J. J. Marshall, 121; Com. *v.* Tibbs, 1 Dana, 524.

[e] Com. *v.* Hart, 6 J. J. Marshall, 121.

[f] 1 Gabbett, Crim. Law, 66; 1 Hawkins, P. C. § 18, 19; 1 Deacon, Crim. Law, 219; Boothby, Crim. Law, (ed. 1854,) 60. See R. *v.* Rice, 3 East, 581; R. *v.* Phillips, 6 East, 464; State *v.* Taylor, 1 Constitutional Reps. 107; R. *v.* Cuddy, 1 Carrington & Kirwan, 210; R. *v.* Young, 8 Carrington & Payne, 644; R. *v.* Murphy, 6 Carrington & Payne, 103. See, also, Sabine's Notes on Duels and Duelling, p. 42, 43, and Appendix, p. 337.

[g] State *v.* Taylor, 1 Const. Rep. 107; State *v.* Farrier, 1 Hawks, 487.

[h] Com. *v.* Hart, 6 J. J. Marshall, 122.

[i] State *v.* Taylor, 1 Tr. Com. 107.

[j] State *v.* Farrier, 1 Hawks, 487.

[k] State *v.* Gibbons, 1 Southard, 40.

[l] Com. *v.* Tibbs, 1 Dana, 524.

[m] Sixth ed. 325.

them. Upon the same principle, employing words or writings for the purpose of provoking another to send a challenge, where the tendency is direct and manifest, is equally indictable, even though the provocation should fail in its object. And no previous misconduct on the part of the individual challenged or provoked will form a defence against such indictment, so as to entitle the defendant to an acquittal, although it will weigh with the court in determining the sentence. Where, indeed, a party challenged applies to the Court of Queen's Bench for a criminal information, that extraordinary remedy will not be granted, if he shall appear to have given provocation to his adversary, but he will be left to indict at the assizes or session. The punishment, on conviction, is fine and imprisonment, or both, at the discretion of the court."

The degree of guilt to be attached to homicides by duel has been already considered.[n]

An indictment on the Massachusetts stat. 1849, c. 49, § 1, is sufficient, which alleges that the defendant, at a time and place named, "by and in pursuance of a previous appointment and arrangement made to meet and engage in a fight with another person, to-wit, with one J. S., did meet and engage in a fight with the said J. S.," without further charging what previous appointment or arrangement was made, or when, or where, or by whom, or further setting out the defendant's acts.[o]

[*For U. S. statutes against duelling in the District of Columbia, see act of Feb.* 20, 1839, § 1; 5 *Stat.* 318; *Brightly's Dig.* 220.]

CHAPTER XIV.

FALSE PERSONATION.

A. STATUTES.

UNITED STATES.
False personation of holder of public security, &c., § 2681.
False acknowledgment of bail, &c., § 2682.

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

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

OHIO, § 2690.

B. OFFENCE GENERALLY, § 2691.

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[n] Statutes of Mass., ante, § 890–1; of New York, § 895–6; of Ohio, § 929; common law, ante, § 959, 990–6.

[o] Com. *v.* Welsh, 7 Gray, (Mass.) 324.

A.—Statutes.

United States.

§ 2681. *False personation of holder of public security, &c.*—If any person shall falsely and deceitfully personate any true or real proprietor or holder of such share or sum in such (the) public stock or debt (of the United States) or capital stock of the said bank (of the United States,) or any person entitled to (any) such annuity, dividend, pension, prize-money, wages, or other debt or sum of money as aforesaid, (due or to become due from the United States,) and thereby transferring or endeavoring to transfer such public stock or debt, or capital stock of said bank, &c., every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement at hard labor, not exceeding ten years, according to the aggravation of the offence.—(Act of 3d March, 1825, sect. 18.)

§ 2682. *False acknowledgment of bail, &c.*—If any person shall acknowledge, or procure to be acknowledged, in any of the courts aforesaid, (of the United States,) any recognizance, bail, or judgment, in the name or names of any other person or persons not privy or consenting to the same, every such person or persons, on conviction thereof, shall be fined, not exceeding five thousand dollars, or be imprisoned, not exceeding seven years, and whipped, not exceeding thirty-one stripes. This act does not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted for any person or persons against whom such judgment or judgments shall be had or given.—(Act of 30th April, 1790, sect. 15.)

Massachusetts.

§ 2683. *False personating of another and receiving property.*—Every person who shall falsely personate or represent another, and, in such assumed character, shall receive any money or other property whatever, intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed, by so doing, to have committed the crime of simple larceny.—(Chap. 126, sect. 31.)

§ 2684. *Pretending to be a public officer.*—If any person shall falsely assume or pretend to be a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, and take upon himself to act as such, or to require any person to aid or assist him in any matter pertaining to the duty of a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, he shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding four hundred dollars.—(Chap. 128, sect. 19.)

New York.

§ 2685. *False personation generally.*—Every person who shall falsely represent or personate another, and in such assumed character shall, 1. Marry another: or, 2. Become bail or surety for any party in any proceeding, civil or criminal, before any court or officer authorized to take such bail or surety: 3. Confess any judgment; or, 4. Acknowledge the execution of any conveyance of real estate, or of any other instrument, which by law may be recorded: or, 5. Do any other act, in the course of any suit, proceeding or prosecution, whereby the person so represented or personated may be made liable, in any event, to the payment of any debt, damages, costs, or sum of money, or his rights or interests may in any manner be

affected: shall, upon conviction, be punished by imprisonment in a state prison for a term not exceeding ten years.—(2 R. S. 676, sect. 48.)

§ 2686. *Complaint of party injured.*—No indictment for the offence described in the first subdivision of the preceding section shall be found, unless upon the complaint of the injured party, and within two years after the perpetration of the offence.—(Ibid. sect. 49.)

§ 2687. *Receiving property by same.*—Every person who shall falsely represent or personate another, and in such assumed character shall receive any money or valuable property of any description, intended to be delivered to the individual so personated, shall, upon conviction, be punished in the same manner and to the same extent as for feloniously stealing the money or property so received.—(Ibid. sect. 50.)

§ 2688. *False production of infant.*—Every person who shall fraudulently produce an infant, falsely pretending it to have been born of parents whose child would be entitled to a share of any personal estate, or to inherit any real estate, with the intent of intercepting the inheritance of any such real estate or the distribution of any such personal property from any person lawfully entitled thereto, shall, upon conviction, be punished by imprisonment in a state prison not exceeding ten years. —(Ibid. sect. 51.)

§ 2689. *Substitution of same.*—Every person to whom an infant under the age of six years shall be confided, for nursing, education, or any other purpose, who shall, with intent to deceive any parent or guardian of such child, substitute and produce to such parent or guardian another child in the place of the one so confided, shall, upon conviction, be punished by imprisonment in a state prison not exceeding seven years.—(Ibid. sect. 52.)

PENNSYLVANIA.

§ 2689 (*a*). *False personating.*—If any person shall fraudulently and corruptly acknowledge, or procure to be acknowledged, any deed, or any writing authorized to be acknowledged, or any recognizance or judgment, in the name of any other person not privy thereto, or consenting to the same, the person so offending shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.—(Rev. Act, 1860, Tit. II., sect. 16.)

OHIO.

§ 2690. *Falsely personating another.*—That if any person shall falsely personate any other before any court of record or judge thereof, or before any justice of the peace, clerk of either the Supreme Court or Court of Common Pleas, or any other officer of this state, who is or may hereafter be authorized to take the acknowledgment of deeds, powers or warrants of attorney, or to grant marriage licenses, with intent to defraud any person, body politic or corporate, any person so offending, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor, for any space of time not exceeding six years nor less than one year.—(Act of March 7, 1835; Swan's Stat. sect. 21, 272.)

B.—OFFENCE GENERALLY.

§ 2691. Two points under the above statute, must be shown; first, that

the defendant personated or assumed the character of J. N.,[a] and that J. N., the person personated, was entitled to receive the wages in question, or to fill the position which the defendant was indicted for assuming.[b]

CHAPTER XV.

ATTEMPT TO COMMIT OFFENCES.

A. STATUTES.
UNITED STATES.
Attempts to kill, without malice, whereby death ensues on land, § 2692.
Punishment, § 2692.(a)
Attempts to kill, death not ensuing, § 2692.(b)
MASSACHUSETTS.
Attempts generally, § 2692.(c)
Punishment, § 2693.
NEW YORK.
Attempts generally, § 2694.
Punishment, § 2695.
B. OFFENCE GENERALLY, § 2696.

A.—STATUTES.

UNITED STATES.

§ 2692. *Attempts to kill without malice, wherefrom death ensues on land.*—That if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state,[c] shall unlawfully and wilfully, but without malice aforethought, strike, stab, wound, or shoot at any other person, of which striking, stabbing, wounding, or shooting, such person shall afterwards die upon land, within or without the United States, every person so offending, his or her counsellors, aiders, and abettors, shall de deemed guilty of the crime of manslaughter, and upon conviction thereof, shall be punished as is hereinafter provided.—(Act of March 3, 1857, sect. 1.)

§ 2692(a). *Punishment.*—That the crime of manslaughter, as provided for by this act, and all other acts heretofore passed, shall be punished by imprisonment, with or without hard labor, for a period not exceeding three years, and a fine not exceeding one thousand dollars, at the discretion of the court.

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[a] R. *v.* Martin, R. & R. 327; R. *v.* Cramp, R. & R. 324; R. *v.* Potts, R. & R. 353; see, for form, Wh. Prec. 506.

[b] R. *v.* Brown, 2 East, P. C. 1007; R. *v.* Tannet, R. & R. 351.

[c] This was not intended by Congress to extend to any waters not essentially maritime; much less to a river in the interior of the continent, not navigable from the ocean; and least of all to a portion of that river within the territory and exclusive jurisdiction of a foreign sovereignty. Nor was it intended to go beyond the class of assaults made manslaughter under the former statutes to which it was amendatory and supplementary; or to do more than provide for the case of death on land, resulting from assaults which were already made punishable when death resulted at the place where the fatal blow was given.

And, therefore, manslaughter committed by a mortal blow given on the river St. Clair, beyond the boundary line between the United States and the Province of Canada, and within a county in said Province, from which blow death ensued on land, is not within the intent and meaning of the said act, though the blow was given on an American vessel. (The People *v.* Tyler, 3 Cooley, Mich., 162.)

§ 2692 (*b*). *Attempts to kill, death not ensuing.*—That if any person upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, shall attempt to commit the crime of murder or manslaughter, by poisoning, drowning, or strangling another person, or by means not constituting the offence of an assault with a dangerous weapon, such offender, upon conviction thereof, shall be punished by imprisonment, with or without hard labor, for a period not exceeding three years, and a fine not exceeding one thousand dollars, at the discretion of the court.

Repeal of former acts.—That all acts, and parts of acts, inconsistent with the provisions of this act, are hereby repealed. *Provided, however*, That this repeal shall not affect any act done before, or any prosecution pending at the time of the passage of this act; but all such acts shall be indictable and punishable, and all such prosecutions shall be proceeded with as the same would have been indictable, and punishable, and proceeded with if this act had not been passed.

MASSACHUSETTS.

§ 2692 (*c*). *Attempts generally.*—Every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, where no express provision is made by law for the punishment of such attempts, shall be punished as follows:

§ 2693. *Punishment.*—First, if the offence attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be punished by imprisonment in the state prison, not more than ten years:

Secondly, if the offence so attempted to be committed is punishable by imprisonment in the state prison for life, or for five years or more, the person convicted of such attempt shall be punished by imprisonment in the state prison not more than three years, or in the county jail not more than one year:

Thirdly, if the offence so attempted to be committed is punishable by imprisonment in the state prison for a term less than five year, or by imprisonment in the county jail, or by fine, the offender convicted of such attempt shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars; but in no case shall the punishment by imprisonment exceed one-half of the greatest punishment which might have been inflicted if the offence so attempted had been committed.[a]—(Rev. Stat., ch. 133, sect. 12.)

NEW YORK.

§ 2694. *Attempts generally.*—Every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the com-

[a] Under Rev. Stat. 133, s. 12, an indictment is not bad for duplicity, when, besides setting forth an "attempt" to set fire to a building, it avers a breaking and entering of the building. (Com. *v.* Harney, 10 Metc. 422.)

When an indictment alleges that a party attempted to set fire to a dwelling-house, with intent to burn it, by attempting to set fire to another building, the jury are authorized to infer the alleged intent, from the evidence respecting the attempt to set fire to the other building. (Ibid.)

It is not necessary, in an indictment for an attempt to commit a crime, within the Rev. Stat. c. 133, s. 12, that it should be directly charged that the act attempted was a crime punishable by law, provided it appear to be so from the facts alleged. In an indictment for an attempt to burn a building, it is not necessary to describe the combustible materials used for the purpose. (Com. *v.* Flynn, 3 Cush. 529.)

See, for forms, Wh. Prec. 1046–7, 8.

mission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows:

§ 2695. *Punishment.*—1. If the offence attempted to be committed be such as is punishable by the death of the offender, the person convicted of such attempt shall be punished by imprisonment in a state prison not exceeding ten years:

2. If the offence so attempted, be punishable by imprisonment in a state prison for four years or more, or by imprisonment in a county jail, the person convicted of such attempt shall be punished by imprisonment in a state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon the conviction for the offence so attempted.

3. If the offence so attempted be punishable by imprisonment in a state prison for any term less than four years, the person convicted of such attempt shall be sentenced to imprisonment in a county jail for not more than one year.

4. If the offence so attempted be punishable by a fine, the offender convicted of such attempt shall be liable to a fine not exceeding one-half of the largest amount which may be imposed, upon a conviction of the offence so attempted.

5. If the offence so attempted be punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half of the longest time of imprisonment and one-half of the greatest fine which may be imposed, upon conviction of the offence so committed.[b]—(2 N. Y. Rev. Stat. 698, sect. 3.)

B.—Offence generally.

§ 2696. Mere intent, let it be observed, is not the subject of penal action. "Cogitationis pœnam nemo patitur," we are told by the Roman law (L. 18, D. de pœnis xlviii, 19). The jurisprudence both of the civil and the common law, rests in this respect upon the position that an overt act is essential to impart to the intent criminal responsibility. As an instance of the liberality with which this indemnity of mere thought is construed, even by the most despotic of modern European powers, we may cite the following passage from the Austrian penal code (sect. 11). "No man can be arraigned for thoughts or personal intents, unless there be an overt act of guilt committed, or some positive violation of law."

There are two apparent exceptions to this with us, but these exceptions are nominal, not real. The one is where an auxiliary overt act is tacked to an independent intent, as where a man intending to shoot A. shoots B. Here, however, we have an act committed, which itself presumes a guilty intent, while there is an adequate though independent guilty intent notwithstanding. Besides this, to say that the intent and the guilty act must exactly square with each other, so that the intent must cover the whole of the act, and not go beyond it or fall within it, would be to give immunity in all cases whatsoever. The second apparent exception is in cases of conspiracy, where it is popularly said that an overt act is not necessary to

[b] See People *v.* Bush, 4 Hill, 133, post, § 2698. See for form, under this Stat., Wh. Prec. 1050.

constitute the offence. This, however, goes on the idea that the conferring together of A. and B., to do an illegal act, is not in itself an overt act, though no further step be taken. Now such conference is an overt act, and as such, with the guilty intent, is punishable.

By the civilians the overt act (*That bestand* as distinct from *corpus delicti*) is regarded as (1) subjective and (2) as objective. The *first* involving the mental, the second the corporeal conditions of the crime. Thus, in obtaining goods by false pretences, the telling the falsehood may fall under the first class, the grasping the goods under the second. In respect to the *proof*, the line seems to be run a little differently. Here, that which relates to the proof of the act itself, and the establishment of its guilt, is called *objective;* that which relates to the individualization of the offender, to the *subjective.*

The older writers frequently used the terms *overt act* and *corpus delicti* in the same general sense. Now, however, the latter term is to be considered as meaning a specific physical incident, which is essential to the constitution of the offence, and the existence of which is a prerequisite to the institution of a prosecution,—*e. g.*, the dead body in a case of murder, the blow in a battery.

An attempt to commit a felony is in itself a misdemeanor.[c] In many cases, apart from the statutes, an attempt to commit even a misdemeanor is indictable.[d] 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;[e]

[c] Ante, § 8; 1 Hawk. P. C. 55; R. *v.* Higgins, 2 East, R. 21; R. *v.* Kinnersley, 1 Strange, 196; Hackett *v.* Com., 3 Harris, 95. See Wharton's Precedents, as follows:

(1046) Attempt to commit an offence in Massachusetts.
(1047) Attempt to burn dwelling-house. Rev. Sts. of Mass., ch. 133, § 12.
(1048) Attempt to burn a dwelling-house in the night time, by breaking and entering a building, and setting fire to the same. Rev. Sts. of Mass., ch. 133, § 12.
(1049) Attempt to commit a larceny from the person of an individual, by picking his pocket. Rev. Sts. of Mass., ch. 133, § 12.
(1050) Attempt to commit arson, &c., in New York, under 2 Rev. Stat. 698, s. 3. First count. Attempt to set fire, &c.
(1051) Second count. Soliciting another to commit arson, &c.
(1052) Attempt to set fire to a house, at common law.
(1053) Conveying instruments into a prison with intent to facilitate the escape of a prisoner.
(1054) Lying in wait near a jail in order to secure a prisoner's escape, at common law.
(1055) Keeping keys with intention to commit burglary.
(1056) Having in possession implements of burglary.
(1057) Attempt to obtain money by means of false pretences.
(1058) Poisoning. By mixing arsenic with water, and administering the same with intent to kill, under Ohio Statute.
(1059) Administering poison with intent to murder.
(1060) Attempt to commit suicide.
For assault with intent, see Wh. Prec. 242, &c.

[d] R. *v.* Higgins, 2 East R. 8; R. *v.* Phillips, 6 East, 464; State *v.* Murray, 15 Maine, 100; Com. *v.* Harrington, 4 Pick. 26; State *v.* Avery, 7 Conn. 257; Demarest *v.* Haring, 6 Cowen, 75; State *v.* Keyes, 1 Ver. 57; see ante, § 8.

[e] State *v.* Caldwell, 2 Tyler, 212.

to lie in wait near a jail, by agreement with a prisoner, and to carry him away;[f] to send threatening letters;[g] to challenge another to fight with fists;[h] to challenge another to fight under any circumstances, though not in such a way as to constitute the statutory offence;[i] to even intimate to another a desire to fight with deadly weapons;[j] and to solicit a woman to commit adultery.[k]

§ 2697 But the inducing another to commit an act not *per se* penal, but made the subject of statutory fine, as a matter of municipal regulation, is not indictable.[l] Thus, a man who purchases liquor by the retail, from one who by selling the same makes himself liable to the statutory penalty, does not become involved in the transaction as a particeps.[m]

§ 2698. 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.[n] In an indictment under the New York statute, as above given, for soliciting the commission of an offence, the particular manner in which the solicitation was made need not be set out.[o] In an indictment for an assault with intent to murder, it is not necessary to set forth the instrument used.[p] So in an indictment for an assault with an intent to pick from the pocket, it is not necessary to set out the money attempted to be stolen,[q] nor that the prosecutor had anything in his pocket to be picked.[r]

§ 2699. In Virginia, however, under a statute similar to that in New York, an indictment simply averring that the defendant "did attempt feloniously to maim," &c., C. R., was said to be not sufficiently precise.[s] The indictment "should allege," said Leigh, J., "some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment." And in Pennsylvania the same rule exists in reference to common law indictments for attempts.[t]

§ 2700. So, recently in England, an indictment stated that the prisoner "did unlawfully attempt and endeavor fraudulently, falsely and unlawfully to obtain from the Agriculturist Cattle Insurance Company a large sum of money, to wit, the sum of 22*l.* 10*s.* with intent thereby then and there to cheat and defraud the said company," &c. It was held, 1st. That the nature of the attempt was not sufficiently set forth. 2d. That the indict-

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[f] People *v.* Washburn, 10 Johns. R. 160.
[g] U. S. *v.* Ravara, 2 Dallas, 299.
[h] Com. *v.* Whitehead, 2 Bost. L. Rep. 148; ante, § 2674.
[i] State *v.* Farrier, 1 Hawks, 487; State *v.* Taylor, 4 Brevard, 243; ante, § 2674.
[j] State *v.* Tibbs, 1 Dana, 524. [k] State *v.* Avery, 7 Conn. 267.
[l] Com. *v.* Willard, 22 Pick. 476; Dobkins *v.* State, 2 Humph. 424; Palse *v.* State, 5 Humph. 108; Ross *v.* Com., 2 B. Monroe, 417; R. *v.* Upton, 2 Strange, 816.
[m] Com. *v.* Willard, 22 Pick. 496.
[n] R. *v.* Higgins, 2 East, 5; Com. *v.* Doherty, 10 Cush. (Mass.) 52; see ante, § 293.
[o] People *v.* Bush, 4 Hill, 133.
[p] State *v.* Dent, 3 Gill. & Johns. 8; State *v.* Chandler, 24 Mis. (3 Jones) 371; ante, § 1281.
[q] Com. *v.* Rogers, 5 Serg. & R. 463. [r] Com. *v.* M'Donald, 5 Cush. 365.
[s] Clark's case, 6 Grat. 675.
[t] Randolph *v.* Com., 6 Serg. & Rawle, 398.

ment did not contain facts amounting to a statement of a misdemeanor, as the money was not laid to be the property of any one.[u]

§ 2701. In Pennsylvania an indictment charging that S. A., on, &c., "in the night time of the said day aforesaid, at, &c., did attempt to commit an offence prohibited by law, to wit: with force and arms, with an axe, &c., with a wicked intent on the dwelling house of D. H., &c., in the night time, feloniously and burglariously did break and enter, and with the intent with the said axe to open and enter," &c., and steal, "but said S. H. did then and there fail in the perpetration of said offence," was held good as an indictment for an attempt to commit burglary at common law.[v]

§ 2702. An *attempt*, under the statute, can only be made by an actual, ineffectual deed, done in pursuance of, and in furtherance of the design to commit the offence. But if the parties continued to commit the offence, and they all assented to it, and a part only went to do the act, those absent, knowing what the others were doing, are principals.[w]

Assaults with intent have been already considered.[x]

CHAPTER XVI.

OFFENCES AGAINST THE POST OFFICE.

I. ROBBERY OR LARCENY FROM MAIL, § 2703.
A. STATUTES.
UNITED STATES.
Robbery of carrier, &c., of mail, or stealing from mail, § 2703.
Injuring mail bag, &c., 2704.
Stealing or forging a mail-key or lock, § 2704(*a*).
Stealing mail-bags, § 2704(*b*).
B. OFFENCE GENERALLY, § 2705.
II. LARCENY OR EMBEZZLEMENT FROM THE MAIL BY EMPLOYEE, OR RECEIVING GOODS SO TAKEN, § 2709.
A. STATUTES.
UNITED STATES.
Employee in post office detaining, &c., letter, or secreting or embezzling same, § 2709.
Receiving articles stolen or embezzled, &c., § 2710.
B. OFFENCE GENERALLY, § 2711.
1st. EMBEZZLEMENT, ETC., § 2711.
(*a*) In what it consists, § 2711.
(*b*) Indictment, § 2713.
2d. RECEIVING EMBEZZLED MONEY, ETC., § 2714.

I. ROBBERY OR LARCENY FROM MAIL.

A.—STATUTES.

UNITED STATES.

§ 2703. *Robbery of carrier, &c., of mail, or stealing from mail.*—If any person

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[u] R. *v.* Marsh et al., 1 Den. C. C. 505.
[v] Hackett *v.* Com., 3 Harris, 95.
[w] Uhl *v.* Com., 6 Grat, 672.
[x] Ante, § 1264, &c.

shall rob any carrier of the mail of the United States, or other persons intrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned, not less than five years nor exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death.[a] And if any person shall attempt to rob the mail of the United States by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by imprisonment, not less than two nor exceeding ten years. And if any person shall steal the mail, or shall steal, or take from, out of any mail, or from or out of any post-office, any letter or packet; or if any person shall take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, and shall open, embezzle or destroy any such mail, letter or pocket, the same containing any article of value, or evidence of any debt, due, demand, right or claim, or any release, receipt, acquittance or discharge or any other article, paper or thing mentioned and described in the twenty-first section of this act; or if any person shall, by fraud or deception, obtain from any person having custody thereof any mail, letter or packet containing any article of value, or evidence thereof, or either of the writings referred to or next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned, not less than two nor exceeding ten years. And if any person shall take any letter, or packet, not containing any article of value, or evidence thereof, out of a post-office, or shall open any letter or packet, which shall have been in a post-office, or in custody of a mail-carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets; or shall secrete, embezzle, or destroy, any such mail, letter, or packet, such offender, upon conviction, shall pay, for every such offence, a sum not exceeding five hundred dollars, and be imprisoned not exceeding twelve months.—(Act of 3d March, 1825, sect. 27.)

§ 2704. *Injuring mail bag, &c.*—If any person shall rip, cut, tear, burn, or otherwise injure, any valise, portmanteau, or other bag, used, or designed to be used, by any person acting under the authority of the postmaster-general, or any person in whom his powers are vested, in a conveyance of any mail, letter, packet or newspaper, or pamphlet, or shall draw or break any staple, or loosen any part of any lock, chain, or strap, attached to or belonging to any such valise, portmanteau, or bag, with an intent to rob or steal any mail, letter or packet, newspaper, or pamphlet, or to render either of the same insecure, every such offender, upon conviction, shall, for every such offence, pay a sum not less than one hundred dollars, nor exceeding five hundred dollars, or be imprisoned not less than one year, nor exceeding three years, at the discretion of the court before whom such conviction is had. Every person who, from and after the passage of this act, shall procure, and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes, according to the provisions of this act.—(Ibid. sect. 23.)

§ 2704 (*a*). *Stealing or forging mail-keys or locks.*—If any person shall steal,

[a] See cases at foot of next section.

purloin, embezzle or obtain by any false pretence, or shall aid or assist in stealing, purloining, embezzling or obtaining by any false pretence, or shall knowingly and unlawfully make, forge or counterfeit, or cause to be unlawfully made, forged or counterfeited, or knowingly aid or assist in falsely and unlawfully making, forging or counterfeiting any key suited to any lock which has been or shall be adopted for use by the post-office department of the United States, and which shall be in use on any of the mails or mail-bags of the said post-office department, or shall have in his possession any such mail-key, or any such mail-lock, with the intent unlawfully or improperly to use, sell or otherwise dispose of the same, or to cause the same to be unlawfully or improperly used, sold or otherwise disposed of, or who, being employed in the manufacture of the locks or keys for the use of the said post-office department, whether as contractor or otherwise, shall deliver, or cause to be delivered, any finished or unfinished key or lock used or designed for use, by the said post-office department, or the interior part of any such mail-lock, to any person not duly authorized under the hand of the postmaster general of the United States and the seal of the said post-office department, to receive the same, (unless such person so receiving the same shall be the contractor for furnishing such locks and keys, or engaged in the manufacture thereof in the manner authorized by the contract, or the agent for such manufacture,) such person so offending shall be deemed guilty of felony, and, on conviction thereof, shall be imprisoned for a period not exceeding ten years.—(Act of 31st August, 1852, sect. 3; 10 Stat. 139.)

§ 2704 (*b*). *Stealing mail-bags, &c.*—If any person shall steal, purloin or embezzle any mail-bags in use by or belonging to the post-office department of the United States, or any other property in use by or belonging to the said post-office department, or shall, for any lucre, gain or convenience, appropriate any such property to his own or any other than its proper use, or for any lucre or gain shall convey away any such property to the hindrance or detriment of the public service of the United States, the person so offending, his counsellors, aiders and abetters, (knowing of and privy to any offence aforesaid,) shall, on conviction thereof, if the value of such property shall exceed twenty-five dollars, be deemed guilty of felony, and shall be imprisoned for a period not exceeding three years; or, if the value of such property shall be less than twenty-five dollars, shall be imprisoned not more than one year, or be fined not less than ten dollars nor more than two hundred dollars, for every such offence.—(Ibid. sect. 4.)

B.—Offence generally.

§ 2705. Robbing the carrier of the mail of the United States, or other person intrusted therewith by stopping him on the highway, and demanding the surrender of the mail, and at the same time showing weapons calculated to take his life, putting him in fear of his life, and obtaining possession of the mail by the means aforesaid, against the will of the carrier, is such a robbery of the mail, and such a putting the life of the carrier or person intrusted therewith in jeopardy, as will bring the offence within the act of Congress.[b]

§ 2706. The defendant was indicted upon the 24th section of the act for advising, procuring and assisting one Joseph J. Straughan, a mail carrier,

[b] U. S. *v.* Hare and Alexander, U. S. Cir. Court, Balt., May, 1818; see Wheeler's C. C. 2, xii.; the same law was recognized by Washington, J., in U. S. *v.* Wood, Phila., June, 1818, and in U. S. *v.* Bernard, Trenton, 1819; see also U. S. *v.* Aminhiser, (pamphlet,) tried in the U. S. Cir. Court, Balt., Dec. 1823.

to rob the mail; and was found guilty. Upon this finding, the judges of the circuit court of North Carolina were divided in opinion on the question whether an indictment, founded on the statute for advising, &c., a mail carrier to rob the mail, ought to set forth or aver that the said carrier did, in fact, commit the offence of robbing the mail. The answer to this, it was said by the Supreme Court, as an abstract proposition, "must be in the affirmative. But if the question intended to be put is, whether there must be a distinctive substantive averment of that fact, it is not necessary. The indictment, in this case, sufficiently sets out that the offence has been committed by the mail carrier."[c]

§ 2707. Upon an indictment for robbing the mail, and putting the person having the custody of it in jeopardy, under the 19th section of the act of April 30th, 1810, ch. 262, a sword, &c., in the hands of the robber, by terror of which the robbery is effected, is a dangerous weapon, within the act, putting the life in jeopardy; though it be not drawn or pointed at the carrier. So a pistol in his hands, by means of which the robbery is effected, is a dangerous weapon; and it is not necessary to prove that it was charged; it is presumed to be so until the contrary is proved.[d]

It is not necessary to a conviction, under the 22d section of the act above given, that the carrier of the mail should have taken the oath prescribed by the second section of the act of 1825, or that the whole mail be taken.[e]

§ 2708. All persons present at the commission of the robbery, consenting thereto, aiding, assisting, or abetting therein, or in doing any act which is a constituent of the offence, are principals.[f]

The word "rob," in section 22, is used in the common law sense.[g]

"Jeopardy," as used in the section, means a well-grounded apprehension of danger to life, in case of refusal to yield to threats of resistance.[h]

II. Larceny or embezzlement from the mail, by employee, or receiving goods so taken.

A.—Statute.

§ 2709. *Employee in post-office detaining, &c., letters, or secreting or embezzling same, or contents thereof, or stealing from same, or deserting mail.*—If any person, employed in any of the departments of the post-office establishment,[i] shall unlawfully detain, delay or open any letter,[j] packet, bag, or mail of letters, with which he shall be intrusted, or which shall have come to his possession, and which are intended to be conveyed by post; or if any person shall secrete, embezzle, or destroy, any

[c] U. S. *v.* Mills, 7 Peters, 18. [d] U. S. *v.* Wood, 3 Wash. C. C. R. 440.
[e] U. S. *v.* Wilson, 1 Baldwin's C. C. R. 102. [f] Ibid. [g] Ibid.
[h] Ibid. For forms under the above stat. see Wh. Prec., as follows:—
(1095) Male 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.
(1096) another form for same. First count, robbing of the mail and putting in jeopardy with pistols.
(1097) Obstructing the mail.
[i] As to this phrase see U. S. *v.* Belew, 2 Brock, 280.
[j] See as to meaning of letter, U. S. *v.* Foye, 1 Curtis, 364.

letter or packet intrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to money, as hereinafter described, every such offender being thereof duly convicted, shall, for every such offence, be fined, not exceeding three hundred dollars, or imprisoned not exceeding six months, or both, according to the circumstances and aggravations of the offence. And if any person, employed as aforesaid, shall secrete, embezzle, or destroy, any letter, packet, bag, or mail of letters, with which he or they shall be intrusted, or which shall have come to his or her possession, and are intended to be conveyed by post, containing any bank note, or bank post-bill, bill of exchange, warrant of the treasury of the United States, note of assignment of stock in the funds, letters of attorney for receiving annuities or dividends, or for selling stock in the funds, or for receiving the interest thereof, or any letter of credit, or note for, or relating to, payments of moneys, or any bond, or warrant, draft, bill, or promissory note, covenant, contract, or agreement whatsoever, for, or relating to, the payment of money, or the delivery of any article of value, or the performance of any act, matter, or thing, or any release, acquittance, or discharge of or from any debt, covenant or demand, or any part thereof; or any copy of any record of any judgment, or decree, in any court of law or chancery, or any execution which may have issued thereon, or any copy of any other record, or any other writing of value, or any writing representing the same; or if any such person, employed as aforesaid, shall steal,[d] or take, any of the same out of any letter, packet, or bag, or mail of letters, that shall come to his or her possession, such person shall, on conviction for any such offence, be imprisoned, not less than ten years, nor exceeding twenty-one years. And if any person who shall have taken charge of the mails of the United States, shall quit or desert the same before such person delivers it into the post-office, kept at the termination of the route, or some known mail-carrier or agent of the general post-office, authorized to receive the same, every such person so offending shall forfeit and pay a sum not exceeding five hundred dollars for every such offence. And if any person, concerned in carrying the mail of the United States, shall collect, receive, or carry any letter or packet, or shall cause or procure the same to be done, contrary to this act, every such offender shall forfeit and pay for every such offence a sum not exceeding fifty dollars.—(Act 3d March, 1825, sect 21.)

§ 2710. *Receiving articles stolen or embezzled, &c.*—If any person shall buy, receive or conceal, or aid in buying, receiving or concealing, any article mentioned in the twenty-first section of this act, knowing the same to have been stolen or embezzled from the mail of the United States, or out of any post-office, or from any person having the custody of the said mail, or the letters sent or to be sent therein; or if any person shall be accessory, after the fact, to any robbery of the carrier of the mail of the United States, or other person intrusted therewith, of such mail, or of part thereof, every person so offending shall, on conviction thereof, pay a fine not exceeding two thousand dollars, and be imprisoned and confined to hard labor for any time not exceeding ten years. And such person or persons, so offending, may be tried and convicted without the principal offender being first tried, provided such principal offender has fled from justice, or cannot be found to be put upon his trial.—(Ibid. sect. 45.)

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[d] See as to form, Wh. Prec., 445.

B.—Offence generally.

1st. Embezzlement, &c.

§ 2711. (*a*) *In what it consists.*—Where a letter is delivered to an authorized agent, the letter cannot be charged with having been embezzled. Whether the alleged agency existed, the jury must determine from the evidence.[e] To constitute the offence, the letter must have been obtained from the post office, or from a letter carrier; after a voluntary delivery to a third person, the letter is no longer under the protection of the laws of the United States; and the act of fraudulently obtaining it from such third person is not punishable under the statute.[ee]

If a clerk in the post office take a letter containing money from its appropriated place of deposit, in the post office building, with intent to convert its contents to his own use, he is guilty of stealing it from the post office, under the 22d section of the act 3 March, 1825 (217, pl. 81), although it be not removed beyond the building containing the post office.[f]

§ 2712. A letter, containing money, deposited in the mail for the purpose of ascertaining whether its contents were stolen on a particular route, and actually sent on a post route, is a letter intended to be sent by post within the meaning of the post office act.[ff]

On a charge for stealing letters out of the mail by a post master or other person, it is important to have as witnesses the post-masters through whose offices the letters passed or were distributed.[g]

When such witnesses are not called, although there may be proof of the mailing of the letters, and that they were never received, it is not sufficient for the conviction of any post-master on the route.[h]

§ 2713. (*b*) *Indictment.*—An indictment which charges the defendant with unlawfully abstracting a letter containing bank notes, from the mail, is good, if it alleges that the letter, containing bank notes was put into the post-office to be conveyed by post, and came into possession of defendant, as a driver of the mail-stage.[i]

It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a post-master, nor to describe the bank notes particularly, enclosed in the letter. But if either the letter or the notes be described in the indictment, they must be proved as laid.[j]

It is enough to state the letter came to the hands of the post-master, in the words of the statute, without showing where it was mailed, or on what route it was conveyed.[jj]

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[e] U. S. *v.* Sander, 6 M'L., C. C. R. 598.
[ee] U. S. *v.* Parsons, 2 Blatch. 104–5.
[f] U. S. *v.* Marselis, 2 Blatch. 108.
[ff] (4 Stat. at Large, 102.) U. S. *v.* Foye, 1 Curtis's R. 364.
[g] U. S. *v.* Emerson, 6 M'Lean, C. C. R. 406.
[h] Ibid.
[i] U. S. *v.* Martin, 2 M'Lean, 256.
[j] U. S. *v.* Lancaster, 2 M'Lean, 431; U. S. *v.* Patterson, 6 Ibid. 466; see U. S. *v.* Sanders, 6 Ibid. 598.
[jj] Ibid.

To convict a person of stealing a letter, &c., who is employed in the department, such employment must be distinctly alleged and proved.[k]

It is enough, however, to aver that the defendant was a person employed in one of the departments of the post-office establishment of the United States.[l]

The description of the termini, between which the letter was intended to be sent by post, cannot be rejected as surplusage, but must be proved as laid.[m]

It is necessary to lay the property stolen on some person other than the prisoner.[n]

2d. Receiving embezzled money, etc.

§ 2714. It is an offence under the post office law of 1825, 45th section, to receive or buy any article that has been stolen from the mail, knowing it to have been so stolen.[o] To show that the article has been stolen, the conviction of the individuals who stole it, is sufficient, if the article be identified.[p]

When an individual under such circumstances is found in possession of stolen property, and fails to show how he acquired it, or gives inconsistent or contradictory accounts, how he came by it, the presumption of guilt is strengthened.[q]

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[k] U. S. *v.* Nott, M'Lean, 499; see U. S. *v.* Belew, 2 Brock. 280.
[l] U. S. *v.* Patterson, 6 M'Lean, C. C. R. 466.
[m] U. S. *v.* Foye, 1 Curtis, 364.
[n] U. S. *v.* Foye, 1 Curtis, 364. See Wh. Prec., as follows:—
(1098) Opening a letter in the United States mail.
(1099) Stealing from the mail of the United States.
First count. Stealing the mail.
(1100) Second count. Stealing from the mail certain letters and packets.
(1101) Third count. Taking letters from the mail and opening and embezzling them.
(1102) Forth count. Stealing a letter, specifying its contents, and by whom sent.
(1103) Fifth count. Same without averment of contents.
(1104) Another form for same, with counts for opening, &c. First count stealing a letter and packet.
(1105) Second count. Same, stating route of mail.
(1106) Third count. Stating direction of letter.
(1107) Fourth count. Same, stating both route and direction of letter.
(1108) Fifth count. Embezzling and destroying letter.
(1109) Sixth, seventh and eighth counts. For embezzling, &c., varying the statement of route and direction as in second, third and fourth counts.
(1110) Ninth count. Against person employed in post-office for opening, &c.
(1111) Tenth count. Against carrier for embezzling and destroying letter.
(1112) 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.
(1113) Embezzling, &c., averring specially the character and route of letter, &c.
(1113) Procuring and advising a person intrusted with the mail to secrete it.
(1115) Second count. Procuring and advising a person intrusted with the mail to secrete a particular letter.
[o] U. S. *v.* Keene, 5 M'L. C. C. R. 509. [p] Ibid. [q] Ibid. ante, § 728.

BOOK VII.

OFFENCES AGAINST SOCIETY.

CHAPTER I.

TREASON.*

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* For forms of indictment, see Wharton's Precedents, as follows:—
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I. Treason against the United States.

A.—Constitution and statutes.

§ 2715. *Treason, in what it consists.*—Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.—(Const. U. S. art. 3, sect. 3, cl. 1.)

§ 2716. *Evidence and punishment.*—If any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be convicted on confession in open court or on the testimony of two witnesses to the same overt act of treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.—(Act 30th April, 1790, sect. 1.)

§ 2717. *Concealment of treason.*—If any person or persons, having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not, as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars. —(Ibid. sect. 2.)

[*See Act of 30th Jan.*, 1799, *sect.* 1, *Bright. Dig.* 203, *by which corresponding with foreign governments, with intent to influence their controversies with the United States, or to defeat the measures of this government, and aiding and abetting such act, is not to prohibit application for redress of injuries.*]

B.—Offece generally.

§ 2718. By the definition of treason in the constitution, it is limited, as

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(1118) Another form for same.
(1119) Traitorously adhering to, and giving aid and comfort to the enemies of the United States.
(1120) Aiding and comforting the enemy, with overt acts specially pleaded, consisting of sending provisions in a vessel to one of the enemy's vessels.
(1121) Illegal outfit of vessel, &o., against a foreign nation, &c.
(1122) Beginning, setting on foot, providing and preparing the means of a military enterprise or expedition, against the territory or dominions of a foreign prince.
(1123) Enlisting soldiers in the United States, in the service of a foreign prince.
(1124) Conspiracy to impede the operation of certain acts of Congress.
First count. Conspiracy alone.
(1125) Second count. Overt act; rioting, &c.
(1126) Third count. Rescue of person under custody of marshal.
(1127) Conspiracy to raise an insurrection against the United States.
First count. By advising the people to resist the execution of the excise law.
(1128) Second count. Setting up a liberty pole for the purpose of inciting the people to sedition.
(1129) Conspiracy to assemble a seditious meeting. First count.
(1130) Conspiracy to raise an insurrection and obstruct the laws. First count.
(1131) Levying war against the State of Massachusetts.

will be perceived, in the first place, to the levying of war against the United States, and secondly, to adhering to the enemies of the United States, giving them aid and comfort.[b]

1st. Levying war.

§ 2719. In the very able and elaborate opinion of Chief Justice Marshall, in Burr's case, this branch of treason was thoroughly examined. "The term," it was said, "is not the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which has been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in their ascertained meaning, unless the contrary is proved by the context. It is said this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the Legislature. In the exposition of terms, therefore, used in the instruments of the present day, the definitions and the dicta of these authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to much respect."[c]

§ 2720. "Taken most literally," it was said, "the words 'levying of war,' are perhaps of the same import with the words raising or creating war; but as those who join after the commencement are equally the objects of punishment, there would be probably a general admission that the terms also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not

(1132) 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.

(1133) Treason against a State before the federal constitution. Overt act taking a commission from the British government in 1778.

(1134) Misdemeanor in going into the city of Philadelphia while in possession of the British army.

(1135) Enticing United States soldiers to desert.

(1136) Against a deserter and the person harboring him.

(1137) Supplying unwholesome bread to prisoners of war.

[b] 2 Federalist, No. 43; 4 Tucker's Black. App. 12; Charge of Judge Wilson, 7 Carey's Am. Museum, 40; 3 Story's Const. Law, sect. 1794.

[c] 2 Burr's Trial, 401; 4 Cranch, 470; see U. S. *v.* Fries, C. C. April, 1800, Pamph.

improbable that those who should raise, create, make or carry on war, might be comprehended. The various acts which would be considered as coming within the term, would be settled by a course of decisions; and it would be affirming boldly to say, that those only who actually constitute a portion of the military force appearing in arms, could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on an open war against the United States, and subverting their government; the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions; or by a recruiting officer, holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him."[d]

§ 2721. The number of persons assembled is not material; a few may complete the offence as well as a thousand.[e] Actual fighting need not, at common law, be proved;[f] enlisting and marching being enough, without coming to battle.[g]

§ 2722. Whether a person who performs no act in the prosecution of the war, but who counsels and advises it; or who, being engaged in the conspiracy, fails to perform his part, may be implicated by the doctrine that whatever would make a man an accessory in felony, makes him a principal in treason, or is excluded because that doctrine is inapplicable to the United States, the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to conviction, is a question which was reserved by the chief justice on Burr's trial, and which will presently be noticed more fully.[gg]

"To constitute that specific crime for which the prisoners now before the court have been committed," said the Supreme Court of the United States,[h] "war must actually be levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are two distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has the principle been carried, that in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined, that the actual enlistment of men to serve against the government,

[d] 2 Burr's Trial, 401; 4 Cranch, 470.
[e] 3 Inst. 9.
[f] Post. 218; 1 Hale, 144.
[g] Vaughan's case, 580, Tr. 17-39; 2 Salk. 634; 2 Burr's Trial, 401.
[gg] Post, § 2735-6.
[h] Ex parte Bollman, 4 Cranch, 126.

does not amount to levying war. It is true, that in that case the soldiers enlisted were to serve without the realm; but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war has been actually levied." . . . "It is not the intention of the court to say that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war."[i]

§ 2723. At common law, in the case of war levied directly against the government, all persons assembling and marching with the rebels are guilty of treason, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence or not;[j] unless compelled to join and continue with them *pro timore mortis*.[k] But in the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason are traitors; the rest are merely rioters.[l]

§ 2724. A person might be concerned in a treasonable conspiracy even to levy war directly, it was said by the court in Burr's case, and yet be legally, as well as actually absent, while some one act of the treason is perpetrated. "If a rebellion should be so extensive as to spread through every state in the Union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army, with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire; if this chief should be there captured, and sent to the other extremity for the purpose of trial; if the indictment, instead of alleging an overt act, which was true in point of fact, should allege that he had assembled some small party, which in truth he had not seen, and had levied war by engaging in a skirmish in Georgia, at a time when in reality he was fighting a battle in New Hampshire; if such evidence would support such an indictment by the fiction that he saw legally present though really absent; "to what purpose," it was asked, "are those provisions in the constitution, which direct the place of trial, and

[i] Ex parte Bollman, 4 Cranch, 126; United States *v.* Burr, 4 Cranch, 469, 508, etc.; Serg. on Const. ch. 30 (2d ed. ch. 32); People *v.* Lynch, 1 John. R. 553.

[j] R. *v.* The Earls of Essex and Southampton, Moor, 621; post, § 2771.

[k] Fost. 216, 217; 3 Inst. 10; 1 Hale, 49, 51, 139; and see R. *v.* M'Growther, Fost. 1.

[l] See R. *v.* Messenger et al., Kel. 70, 79; 1 Sid. 358; 2 St. Tr. 585, 594.

ordain that the accused shall be informed of the nature and cause of the accusation."

§ 2725. Levying of war is direct when the war is levied directly against the government with intent to overthrow it;[m] such, for instance, as holding any of the government's forts or ships, or attacking the same, or delivering them up to rebels through treachery;[n] constructive, where it is levied for the purpose of producing changes of a public and general nature by an armed force;[o] as for the purpose of attempting by force to obtain the repeal of a statute, to alter the religion established by law, or to obtain the redress of any other public grievance, real or pretended;[p] or to throw down all enclosures, pull down all bawdy-houses, open all prisons, &c., expel all strangers, enhance the price of wages generally, or the like.[q] If a body of men conspire, and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such an intention into execution by force, they are then guilty of treason by levying war.[r] To march in arms, with a force marshalled and arrayed, committing acts of violence and devastation, in order to compel the resignation of a public officer, and thereby render ineffective an act of Congress, is high treason.[s] But an insurrection for the purpose of throwing down the enclosures of a particular manor, park, common, &c., or upon a mere quarrel between private persons,[t] or to deliver one or more particular persons out of prison, they not being imprisoned for treason,[u] or holding a house by force against the sheriff and *posse comitatus*,[v] is not treason.

§ 2726. Very lately (1851) the doctrine of constructive treason has been canvassed in elaborate charges of Mr. Justice Curtis, and Mr. Justice Grier, of the Supreme Court of the United States, and Mr. Justice Kane, of the Supreme Court of the United States for the Eastern District of Pennsylvania. In Philadelphia the point was brought up by a series of prosecutions, which not only made the questions presented to the judges of the Circuit Court of great practical moment, but led to a very able and elaborate examination of the whole law of treason. In Christiana, a village in Lancaster county, were lurking a band of fugitive slaves, the master of two of whom, armed with process issued by a federal commissioner under the fugitive slave law of 1850, met with his death in an attempt on his part, in concert with an officer especially deputed for the purpose, to reclaim his property. Of course the only way of making such an offence

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[m] 1 Hale, 131, 132.
[n] 3 Inst. 10; Fost. 219; 1 Hale, 325, 326.
[o] Foster, 211.
[p] 1 Hawk. c. 17, s. 25; 1 Hale, 153; Foster, 211; 3 Inst. 9, 10; R. *v.* Lord G. Gordon, Dougl. 590.
[q] Foster, 214; 1 Hale, 132; R. *v.* Bradshaw et al., Poph. 122; R. *v.* Messenger et al., Kel. 70, 79.
[r] U. S. *v.* Fries, C. C. Ap. 1800, Pamph.; U. S. *v.* Mitchell, 2 Dallas, 348.
[s] U. S. *v.* Vigol, 2 Dallas, 246; U. S. *v.* Mitchell, 2 Dallas, 348.
[t] Fost. 210; 1 Hale, 131, 133, 149.
[u] 1 Hale, 134.
[v] 1 Hale, 146; Rawle on Constitution, 305.

treason, was to establish a general intent to resist the fugitive slave act. It is clear that this intent was not satisfactorily proved by the prosecution; and the court, in charging the jury, pretty distinctly intimated that such was the case. The result, so far as the treason prosecution was concerned, was an acquittal. The law laid down on the trial of the misdemeanor cases has been already stated.[w]

§ 2727. "In the application of these principles of construction to the case before us," said Grier, J., in the treason case, "the jury will observe that the 'levying of war' against the United States is not necessarily to be judged of alone by the number or array of troops. But there must be a conspiracy to resist by force, and an actual resistance by force of arms or intimidation by numbers. The conspiracy and the insurrection connected with it, must be to effect something of a *public nature*, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution, or compel its repeal.

§ 2728. "A band of smugglers may be said to set the laws at defiance, and to have conspired together for that purpose, and to resist, by armed force, the execution of the revenue laws; they may have battle with the officers of the revenue, in which numbers may be slain on both sides, and yet they will not be guilty of treason, because it is not an insurrection of a public nature, but merely for private lucre or advantage.

§ 2729. "A whole neighborhood of debtors may conspire together to resist the sheriff and his officers in executing process on their property—they may perpetrate the resistance by force of arms—may kill the officer and his assistants—and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, and not of a public nature; their object is to hinder or remedy a private not a public grievance.

§ 2730. "A number of fugitive slaves may infest a neighborhood, and may be encouraged by the neighbors in combining to resist the capture of any of their number; they may resist with force and arms their master or the public officer who may come to arrest them; they may murder and rob them; they are guilty of felony and liable to punishment, but not as traitors. Their insurrection is for a private object, and connected with no public purpose.

§ 2731. It is true that constructively they may be said to resist the execution of the fugitive slave law, but in no other sense than the smugglers resist the revenue laws, and the anti-renters the execution laws. Their insurrections, their violence, however great their numbers may be, so long as it is merely to attain some personal or private end of their own, cannot be called *levying war*. Alexander the Great may be classed with robbers by moralists, but still the political distinction will remain between war and robbery. One is public and national, the other private and personal.

§ 2732. "Without desiring to invade the prerogatives of the jury in

[w] Ante, § 1294, &c.

judging the facts of this case, the court feel bound to say that they do not think the transaction with which the prisoner is charged with being connected, rises to the dignity of treason, or a levying of war. Not because the numbers or force was insufficient. But, 1st. For want of any proof of previous conspiracy to make a *general and public resistance to any law* of the United States.

"2d. There is no evidence that any person concerned in the transaction knew there were such acts of Congress as those which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed kidnapping. (By which slang term they probably included not only actual kidnappers, but all masters and owners seeking to recapture their slaves, and the officers and agents assisting therein.)

"The testimony of the prosecution shows that notice had been given that certain fugitives were pursued; the riot, insurrection, tumult, or whatever you may call it, was but a sudden "*conclamatio*," or running together, to prevent the capture of certain of their friends or companions, or to rescue them if arrested. Previous to this transaction, so far as we are informed, no attempt had been made to arrest fugitives in the neighborhood under the new act of Congress, by a public officer. Heretofore arrests had been made not by the owner in person, or his agent properly authorized, or by an officer of the law.

§ 2733. "Individuals without any authority, but excited by cupidity and the hope of obtaining the reward offered for the return of a fugitive, had heretofore undertaken to seize them by force and violence, to invade the sanctity of private dwellings at night, and insult the feelings and prejudices of the people. It is not to be wondered at that a people subject to such inroads, should consider odious the perpetrators of such deeds, and denominate them kidnappers, and that the subject of this treatment should have been encouraged in resisting such aggressions, where the rightful claimant could not be distinguished from the odious kidnapper, or the fact be ascertained whether the person seized, deported, or stolen in this manner, was a free man or a slave.

§ 2734. "His acts, his declarations and his conduct are fair subjects for your careful examination, in order to judge of his intentions or his guilty complicity with those whose hands perpetrated the offence. If, as the counsel for the United States have argued, he countenanced or encouraged, aided or abetted the offenders in the commission of the offence, he is equally an offender with them.

"If, on the contrary, as is argued by his counsel, he came there without any knowledge of what was about to take place, and took no part by encouraging, countenancing, or aiding the perpetrators of the offence; if he merely stood neutral through fear of bodily harm, or because he was conscientiously scrupulous about assisting to arrest a fugitive from labor and therefore merely refused to interfere while he did not aid or encourage

the offenders; he may not have acted the part of a good citizen; he may be liable to punishment for such neutrality by fine and imprisonment, but he cannot be said to be liable as a principal in the riot, murder and treason committed by the others; and much more so if, as has been argued, his only interference was to preserve the lives of the officer and his attendants."[x]

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[x] U. S. *v.* Hanway, 2 Wall. Jur. 144. The professional reader is referred to the very elaborate argument of Mr. J. M. Read, as reported in the pamphlet trial, and which presents one of the most learned and critical disquisitions extant, on the law of treason.

The charge of Judge Kane to the grand jury, which was subsequently adopted by Judge Grier in his charge to the petit jury, I give in full, not only from its high authority, but from the lucid exactness with which the law is stated.

"It has been represented to me, that, since we met last, circumstances have occurred in one of the neighboring counties of our district, which should call for your prompt scrutiny, and perhaps for the energetic action of the court.

"It is said, that a citizen of the State of Maryland, who had come into Pennsylvania to reclaim a fugitive from labor, was forcibly obstructed in the attempt by a body of armed men,—assaulted, beaten, and murdered:—that some members of his family, who had accompanied him in the pursuit, were at the same time, and by the same party, maltreated and grievously wounded; and that an officer of justice, constituted under the authority of this court, who songht to arrest the fugitive, was impeded and repelled by menaces and violence, while proclaimiug his character and exhibiting his warrant. It is said, too, that the time and manner of these outrages, their asserted object, the denunciations by which they were preceded, and the simultaneous action of most of the guilty parties, evinced a combined purpose forcibly to resist and make nugatory a constitutional provision, and the statutes enacted in pursuance of it:—and it is added, in confirmation of this, that for some months back, gatherings of people, strangers as well as citizens, have been held from time to time in the vicinity of the place of the recent outbreak, at which exhortations were made and pledges interchanged to hold the law for the recovery of fugitive slaves as of no validity, and to defy its execution.

"Such are some of the representations that have been made in my hearing, and in regard to which it has become your duty, as the grand inquest of the district, to make legal inquiry. Personally, I know nothing of the facts, or the evidence relating to them. As a member of the court, before which the accused persons may hereafter be arraigned and tried, I have sought to keep my mind altogether free from any impressions of their guilt or innocence, and even from an extra-judicial knowledge of the circumstances which must determine the legal character of the offence that has been perpetrated. It is due to the great interests of public justice, no less than to the parties implicated in a criminal charge, that their cause shall be in no wise and in no degree prejndged. And in referring, therefore, to the representations which have been made to me, I have no other object than to point you to the reasons for my addressing you at this advanced period of our sessions, and to enable you to apply with more facility and certainty the principles and rules of law, which I shall proceed to lay before you.

"If the circumstances to which I have adverted have in fact taken place, they involve the highest crime known to our laws. Treason against the United States is defined by the constitution, art. 3, sect. 3, cl. 1, to consist in "levying war against them, or in adhering to their enemies, giving them aid and comfort." This definition is borrowed from the ancient law of England, Stat. 25 Edw. 3, stat. 5, chap. 2, and its terms must be understood, of course, in the sense which they bore in that law, and which obtained here when the constitution was adopted. The expression 'levying war,' so regarded, embraces not merely the act of formal or declared war, but any combination forcibly to prevent or to oppose the execution or enforcement of a provision of the constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination. This, in substance, has been the interpretation given to these words by the English judges, and it has been uniformly and fully recognized and adopted in the courts of the United States. (See Foster, Hale and Hawkins, and the opinions of Iredell, Patterson, Chase, Marshall, and Washington, JJ. of the Supreme Court, and of Peters, C. J., in U. S. *v.* Mitchell, U. S. *v.* Fries, U. S. *v.* Vollum and Swartwout, and U. S. *v.* Burr.)

"The definition, as you will observe, includes two particulars, both of them indis-

§ 2735. While in treason all parties concerned are principals, it has been considered an open question whether those who before the act, counsel and

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pensable elements of the offence. There must have been a combination or conspiring together to oppose the law by force, and some actual force must have been exerted, or the crime of treason is not consummated.

"The highest, or at least the direct proof of the combining may be found in the declared purposes of the individual party before the actual outbreak; or it may be derived from the proceedings of a meeting in which he took part openly, or which he either prompted or made effective by his countenance or sanction—commending, counselling and instigating forcible resistance to the law. I speak, of course, of a conspiring to resist a law, not the mere limited purpose to violate it, or to prevent its application and enforcement in a particular case, or against a particular individual. The combination must be directed against the law itself.

"But such a direct proof of this element of the offence is not legally necessary to establish its existence. The concert of purpose may be deduced from the concerted action itself, or it may be inferred from facts concurring at the time or afterwards, as well as before.

"Besides this, there must be some act of violence, as the result or consequence of the combining. But here, again, it is not necessary to prove that the individual accused was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised, or knowingly furnished the means for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories.

"There has been, I fear, an erroneous impression on this subject among a portion of our people. If it has been thought safe to counsel and instigate others to acts of forcible oppurgation to the provisions of a statute—to inflame the minds of the ignorant by appeals to passion, and denunciations of the law as oppressive, unjust, revolting to the conscience, and not binding on the actions of men—to represent the constitution of the land as a compact of iniquity, which it were meritorious to violate or subvert,—the mistake has been a grievous one; and they who have fallen into it may rejoice, if peradventure their appeals and their counsels have been hitherto without effect. The supremacy of the constitution, in all its provisions, is at the very basis of our existence as a nation. He whose conscience, or whose theories of political or individual right, forbid him to support and maintain it in its fullest integrity, may relieve himself from the duties of citizenship by divesting himself of its rights; but while he remains within our borders, he is to remember, that successfully to instigate treason is to commit it.

"I shall not be supposed to imply, in these remarks, that I have doubts of the law-abiding character of our people; no one can know them well, without the most entire reliance on their fidelity to the constitution. Some of them may differ from the mass, as to the rightfulness or the wisdom of this or the other provision that is found in the federal compact; they may be divided in sentiment as to the policy of a particular statute or of some provision in a statute; but it is their honest purpose to stand by the engagements—all the engagements—which bind them to their brethren of the other states. They have but one country; they recognize no law of higher social obligation than its constitution and the laws made in pursuance of it; they recognize no higher appeals than to the tribunals it has appointed; they cherish no patriotism that looks beyond the union of the states.

"That there are men here, as elsewhere, whom a misguided zeal impels to violations of law—that there are others who are controlled by false sympathies, and some who yield too readily and too fully to sympathies not always false, or, if fale, yet pardonable, and become criminal by yielding,—that we have, not only in our jails and almshouses, but congregated here and there in detached portions of the State, ignorant men, many of them without political rights, degraded in social positions, and instinctive of revolt,—all this is true. It is proved by the daily record of our public courts, and by the ineffective labors of those good men among us, who seek to detach want from temptation, passion from violence, and ignorance from crime. But it should not be supposed that any of these represent the sentiment of Pennsylvania, and it would be to wrong our people sorely, to include them in the same category of personal, social or political morals.

"It is declared, in the article of the constitution which I have already cited, that 'no person shall be convicted of treason, unless on the testimony of two witnesses to

advise it, who in ordinary felonies would be accessories before the fact, are here principals. In Burr's case the point was not ruled by Marshall, C. J., who considered the case not to require it; and, in fact, our judicial history presents no case of a prosecution against a party who, while advising the overt act, is absent at its commission, perhaps ignorant that it was to be committed. But, however harsh may be the doctrine, it

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the same overt act, or on confession in open court.' This, and the corresponding language in the act of Congress of the 30th of April, 1790, seem to refer to the proofs on the trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the grand inquest. There can be no conviction until after arraignment on bill found. The previous action in the case is not a trial, and cannot convict, whatever be the evidence or the number of witnesses. I understand this to have been the opinion entertained by Chief Justice Marshall, 1 Burr's Trial, 196; and though it differs from that expressed by Judge Iredell, on the indictment of Fries, 1 Whart. Am. St. Tr. 480, I feel authorized to recommend it to you, as within the terms of the Constitution, and involving no injustice to the accused.

"I have only to add, that treason against the United States may be committed by any one resident or sojourning within its territory and under the protection of its laws, whether he be a citizen or an alien. (Fost. C. L. 183-5; 1 Hale, 59, 60, 62; 1 Hawk. ch. 17, § 5; Kel. 38.)

"Besides the crime of treason, which I have thus noticed, there are offences of minor grades, against the constitution and the state, some or other of which may be apparently established by the evidence that will come before you. These are embraced in the act of Congress of the 30th Sept. 1790, ch. 9, sect. 22, on the subject of obstructing or resisting the service of legal proces; the act of the 2d of March, 1831, ch. 99, sect. 2, which secures the jurors, witnesses, and officers of our courts in the fearless, free and impartial administration of their respective functions; and the act of the 18th of September, 1850, ch. 60, which relates more particularly to the rescue or attempted rescue of a fugitive from labor. These acts were made the subject of a charge to the grand jury of this court, in November last, of which I shall direct a copy to be laid before you; and I do not deem it necessary to repeat their provisions at this time.

"Gentlemen of the grand jury:—You are about to enter upon a most grave and momentous duty. You will be careful, in performing it not to permit your indignation against crime, or your just appreciation of its perilous consequences, to influence your judgment of the guilt of those who may be charged before you with its commission. But you will be careful, also, that no misguided charity shall persuade you to withhold the guilty from the retributions of justice. You will inquire whether an offence has been committed, what was its legal character, and who were the offenders, —and this done, and this only, you will make your presentments according to the evidence and the law.

"Your inquiries will not be restricted to the conduct of the people belonging to our own State. If, in the progress of them, you shall find that men have been among us, who, under whatever mask of conscience or of peace, have labored to incite others to treasonable violence, and who, after arranging the elements of the mischief, have withdrawn themselves to await the explosion they had contrived, you will feel yourselves bound to present the fact to the court; and however distant may be the place in which the offenders may have sought refuge, we give you the pledge of the law, that its far-reaching energies shall be exerted to bring them up for trial—if guilty, to punishment.

"The offence of treason is not triable in this court. But, by an act of Congress, passed on the 8th of August, 1846, ch. 98, it is made lawful for the grand jury, empanneled and sworn in the District Court, to take cognizance of all indictments for crimes against the United States within the jurisdiction of either of the Federal Courts of the Districts. There being no grand jury in attendance at this time in the Circuit Court to pass upon the accusations I have referred to in the first instance, it has fallen to my lot to assume the responsible office of expounding to you the law in regard to them. I have the satisfaction of knowing, that if the views I have expressed are in any respect erroneous, they must undergo the revision of my learned brother of the Supreme Court who presides in this circuit, before they can operate to the serious prejudice of any one; and that if they are doubtful even, provision exists for their re-examination in the highest tribunal of the country." A more condensed report of the same charge will be found in 2 Wall. Jun. 135.

will be necessary, should such a case occur, either to hold the offender within the legal definition of treason, or to overrule the previous cases where the doctrine is announced that in treason all concerned are principals.[y] In misdemeanors, to which the like doctrine applies, an accessory before the fact, who knows nothing as to whether it be actually committed, is a principal.[z]

§ 2736. But while it would thus appear that a party concerting a treasonable act would be a principal in its commission even though absent, yet it is submitted, with due deference to the weight of authority to the contrary, that it is just as absurd to make a party who publishes seditious writings, or participates in seditious meetings, a principal in any particular treasonable conspiracy to which they lead, but with the intended execution of which he is ignorant, as it would be to make the publisher of an obscene book the principal in any act of lasciviousness it might excite.

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

§ 2737. The same principle is to be applied in construing the phrase adhering to the enemies of the United States, as is adopted in the interpretation of the phrase, levying war. Both were taken from the same English statute, and the rule laid down by Marshall, C. J., in Burr's case, that the common law definitions were to be considered as authoritative, bears equally on either. Under the English statute every assistance yielded by a citizen to the enemies of the government under which he lives, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this branch of the statute. Therefore, if citizens of the United States join public enemies in acts of hostility against this country,[a] or even against its allies;[b] or deliver up its castles, forts, or ships of war to its enemies through treachery, or in combination with them;[c] or join the enemy's forces, although no acts of hostility be committed by them;[d] or raise troops for the enemy;[e] or supply them with money, arms, or intelligence,[f] although such money, intelligence, &c., be intercepted and never reach them;[g] all these are cases of adhering to the enemies of the United States, and the parties are guilty of high treason under the federal constitution. It has been ruled by a learned judge, that

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[y] See, for a very interesting article on this point, 14 Bost. Law Rep. 1851.

[z] R. *v.* Clayton, 1 C. & K. 128; 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; ante, § 149, 150.

[a] Fost. 216; 1 Hawk. c. 17, s. 8.

[b] Fost. 210; per Car. in R. *v.* Vaughan, 2 Salk. 625.

[c] Fost. 219; 3 Inst. 10; 1 Hale, 168.

[d] Fost. 218; R. *v.* Vaughan, 2 Salk. 134; 5 St. Tr. 17.

[e] R. *v.* Harding, 2 Vent. 315.

[f] Fost. 217.

[g] R. *v.* Gregg, 10 St. Tr. Ap. 77; Fost. 198, 217, 218; R. *v.* Hensey, 1 Bur. 642; R. *v.* Lord Preston, 4 St. Tr. 409, 455.

delivering up prisoners and deserters to the enemy, is adhering to them giving them aid and comfort, and is treason against the United States. Nothing will excuse the act but a well-grounded fear of life.[h]

§ 2738. If a citizen of the United States, it was said, in another case, being a prisoner on board an enemy's ship, proceed from the ship to the shore, with an intention peaceably to procure provisions for the enemy, on a promise, in consequence thereof, of being liberated, and fails to procure them, this not treason. But if his intentions were to procure them forcibly, and he proceeded on the way; or if a person having provisions, with him, intended for the enemy, proceed towards the enemy, in the latter case, or towards the shore, in the former, it is treason, though his object be defeated.[i] But where the supreme authority is not able to give him protection, a subject may enter into an agreement of neutrality with a public enemy.[j]

§ 2739. Although the constitution requires the testimony of two witnesses to the same overt act on trial, yet Chief Justice Marshall seems to have held that two witnesses to such act were not absolutely necessary to authorize the grand jury to find a bill,[k] although the contrary opinion was expressed on Fries' trial.[l]

§ 2740. It has been doubted, as has been noticed, whether the common law principle that in treason all are principals, there being no accessories, applies to the United States, under the constitutional limitation,[m] though it has been intimated that in case of treason against the individual states, the common law in this respect is unaltered.[n]

In order to render words criminal as a misprision of treason, they must be spoken with a malicious and mischievous intent.[o]

§ 2741. The indictment need do no more than to specify the substance of the words of writings, when laid as overt acts.[p] It has been held sufficient to lay that the defendant sent intelligence to the enemy, without setting forth the particular letter or its contents.[q] It is clear, however, that it will not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war.[r]

§ 2742. Although writings cannot be laid as an overt act, unless published, yet if they tend to prove any overt act laid, they shall be admitted in evidence for that purpose, although never published.[s]

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[h] Per Duvall, J., U. S. *v.* Hodges, 2 Dallas, 87; 2 Wheeler's C. C. 477; Respublica *v.* M'Carty, 2 Dallas, 87.

[i] U. S. *v.* Pryor, 3 Washington C. C. R. 234.

[j] Miller *v.* Resolution, 2 Dallas, 10; and see Respublica *v.* Chapman, 1 Dallas, 58.

[k] 1 Burr's Trial, 196, see ante, § 801–3.

[l] Fries's Trial, Wh. St. Tr. 480.

[m] U. S. *v.* Burr, 4 Cranch. 472, 501.

[n] Davis' Va. Crim. Law, 38

[o] Respublica *v.* Wredle, 2 Dallas, 161.

[p] R. *v.* Francis, 6 St. Tr. 58, 73; R. *v.* Preston, 4 St. Tr. 411; R. *v.* Watson, 2 Stark, 137.

[q] Respublica *v.* Carlile, 1 Dallas, 35.

[r] 2 Burr's Trial, 400.

[s] R. *v.* Lord Preston, 4 St. Tr. 410, 440; R. *v.* Layer, 6 St. Tr. 272, 280; R. *v.*

§ 2743. The confession of a defendant out of court is not sufficient evidence under the constitution of the United States for conviction; but where an overt act of treason has been proved by two witnesses, it may be adduced as a corroboration.[t]

II. Treason against the several States.

A.—Statutes.

Massachusetts.

§ 2744. *Legislature have no power to declare subject guilty of treason.*—No subject ought, in any case, or in any time, to be declared guilty of treason by the legislature.—(Const. of Mass., Part 1st, sect. 25.)

§ 2745. *In what treason consists.*—Treason against this commonwealth shall consist only in levying war against the same, or adhering to the enemies thereof, giving them aid and comfort.—(R. S. ch. 124, sect. 1.)[tt]

§ 2746. *Punishment.*—Every person who shall commit the crime of treason against this commonwealth, shall suffer the punishment of death for the same.—(Ibid. sect. 2.)[u]

[*Altered to imprisonment for life, Stat.* 1852, *ch.* 259.]

§ 2747. *Concealing treason.*—If any person, who shall have knowledge of the commission of the crime of treason against this commonwealth, shall conceal the same, and shall not, as soon as may be, disclose and make known such treason to the governor thereof, or to one of the justices of the supreme judicial court, or of the court of common pleas, he shall be adjudged guilty of the offence of misprision of treason, and shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the state prison not more than five years, or in the county jail not more than two years.—(Ibid. sect. 3.)

§ 2748. *Evidence.*—No person shall be convicted of the crime of treason against this commonwealth, but by the testimony of two lawful witnesses to the same overt act of treason, whereof he shall stand indicted, unless he shall, in open court, confess the same.—(Ibid. sect. 4.)

New York.

§ 2749. *Punishment.*—Every person who shall hereafter be convicted,

1. Of treason againt the people of this state: or,

2. Of murder: or of arson in the first degree: as those crimes are respectively declared in this title, shall suffer death for the same.—(2 R. S. 656.)

§ 2750. *In what treason consists.*—The following acts shall constitute treason against the people of this state:

1. Levying war against the people of this state, within the state: or,

2. A combination of two or more persons by force, to usurp the government of the state, or to overturn the same, evidenced by a forcible attempt made within this state, to accomplish such purpose: or,

3. Adhering to the enemies of this state, while separately engaged in war with a foreign enemy in the cases prescribed in the Constitution of the United States, and giving to such enemies aid and comfort, in this state or elsewhere.—(Ibid. sect. 2.)

Hensey, 1 Bur. 642, 644; Respublica *v.* Carlile, 1 Dallas, 35; Respublica *v.* Malin, 1 Dallas, 33; Id. *v.* Roberts, 1 Dallas, 39.

[t] Fries's Trial, 171; ante, § 802.

[tt] For forms, see Wh. Prec. § 1131.

[u] Changed to imprisonment for life. See Sub. Rev. Stat. p. 854.

§ 2751. *Forfeiture.*—Whenever any person shall be outlawed upon a conviction for treason, the judgment thereupon shall produce a forfeiture to the people of this state, during the lifetime of such person, and no longer, of every freehold estate in real property, of which such person was seised in his own right, at the time of such treason committed, or at any time thereafter; and of all his goods and chattels.—(Ibid. sect. 3.)

§ 2752. *Evidence.*—No person shall be convicted upon any indictment for treason, but by the testimony of two lawful witnesses to the same overt act, or one witness to one overt and another witness to a different overt act of the same treason. But if two or more distinct treasons of divers kinds be alleged in any indictment, one witness to prove one treason, and another witness to prove a different treason, shall not be deemed two witnesses to the same treason, within the provisions of this section.—(2 R. S. 735, sect. 15.)

In trials for treason, no evidence shall be given of any overt act that is not expressly laid in the indictment, and no conviction shall be had in any indictment for the said offence, unless one or more overt acts be expressly alleged therein.—(Ibid. sect. 16.)

PENNSYLVANIA.

§ 2753. That if any person owing allegiance to the commonwealth of Pennsylvania, shall levy war against the same, or shall adhere to the enemies thereof, giving them aid and comfort within the state or elsewhere, and shall be thereof convicted on confession in open court, or on the testimony of two witnesses, to the same overt act of the treason whereof he shall stand indicted, such person shall, on conviction, be adjudged guilty of treason against the commonwealth of Pennsylvania, and be sentenced to pay a fine not exceeding two thousand dollars, and undergo an imprisonment, by separate and solitary confinement at labor, not exceeding twelve years.—(Rev. Acts, 1860, Bill I., sect. 1.)[uu]

§ 2754. If any person, having knowledge of any of the treasons aforesaid, shall conceal, and not as soon as may be, disclose and make known the same to the governor or attorney-general of the state, or some one of the judges or justices thereof, such person shall, on conviction, be adjudged guilty of misprision of treason, and shall be sentenced to pay a fine not exceeding one thousand dollars, and

[uu] "Sections 1 and 2. These sections are almost literal transcripts of the act of Congress, declaring and punishing treason against the United States. The only addition thereto is that found in the proviso of the second section, which precludes the infliction of the penalties of misprision of treason, on the husband and wife concealing each their knowledge of the other's treason. Such a concealment at common law, makes the party so concealing guilty of misprision of treason. The gravity of the offence being supposed to require the husband and wife to denounce each other. It seems unnecessary, at this period of advanced civilization, to reason in favor of a proposition which changes this harsh and repulsive feature of the common law.

"The statutes which these sections are proposed to supply, are the acts of the 11th of February, 1777, entitled 'An Act declaring what shall treason, and what other crimes and practice against the State shall be misprision of treason.' 1 Smith's Laws, 435. Brightly's Digest, 800, Nos. 1, 2; and the act, entitled 'An Act to prevent the erecting any new and independent State within the limits of this Commonwealth,' passed December 3, 1782. 2 Smith's Laws, 61. Brightly's Digest, 800, Nos. 3, 4, 5, 6. The first of these statutes, passed during our revolutionary struggle, provided against emergencies which never can again occur; and the second has long since ceased to have any practical operation with the existence of the contests with the Connecticut settlers which gave it birth. Punishment for treason is also provided for by the fourth section of the act of the 23d April, 1829, entitled 'A further supplement to an act, entitled "An Act to reform the penal laws of this Commonwealth."' 10 Smith's Laws, 430. Brightly's Digest, 801, No. 8." (Revisors' notes.)

undergo an imprisonment, by separate or solitary confinement at labor, not exceeding six years: *Provided always*, That nothing herein contained shall authorize the conviction of any husband or wife for concealing any treasons committed by them respectively.—(Ibid. sect. 2.)

§ 2755. *Form of trial.*—Every person indicted for treason shall have a copy of the indictment and a list of the jury and the witnesses to be produced on the trial for proving such indictment, mentioning the names and places of abode of such jurors and witnesses, delivered to him three whole days before the trial.—(Ibid. Bill II., sect. 35.)

§ 2756. *Place of trial of treason.*—The trial of all treason against the commonwealth, committed out of the jurisdiction of the state, shall be in the county where the offender is apprehended, or into which he shall first be brought.—(Ibid. sect. 36.)

VIRGINIA.

§ 2762. *In what treason consists.*—Treason shall consist only in levying war against the state, or adhering to its enemies, giving them aid and comfort, or establishing, without the authority of the legislature, any government within its limits, separate from the existing government, or holding or executing, in such usurped government, any office, or professing allegiance or fidelity to it, or resisting the execution of the laws, under color of its authority; and such treason, if proved by the testimony of two witnesses to the same overt act, or by confession in court, shall be punished with death.—(Code, 1849, ch. 191, sect. 1.)

§ 2763. *Concealing same.*—If a free person, knowing of any such treason, shall not, as soon as may be, give information thereof to the governor, or some conservator of the peace, he shall be punished by fine not exceeding one thousand dollars, or by confinement in the penitentiary not less than three, nor more than five years. —(Ibid. sect. 2.)

§ 2764. *Attempting same.*—If a free person attempt to establish any such usurped government, and commit any overt act therefor, or, by writing or speaking, endeavor to instigate others to establish such government, he shall be confined in jail not exceeding twelve months, and fined not exceeding one thousand dollars.—(Ibid. sect. 3.)

§ 2765. *Aiding slave to rebel, &c.*—If a free person advise or conspire with a slave to rebel or make insurrection, or with any person, to induce a slave to rebel or make insurrection, he shall be punished with death, whether such rebellion or insurrection be made or not.—(Ibid. sect. 4.)

B.—OFFENCE GENERALLY.

§ 2766. Treason is undoubtedly a common law offence in each state, aside from constitutional and statutory provisions,[v] and is recognized as having a substantive and independent existence, in that clause of the federal constitution which provides, that if a person accused of treason in any state shall flee from justice, and shall take refuge in another state, he may, on a proper requisition, be delivered up by the executive of the state to which he has fled.

§ 2767. During the revolution, and immediately afterwards, convictions for treason against a state were frequent. In Massachusetts, at the time

[v] Resp. *v.* Chapman, 1 Dallas, 56; People *v.* Lynch, 11 Johnson, 549.

of Shay's rebellion, there were sixteen capital convictions for the crime, though none of the offenders were executed, and very few subjected to any great length of imprisonment. In Pennsylvania, five persons have actually suffered death for the offence; all, however, prior to the close of the revolutionary war.

§ 2768. The offence of adhering and giving aid to the enemies of the United States, it is said, is not treason against the people of New York, under the constitution, and is not cognizable, therefore, in the state court.[w] So, on the other hand, every interpretative or constructive levying of war, however general, as is maintained by Judge Tucker, in his valuable note on treason,[x] must be and remain an offence against the state, unless the object of levying war be manifestly for some matter of a general concern to the United States; and this view, it is said, was adopted by the late Mr. Justice Story, in charging a grand jury during the Rhode Island disturbance in 1842. It is not enough, it was maintained, that the offence is of a public nature, or of a great and general concern to the citizens of the commonwealth; but it must be of a general or public nature and concern, as it respects the United States and their jurisdiction, to oust the state of that exclusive right which it enjoyed before the adoption of the constitution. Were an armed multitude, it was said, arrayed in order of battle, to enter the city of Richmond, destroy all public records of the state, and commit every other possible outrage, aggravated by every atrocious circumstance imaginable, if their intention in so doing should neither be to subvert the constitution of the United States, nor to effect any object in relation to the federal government, such conduct, though, in the strictest sense, it might amount to treason against the state of Virginia, could never be treason against the United States.[y] On the same reasoning Judge King, when charging a grand jury in Philadelphia at the time of the Kensington riots, declared, "that where the object of a riotous assembly is to prevent by force and violence the execution of any statute of this commonwealth, or by force and violence to coerce its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by law, as burning down all churches or meeting-houses of a particular sect, under color of reforming a public grievance, or to release all prisoners in the public jails and the like, and the rioters proceed to execute by force their predetermined objects and intents, they are guilty of high treason in levying war against the commonwealth of Pennsylvania.[z]

§ 2769. Where, however, as in case of insurrection or rebellion, any

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[w] People *v.* Lynch 11 Johnson, 549.

[x] 4 Tucker's Black. App. 21.

[y] 4 Tucker's Black. App. 21. But see Fries's Trial, Wh. St. Tr. 666, where Judge Chase seems to advance the opinion that the rising of any body of people in the United States, to attain or effect by force or violence any object of a great public nature, is a levying of war against the United States. Mr. Justice Brackenbridge, on the other hand, lays down the law broadly that such rising cannot be considered treason, either under federal or state constitutions, but is a mere riot. Brack. Miscel. 495.

[z] Penn. Law Jour. 35.

state makes application to the United States for such aid as the constitution guarantees in such cases, if the opposition should extend to the authority thus interposed, the offence becomes treason against the United States.[a]

§ 2770. Whether express treason against a state, as distinguished from constructive treason, is not also treason against the United States; and whether if such be the case, it can be punished in a state court, has been the subject of some difference of opinion. "From the nature of the federal union," said Mr. Edward Livingston, in his introductory report to the Legislature of Louisiana, "a levy of war against one member of the Union is a levy of war against the whole; therefore, it is concluded that treason against the state being treason against the United States, it is to be punished by their laws and in their courts."[b] On this reasoning, the levying war against Rhode Island, which lately was punished in a state court as a state offence, was, if not merged in treason against the Union, at least properly and exclusively cognizable in the federal courts; and such is the position advanced with much subtlety by an ingenious writer in the American Law Magazine.[c]

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[a] 4 Tucker's Black. App. 22.

[b] Introductory Report, &c., to Criminal Code, 148.

[c] 4 Am. Law Mag. 318. Thus: "Undoubtedly, if the question is considered apart from the relations of the state and federal government, an act of war, for the subversion of a state government, is treasonable against the state; but the same offence constitutes treason against the federal government, and the crime against a part is atoned for by the punishment inflicted for the offence against the general sovereignty. The general government does not, as in certain other cases, supersede the state government, by reason of a delegated jurisdiction. The subject of treason is within the jurisdiction of each sovereignty, and it is competent for each to make full provision for the punishment of the crime. But the citizen, who owes a double allegiance, cannot be twice punished or put in peril for the same offence. The crime which was committed against a state tends also to the destruction of the confederacy. The laws of the state provide for the punishment of the crime against its own sovereignty. The laws of the United States provide for the punishment of the offence, not only as a crime against the state, but also as committed against the government of the nation. The power of the state is maintained. Its sovereignty is not diminished, but the accused pleads within its jurisdiction another liability, which constitutes a personal exemption. It might, however, be maintained, that the sovereignty of the general government entirely supersedes that of the states, in relation to subjects within the jurisdiction of the former. What is sovereignty? In its true sense it implies independence and superiority. There is, however, no actual independence of the states, in relation to the United States; but the supremacy of the latter is absolute in all cases where the constitutional powers of the government are exercised. Sovereignty not only implies independence, but absolute powers of government; but neither the United States nor the state can exercise such powers. As one whole, the states and the United States may exercise full powers of government. Before the adoption of the constitution of the United States, the states were independent governments, capable of exercising every power of sovereignty; but so far as those powers were withdrawn, and delegated to the government of the United States, their sovereignty was diminished. The degree in which the sovereignty of the states is affected by the constitution of the United States, is measured by the extent of these enumerated powers which cannot be concurrent, and in their exercise necessarily supersede those of the states. The application of the term sovereign to the government of the states is an erroneous use of language, and has a tendency to confound ideas. In almost all discussions relating to the state governments, from this perversion of terms, an unfounded assumption has been made, which has tended to false conclusions. The constitution of the United States provides that Congress shall have power to 'provide for calling forth the militia

§ 2771. The course of practice, however, adopted at the time of the formation of the federal constitution, when the attention of the judiciary was closely called to the boundaries of the national and state sovereignties, and pursued to the present day, is to recognize levying war against a state as forming a state offence, cognizable in a state court, and punishable by state authority. Thus in Lynch's case, the Supreme Court of New York, while holding open waging of war against the federal government to be not cognizable in a state court, declared that treason against the state "might be committed by an open and armed opposition to the laws of the state, or a combination and forcible attempt to overturn or usurp the government."[d] Such was the law laid down by Durfee, C. J., in Dorr's case, as will be presently seen more fully; and such is the opinion of Judge Tucker, in his appendix to Blackstone;[e] of Judge Sergeant in his Treatise on Constitutional Law;[f] and of the late learned Mr. Rawle, in his Essay on the Constitution.[g]

§ 2772. The first reported case of treason against a state since the adoption of the federal constitution, in which the character of the offence was examined, is that of Dorr, charged with levying war against the state of Rhode Island. The allegation of the prosecution was, that the prisoner attempted to set up a new government in the state; that under such a government a legislature was actually convened at Providence; that the prisoner claimed under a new constitution, alleged to have been established by the people, to be governor of the state, and as such, with the pretended legislature behind him, paraded through the streets of Providence, escorted by a large body of armed men; that on May 3d, 1842, he delivered an executive message, and exercised executive duties; and that afterwards, on the 17th of May, he marched with an armed force to the arsenal, attempting to seize it, and on the 26th and 27th of June, collected troops

to execute the laws of the Union; suppress insurrections and repel invasions;' and 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.' How can a government be sovereign, in any just sense of the term, whose army is under the control of another government, which is empowered to organize, arm, and discipline it? The proper mode of regarding the two governments is, as exercising the distributed powers of one entire sovereignty. From the nature of the case, the general government must have exclusive jurisdiction of all crimes which are committed against the whole people of the United States; and from jurisdiction of the same offence, as constituting a crime against a portion of the people, the governments of the states must be excluded." — "There is no principle on which an offence can be regarded as constituting a crime within the jurisdiction of a state, if the same offence is a crime against the national sovereignty, for there is then not only an identity in respect to the offence, but also in respect to the sovereignty against which it is committed. Regarded as a crime against the state, it is punished as such, though it is also a crime against every other state in the Union, and therefore within the jurisdiction of the national courts. If the United States courts have jurisdiction of the person of the offender, it is necessarily exclusive, and the punishment of the offence is withdrawn from the inferior jurisdiction. It extends to pardon as well as punishment, and a pardon from the executive of the United States purges the crime which has been committed against the people by levying war against a portion of the Union."

[d] People *v.* Lynch, 11 Johnson, 549; see 1 Kent's Com. *403, note.

[e] See ante, § 2723, &c.

[f] Sergeant's Constitutional Law, 382.

[g] Rawle on Constitution, 305.

at Chepachet, for the express and avowed purpose of making war on the existing government, and actually commenced hostilities.[h] The defendant, in opening his case, rested his defence on five points: 1st. That in this country treason is an offence against the United States only, and cannot be committed against an individual state. 2d. That the fourth section of the act of Rhode Island, of March, 1842, entitled "an act relating to offences against the sovereign power of the state," was unconstitutional and void, as destructive of the common law right of trial by jury, which was a fundamental part of the English constitution, at the Declaration of Independence, and has ever since been a fundamental law in Rhode Island. 3d. That the act, if constitutional, gave the court no jurisdiction to try the indictment in the county of Newport, all the overt acts being therein charged as committed in the county of Providence. 4th. That the defendant acted justifiably as governor of the state, under a valid constitution, rightfully adopted, which he was sworn to support. 5th. That the evidence did not support the charge of treasonable and criminal intent in the defendant.

§ 2773. The evidence having concluded, the Chief Justice said that the court considered the first, second, and third points, pure questions of law, to be argued to the court, but not to the jury; and to be decided only by the court. The fourth point, he said, "is a mixed question of law and fact: no evidence, however, had been offered, to show the fact on this point. There is nothing therefore for the jury, he said, to consider on this point." The defendant then proposed to show by the authorities, that the people of the state had a right to adopt a written constitution of government; and that, in the exercise of that right, they did adopt a constitution, in the month of December, 1841, under which the defendant derived his authority, and this fact he proposed to prove, by the production of the votes of the people themselves, given in favor of the said constitution. The Chief Justice said "that the court had deliberately decided this question, after a full and able argument, in the case of the State *v.* Cooley. They could not hear the question re-argued in the course of a jury trial. The court must take notice, officially, of who was the governor of the State in 1842. If not, they should require the best evidence that the nature of the case admits, which is the certificate of the secretary of state, under the seal of the state. The evidence sought to be introduced, he held, was inadmissible and irrelevant." The defendant then offered to prove, by the votes of the people, to be produced and verified by the votes themselves, that a large majority of the whole resident adult male population of the state, being citizens of the United States, gave their votes for the adoption of the constitution called the People's Constitution, in the month of December, 1841; and also, to prove that under the said constitution, the defendant was elected governor of the state, in the month of April, 1842; and this testimony he offered to repel the imputation of mali-

[h] Pittman's Dorr's Trial, 21.

cious and treasonable motives, urged by the prosecution in behalf of the state. The court ruled out the evidence as inadmissible and irrelevant; upon which the defendant offered a copy of the said constitution, to prove the government of the state under it was republican in form, which was ruled out by the court as inadmissible and irrelevant. The defendant then offered in evidence a copy of the message delivered by him to the Legislature under the people's constitution, at their organization on the 3d of May, 1842. The paper was decided by the court to be inadmissible and irrelevant; to which decision the prisoner also took exception. The charge of the court to the jury was given by Chief Justice Durfee, who said "the first question was whether the crime of treason could be committed against the states of the union.

§ 2774. "It involves," he said, "no fact *in pais*. It is a question of mere constitutional law, and for the court alone to decide. Wherever," he declared, "allegiance is due, there treason may be committed. Allegiance is due to a state, and treason therefore may be committed against the state. The constitution of the United States itself, an instrument in which it is hardly to be sought for, recognizes it by an implication too strong to be resisted. It expressly provides, that a person accused of treason in any state, who shall flee from justice, and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. The result of the debate in the convention that formed the constitution of the United States, in reference to the article defining treason, is in accordance with this view. The decisions of all the courts of these states that have had occasion to touch the question, and the opinions of all our commentators on constitutional law, recognize the same fact. Treason against the state, and treason against the United States, are to be distinguished, the one from the other, by the immediate objects and designs of the conspirators. If the blow be aimed only at the internal and municipal regulations or institutions of a state, without any design to disturb it in the discharge of any of its functions under the constitution of the United States, it is treason against the state only, though, if the object be to prevent it from discharging those functions, as the election of senators, or electors of president and the like, it becomes treason against the United States." "The power to provide for the punishment of this crime," he continued, "the Legislature derives, not from the United States, or the people thereof, but from our own people, from the organized sovereign people of the state. That Legislature, exercising this power, has declared that treason against this state, shall consist only in levying war against the state, or in adhering to the enemies thereof, giving them aid and comfort. This law, we now say to you, is *constitutional* and binding on all, and the sovereign authority of this state is such, that treason can be committed against it."

§ 2775. In considering the construction of the meaning of the words levying of war against the state, the Chief Justice said, "In giving you

the meaning of these words, we shall rely as little as possible upon our own judgment. We shall endeavor to be governed as much as possible by the opinions of those able jurists who, undisturbed by the excitement and alarm of an agitated community, have, after calm and deliberate consideration, pronounced their meaning. 'To constitute,' says Justice Story, 'an actual levy of war, there must be an assembly of persons met for treasonable purpose, and some overt act done, or some attempt made by them with force, to execute, or towards executing that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use it, if necessary, to further, to aid, or to accomplish their treasonable design. If the assembly is arrayed in a military manner, for the express purpose of overawing or intimidating the public, and to attempt to carry into effect the treasonable design, that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place.' This construction of the meaning of the words levying war against the state, accords entirely with the opinion of Chief Justice Marshall, delivered in the case of Burr, and in the main with that of the American jurists and writers on the subject.

§ 2776. "Let us now consider this construction of the meaning of those words, with reference to the evidence which has passed to you under the first two counts in this indictment. It is for you to say what the evidence proves, but I must put these questions to you. Has it been proved by two or more witnesses, or by confession in open court, that on the 17th and 18th of May, or either of those days, that there assembled in Providence a body of armed men arrayed in a military manner? that they provided themselves with artillery, musketry, or like implements of war, for the express purpose of making an assault upon, or taking possession of the state's arsenal or magazine of arms in Providence? that they marched on the night of the 17th or morning of the 18th, with intent of carrying into effect their design? that they arrayed themselves in arms before the arsenal? that the arsenal was at that time in the actual occupation of the military forces of the government of the state? that they sent a messenger with a flag to demand its surrender? that upon the refusal to surrender the messenger returned; and that upon his return, or before it, one or more of the guns were aimed at the building? that there were two attempts made to discharge them into the building? If you believe these facts have been proved by two witnesses, or by the confession of the prisoner, it is the opinion of this court, not only that war was levied, but actually carried on against the state, although not a single gun was discharged, and no engagement actually took place.

"But supposing you should be satisfied that war had been thus levied, this will not justify you in returning a verdict of guilty; you must be satisfied by the two or more credible witnesses, or by confession in open court, that the prisoner took a part in it; in other words, his particular

overt act must thus be proved upon him. The main question then is: Did the prisoner march with this body of men to the arsenal, or was he then and there present; and is the fact proved by two or more credible witnesses, or confessed by him in open court? If you believe, from such evidence or confession, that he was leagued with the conspirators and performed a part, the overt act or acts charged are fixed upon him, and there is no alternative but to return a verdict of guilty on one or both of these counts in the indictment."

§ 2777. In another part of the charge the following language is used in regard to the justification set up by the defendant. "It may be that he really believed himself to be the governor of the state, and that he acted throughout under that delusion. However this may go to extenuate the offence, it does not take from it its legal guilt. It is no defence to an indictment for the violation of any law, for the defendant to come into court and say, 'I thought that I was exercising a constitutional right, and I claim an acquittal on the ground of mistake.' Were it so, there would be an end to all law and all government. Courts and juries would have nothing to do but sit in judgment upon indictments in order to acquit or excuse. The accused has only to prove that he has been systematic in committing crime, and that he thought that he had a right to commit, and according to this doctrine, you must acquit. The main ground upon which the prisoner sought for a justification was, that a constitution had been adopted by a majority of the male adult population of this state, voting in their primary or natural capacity or condition, and that he was subsequently elected, and did the acts charged, as governor under it. He offered the votes themselves to prove its adoption, which were also to be followed by proof of his election. This evidence we have ruled out. Courts and juries, gentlemen, do not count votes to determine whether a constitution has been adopted, or a governor elected, or not. Courts take notice, without proof offered from the bar, what the constitution is or was, and who is or was the governor of their own state. It belongs to the legislature to exercise this high duty. It is the legislature which, in the exercise of its delegated sovereignty, counts the votes and declares whether a constitution be adopted or a governor elected or not, and we cannot revise and reverse their acts, in this particular, without usurping their power. Were the votes on the adoption of our present constitution now offered here to prove that it was or was not adopted, or those given for the governor under it, to prove that he was or was not elected, we could not receive the evidence ourselves, we could not permit it to pass to the jury. And why not? Because, if we did so, we should cease to be a mere judicial, and become a political tribunal, with the whole sovereignty in our hands. Neither the people nor the legislature would be sovereign. We should be sovereign, or you would be sovereign; and we should deal out to the parties litigant at our bar, sovereignty to this or that, according to the rules or laws of our own making, and heretofore unknown in courts.

In what condition would this country be, if appeals thus can be taken to courts and juries? *This* jury might decide one way, and *that* another, and the sovereignty might be found here to-day and there to-morrow. Sovereignty is above courts and juries, and the creature cannot sit in judgment upon its creator. Were this instrument offered as the constitution of a foreign state, we might, perhaps, under some circumstances, require proof of its existence; but even in that case the fact would not be ascertained by counting the votes given at its adoption, but by the certificate of the secretary of the state, under the broad seal of the state. This instrument is not offered as a foreign constitution, and the court is bound to know what the constitution of the government is under which it acts, without any proof of that high character. We know nothing of the existence of the so-called 'people's constitution' as law, and there is no proof before you of its adoption, and of the election of the prisoner as governor under it; and you can return a verdict only on the evidence that has passed to you. Our ruling on this point is in exact accordance with that on the same point in the trial of the indictment of the State *v.* Cooley, where, after an elaborate argument, it was unanimously decided, that no such evidence could be received by the court or pass to the jury."[h]

APPENDIX TO BOOK VII., CHAPTER I.

Charles Robinson was tried on August 18, 1857, before the United States Court of the Territory of Kansas, for usurpation of office, under the following statute:

"If any person shall take upon himself any office or public trust in this Territory, and exercise any power to do any act pertaining to such office or trust, without a lawful appointment or deputation," he shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year.

The indictment was as follows:

"*Territory of Kansas, Douglas County.*—The First District Court, Adjourned Session of April Term, A. D. 1856.—The Grand Jurors for the Territory of Kansas, for Douglas County, sworn to inquire upon their oaths, present that—whereas, by an act of Congress, entitled 'An Act to organize the Territories of Nebraska and Kansas,' approved May 30, 1854, among other things it was provided, in substance, as follows, to wit: 'That the executive power and authority, in and over said Territory of Kansas, shall be vested in a Governor, who shall hold his office for five years, and until his successor shall be appointed and qualified, unless sooner removed by the President of the United States.' And by another section of the same act, among other things, it was provided as follows, to wit: 'That the Governor, Secretary, Chief Justice and Associate Justices, Attorney, and Marshal, shall be nominated and, by and with the advice and consent of the Senate, appointed by the President of the United States.' One Charles Robinson, late of the county aforesaid, well knowing the provisions of the aforesaid act, on the 23d day of April, in the year 1856, in the county aforesaid, and within the jurisdiction of the said Court, without then and there being nominated and appointed, according to the act aforesaid, and without then and there having any lawful appointment or deputation whatever, as Governor of the Territory of Kansas, unlawfully then and there did assume and take upon himself the office of Governor of the Territory of Kansas, under the false name and style of Governor of the *State* of Kansas; and that the said Charles Robinson, afterwards, to wit, on the 23d day of April, in the year aforesaid, in the county aforesaid, and within the jurisdiction of the said court,

[h] For forms of indictment, see Wh. Prec., § 1117, &c.

did utter and issue a certain proclamation as Governor of the Territory of Kansas, but calling himself Governor of the State of Kansas, the issuing and uttering of which proclamation then and there was an act appertaining to the office of Governor of the Territory of Kansas. And the said Charles Robinson, without having any appointment or deputation whatever so to do, at the time and place late aforesaid, and on divers times between that time and the day of taking this inquisition, did exercise the powers appertaining to the said office of Governor of the Territory of Kansas, to the great disturbance of the peace and good order of the said Territory, contrary to the form of statute in such case made and provided, and against the peace, government and dignity of the Territory of Kansas.

"C. H. GROVER, *District Attorney.*"

The Judge read his instructions to the jury as follows:

"If the jury are satisfied, from the evidence in this case, that the defendant, within twelve months next before the finding of the indictment, did take upon himself the office of the Governor of the State of Kansas, and did exercise any power to do any act appertaining to said office of the Governor of the State of Kansas; and that he did so without a lawful appointment or deputation; then it is the duty of the jury to find the defendant guilty in manner and form as charged in the indictment, and to assess a fine against him not to exceed five hundred dollars, or to imprison him in the county jail for any time not exceeding twelve months.

"And if the jury should be satisfied that the defendant did take upon himself the office of Governor, and did exercise any power to do any act appertaining to said office, then the court further instructs the jury that the law casts the burden of proof on the defendant, to show that he was appointed or deputed to said office, and that said appointment or deputation was lawful.

"The only government in Kansas, recognized as a valid one by the National Executive, is the territorial government established by Congress. This is the government which the courts here are bound to consider as valid, and the only one, and if the jury are satisfied, from the evidence in this case, that the defendant did take upon himself the office of Governor of the State of Kansas, and did exercise any power to do any act appertaining to said office, and that he did this within the limits of the territorial boundaries of Kansas, and within twelve months before the finding of the indictment, then it is an offence within the meaning of the act under which the indictment was found, and it will be the duty of the jury to find the defendant guilty.

"If one can take upon himself the office of Governor of the State of Kansas, and can exercise any power to do any act appertaining to said office of Governor, without lawful appointment or deputation, then all other offices necessary to make a complete state government might, in the same way, be assumed; and thus territorial government established by Congress might be displaced.

"This being the case, the court instructs the jury, that if the evidence satisfies them that the defendant did take upon himself the office of Governor, as charged in the indictment, and did exercise any power to do any act appertaining to such office, then this was without lawful appointment or deputation, and it will be the duty of the jury to find him guilty as charged in the indictment."

The defendant was acquitted.

[*See Report in full in N. Y. Times, of Sept.* 3, 1857.]

CHAPTER II.

VIOLATION OF NEUTRALITY LAWS.

A. STATUTES.
UNITED STATES.
Serving foreign prince against another with whom United States are at peace, § 2778.
Enlisting in service, &c., § 2779.
Fitting out vessel, &c., to be employed in service of foreign prince, § 2780.
Fitting out or being concerned in vessel to commit hostilities upon people of the United States, § 2781.
Increasing force of ship of war in service of foreign prince, &c., § 2782.
Setting on foot military expedition, &c., against foreign prince, § 2783.
B. OFFENCE GENERALLY, § 2784.

A.—STATUTES.

UNITED STATES.

§ 2778. *Serving foreign prince against another with whom U. S. are at peace.*—If any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people in war, by land or by sea, against any prince, state, colony, district or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.—(Act of April 20th, 1818, s. 1.)

§ 2797. *Enlisting in service, &c.*—If any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: *Provided*, That this act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people, who shall transiently be within the United States, and shall on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States, was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people.—(Ibid. sect. 2.)

§ 2780. *Fitting out vessel, &c., to be employed in service of foreign prince, &c.*—If any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise, or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or shall issue

or deliver a commission within the jurisdiction of the United States, for any ship or vessel to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and be imprisoned not more than three years; and every such ship or vessel, with her ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the United States.—(Ibid. sect. 3.)

§ 2781. *Fitting out or being concerned in vessel to commit hostilities upon people of the U. S.*—If any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned or aid in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruise or commit hostilities upon the citizens of the United States, or their property, or shall take the command of, or enter on board of, any such ship, or vessel, for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such person so offending shall be deemed guilty of a high misdemeanor, and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offence, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought.—(Ibid. sect. 4.)

§ 2782. *Increasing force of ship of war in service of foreign prince, &c.*—If any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars, and be imprisoned not more than one year.—(Ibid. sect. 5.)

§ 2783. *Setting on foot military expedition, &c., against foreign prince.*—If any person shall, within the territory or jurisdiction of the United States, begin or set on foot or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.—(Ibid. sect. 6.)

B.—Offences generally.

§ 2784. This class of offences appear to have attracted attention at an early stage of the constitutional existence of this government, and there were various enactments for their punishment and suppression. The several acts of 1794, c. 50; 1797, c. 59; 1797, c. 1; and 1817, c. 231, are all

at this day obsolete; the act of 1818, c. 83, repealing all former laws on the subject, and embracing all the provisions respecting our neutral relations.[a] This last mentioned law, however, being chiefly modelled on its predecessors, most of the early decisions will still be found in force. The first section of the act of 1818, is taken from that of 1794, c. 50, § 1; the second section (save the second proviso) from the act of 1794, § 2; the third, from the act of 1794, § 3; the fourth, from the act of 1797, c. 1, § 1; the fifth, from the act of 1794, § 4; the sixth, from the act of 1794, § 6; the whole of which last named act was prepared by Alexander Hamilton.[b] The act of 10 March, 1838, provides for the seizure of property, &c., which may be provided for any military expedition against the territory of any foreign prince, &c., conterminous with and at peace with the United States, contrary to sec. 6 of seizure and detention of vessels or vehicles transporting arms, &c., about to pass the frontier of the U. S., with intent, it was held that the term "frontier" meant a tract of country contiguous to the boundary line; and that it was not material whether such vessels, &c., were actually intended to be passed across the border line into the foreign territory.[c]

§ 2785. Prizes made by armed vessels, whether with or without a commission,[d] which have violated the laws for preserving the neutrality of this country, will be restored if brought into our ports,[e] and the claim of an alleged *bona fide* purchaser in a foreign port rejected,[f] though it may have come back to the original wrong-doer's possession after a regular condemnation as a prize;[g] and the *onus probandi* in such a case rests on the claimants.[h] Thus may be seen how strongly the settled current of judicial decisions bears against any infraction of our neutrality laws, and how firmly it resists any attempt at evading them, whether it be at the time successful or the contrary.

§ 2786. When the existence of a war between two countries, or between a state and its colonies,[i] is recognised by this government, each party is entitled to the sovereign rights of war; and the duty of our courts, where the property of either is brought innocently within our jurisdiction, is to leave things as we find them, or to restore them to the state whence they have been forcibly removed by our citizens;[j] unless, indeed, our own neutral rights have been invaded by either belligerent.[k]

§ 2787. When France prohibited all trade with its revolted colony of Santo Domingo, our courts recognised the prohibition as the exercise of a municipal, and not of a belligerent right,[l] which, in consequence, only

[a] The Estrella, 4 Wheat. 298.
[b] 5 Hamilton's Works, 99.
[c] Stoughton *v.* Mott, 15 Verm. 162.
[d] The Santa Maria, 7 Wheat. 490.
[e] Ibid.; La Gran Para, 7 Ibid. 471; La Santissima Trinidad, Ib. 283.
[f] La Concepcion, 6 Ibid. 235; The Fanny, 9 Ib. 659.
[g] The Arrogante Barcelones, 7 Ib. 496.
[h] The Estrella, 4 Wheat. 298; La Amistad de Rues, 5 Ib. 385; the Santissima Trinidad, 7 Ibid. 283.
[i] 7 Wheat. 283.
[j] The Nuestra Signora de la Caridad, 4 Wheat. 497.
[k] The Divina Postora, 4 Wheat. 52.
[l] Rose *v.* Himely, 4 Cranch, 242.

authorized seizures within two marine leagues of the shore of that island. The fact that the colony had declared and thus far maintained by arms its independence, was strongly urged as such a case as Vattel prescribed for its recognition and treatment by other nations as a sovereign state. "But," said Chief Justice Marshall, "this language is obviously addressed, not to *courts* but to *sovereigns*. Until our governnment decides that a revolted colony is an independent nation, or until the parent state relinquishes its claim, courts of justice here must consider the ancient state of things as remaining unaltered." It was subsequently decided in the Supreme Court of New York, (Spencer J.,) and affirmed in the Court of Errors, (Kent, Chancellor,) that it was not an infraction of the act of June, 1794, to fit out a vessel here for the purpose of assisting the government of Petion against that of Christophe, (two rival black factions,) in the isle of Santo Domingo, because neither was an independent state, within the meaning of the act.[m] These cases show how the law stands in relation to states whose existence as such we do not recognise, but the case is rare where there is no acknowledged sovereign power whose interests are invaded by such an expedition.

§ 2788. In several early cases, the question of what constituted an illegal outfit in our ports, and what equipments therein amounted to a breach of the neutrality laws, was largely discussed. It was decided in a District Court,[n] and affirmed in the Circuit and Supreme Courts of the United States,[o] that where an American vessel was equipped here with eight guns, one hundred weight of powder, some shot, etc., and taken to a French port, and there sold to an American born, but a naturalized French citizen of three days' standing, the American registry cancelled, and the vessel, commissioned as a French privateer, commanded by a quasi French citizen, commenced preying on the high seas on the commerce of enemies of the French republic, but allies of this: this was an arming and equipment within the act. It is true the subject of the right of expatriation, (a privilege which has been elsewhere fully discussed,)[p] as well as its *quo animo*, entered into the consideration of the Court. But there was another feature in this case. A second armed vessel, which, within the jurisdiction of this country, had received a part of her armament from the one just mentioned, but which was in every respect an undoubted American vessel, cruised in concert with the alleged French privateer, and actually had first captured the neutral vessel. To evade the effect of the law, as they were in common interest, the French vessel collusively took possession of the prize, pretending that it did so in good faith, its coadjutor not being lawfully authorized so to do, and claimed it as its own. Instead of mending matters, the Supreme Court held that this course but increased the nefariousness of the capture:[q] that, supposing the Frenchman all he declared himself to

[m] Gelston et al. *v.* Gould Hoyt, 13 Johns. 156, 588.
[n] Jansen *v.* Vrow Christina Magdalena, Bee, 11.
[o] S. C. 3 Dall. 159. [p] Wharton's St. Tr. 655.
[q] U. S. *v.* Guinet et al., 2 Dall. 321; S. C. Wharton's State Trials, 95.

be, yet by his giving his comrade guns in an American port, and thus aiding in making him an illegal cruiser, and consorting and acting with him, he became himself a participant in the iniquity and fraud.

§ 2789. The act of 1794, sect. 3, (which, as has been stated, is the basis of sect. 3 of the act of 1818, now in force,) was construed in the first indictment brought thereon,[r] to include all cases of vessels armed within our ports by a belligerent, to act as cruisers against another belligerent with whom we are at peace. Converting a ship from her original destination, with intent to commit such hostilities, as, converting a merchant ship into a vessel of war, must be deemed an original outfit.

§ 2790. In this case the prisoner arrived at Philadelphia with a merchant vessel originally pierced for twenty guns, but mounting four, the other port-holes being closed. After some repairs she left the wharf in ballast, with a crew of thirty or forty men, and but four guns, but some distance below the city took on board several other guns, and a number of muskets, etc., by nightfall, and other guns were ready to have been sent to her by the pilot boat. The Circuit Court declared this to be an illegal outfit within the act, and the defendant was found guilty; overruling thereby, it would seem, the principle laid down in a civil suit in the District Court of South Carolina, that it was perfectly lawful for a French privateer, cruising against a power with which we are at peace, to receive in our ports new decks, additional gun-carriages, and other repairs clearly intended to better adapt the vessel for the purposes of war.

§ 2791. This statute, the earliest federal enactment on the subject, was passed in consequence of the contradictory opinions arising from the construction of treaties and of the law of nations, which existed at the time, as to whether the offences it prescribes were offences punishable at common law.[s] President Washington, by a proclamation, had notified this country that war actually existed between certain nations, friends and allies of this, and that as our citizens were bound to a friendly and impartial conduct towards each of them, that any violation of such neutrality would be prosecuted and punished. Chief Justice Jay, in a charge to a grand jury, May 22d, 1793,[t] directed specially its attention to such offences, maintaining the law to be as stated by the executive, and declaring that any who in this country committed, aided or abetted hostilities against either of those powers, had offended against our laws, and ought to be punished. Two months later, these opinions were repeated by the judges of the Circuit Court, in their charge to the grand jury at Philadelphia, and on the trial of the indictments thereon found.[u] The defendant, an American citizen, entered on board a French privateer, and by previous agreement was put on board a prize (belonging to a power between whom and this country existed a treaty of peace,) as prize-master, and bronght it into one of our

[r] U. S. *v.* Guinet et al., 2 Dall. 321; S. C. Wharton's State Trials, 95. Ramon de Salderondo *v.* Nostra Signora del Camino, Bee's Adm. 46.
[s] U. S. *v.* Guinet, 2 Dall. 321; ante, § 163. [t] Wharton's State Trials, 57.
[u] Wharton's State Trials, 60.

ports.[v] The Circuit Court held that his conduct was a violation of the law of nations, and that though there had then been no exercise by Congress of its constitutional prerogative "to define and punish offences against the law of nations," yet the federal judiciary had jurisdiction, and might punish him according to the forms of the common law; and that a violation by a citizen here of a treaty with a foreign power was punishable by indictment in these courts. Of the first principle there has been never any doubt; the second has heretofore been discussed in much detail.[w]

§ 2792. In Williams's case, Ellsworth, C. J., sustained an indictment charging the defendant, he being a citizen of this Union, with accepting a commission and serving on board a French privateer against British commerce, and committing hostilities thereon, contrary to the treaty of amity, &c., between England and this nation; and he was convicted, despite his formal naturalization as a French subject. His offence would have fallen under the first section of the present act.[x] It seems, however, that a foreigner, who had applied for naturalization in this country and taken the usual oath, but where naturalization was not at all completed, and who, being abroad, there enters such a privateer, &c., would hardly fall within the compass of the act.[y]

§ 2793. Under sect. 3 of the act of 1818, it is not necessary that the accused shall be concerned in fitting out and arming such a vessel as is therein described with intent, &c.; the words are, "fitting out or arming," and either will constitute the offence.[z] It is enough, if the indictment charges the offence in the words of the act. Thus, where the indictment charged the defendant with being at the port of Baltimore, knowingly concerned in the fitting out of a vessel, with intent that it should be used in the service of *a foreign people*, to wit, the United Provinces of Rio de la Plata, against the Emperor of Brazil, with whom we were then at peace; it was held not necessary that the vessel should be *armed* or in a condition to commit hostilities when it left this country, or before it arrived in a foreign port, but that if it was shown that when the vessel left Baltimore, the owner and equipper intended to go to a foreign port in search of funds to arm and equip it, and had no present intention of using it as a privateer, &c.; or if that at such departure, the equipper had no fixed intention to employ the vessel as a privateer, though a decided wish, the fulfilment of which depended on his getting funds at a foreign port, for the purpose of arming it for war, then the accused would not be guilty. As to the word "*people*" applied in the indictment to a nation acknowledged by our government as an *independent state*, the court held the indictment sufficiently certain, and good in law. For the *attempt* to fit out and arm does not imply a completion of the act, nor any definite progress towards it. Any

[v] U. S. *v.* Henfield, Wharton's St. Trials, 48.
[w] See ante, p. 98; Bee's Adm. Decisions, 41, 45.
[x] U. S. *v.* Williams, Wharton's St. Trials, 653.
[y] U. S. *v.* Villato, 2 Dall. 170; S. C., Wharton's St. Trials, 186.
[z] U. S. *v.* Quincy, 6 Peters, 462.

effort or endeavor to effect it will satisfy the terms of the law, which was so variously worded as to embrace every description of persons, who, directly or indirectly, should engage in preparing vessels with intent to commit hostilities against nations with whom we were at peace. But these preparations must be made within the United States, and as the offence consists mainly in the *intention*, it is necessary that the intention with respect to the vessel's employment should not be contingent or conditional on future arrangements, but must be formed before the ship leaves our shores, and of such intention the jury are to decide.

§ 2794. It has been decided that any expedition concerted or carried on from the United States, with intent to commit hostilities against a power at peace with us, was sufficient to constitute the offence under the act of 1794, sect. 5, which corresponds with sect. 6 of the act now in force. It is of no consequence whether the expedition originated here or abroad, provided it used this country as a rendezvous, and departed hence, either as passengers or taking a whole vessel to themselves, with the design of committing such hostilities.[a]

§ 2795. Where a privateer belonging to one of two powers, hostile to each other but at peace with us, came *unarmed* into our ports, received some (though what, was not shown) alterations here, applied for permission to arm, which was refused, and departed, having trebled her crew here; and at one hundred leagues from shore, on the third day of the voyage, was proved to have had both cannons and swivels mounted; this, it was said, created the most violent presumptions that the guns were taken in here, and the court held there was such an augmentation of force as amounted to a breach of the act of 1764.[b] But where the armed vessel of one of such powers was captured by that of the other, brought into our ports and having been much injured in the combat, her quarter deck taken down, her waist altered, and two ports cut or altered therein, and then sailed, with actually fewer guns mounted than when she arrived, for a port of the captor's country, where she was commissioned and manned; when on the way, however, the vessel was dismasted, and returned and took a new mast; the same court held these repairs were necessary to her safety and sailing, but not at all applicable to war, and did not amount to any *additional* equipments.[c]

§ 2796. Where a French privateer arrived at Philadelphia with only twelve guns mounted, and while in the river, below the city, opened new ports and mounted fourteen or sixteen more, every person concerned in such increasing of its armament or in procuring the same, was held to be an offender against our laws.[d]

§ 2797. Any such offence committed within a marine league of our

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[a] Ex parte Needham et al., Pet. C. C. 487, per Washington, J.
[b] British Consul *v.* Nancy, Bee's Adm. Decisions, 74.
[c] Moodie *v.* Ship Brothers, Bee's Adm. Dec. 77.
[d] Moodie *v.* Betty Cathcart, Bee's Adm. Dec. 298.

coasts or shores, extending from low water mark, would be within the limitation of the act.[e]

§ 2798. Where a privateer was illegally fitted out in this country, and commissioned by M. Genet, the French minister here, to cruise against powers with whom we were at peace, and in consequence was proscribed by President Washington, dismantled and sold, and, having been taken by the purchaser to a French port, was there fitted out anew for war, by French citizens, it was ruled there was no breach of our neutrality laws.[f] The act does not extend to vessels owned and equipped abroad, though they may originally have been American bottoms.[g]

§ 2799. In Smith and Ogden's case,[h] the indictment (brought on what is now sect. 6, act of April 20th, 1818,) charged the accused with here *beginning*, setting on foot, and preparing and providing the means of a military expedition and enterprise against the dominions and territory of a foreign prince with whom we are at peace; in other words, engaging in Miranda's expedition against the Spanish American provinces.[i]

§ 2800. The defence offered testimony tending to show that by an alleged sanction of this enterprise by the American executive, and other circumstances, the inference was fair that a state of war existed between this nation and Spain; but the court decided such evidence to be irrelevant

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[e] Vide the case of L'Africaine, Bee, 204. [f] Williamson *v.* Brig Betsey, Bee, 67.
[g] British Consul *v.* Ship Mermaid, Bee, 69.
[h] Trials of Wm. S. Smith and Samuel G. Ogden, for misdemeanors, in the U. S. C. C. for N. Y. in July, 1806. By Tho. Lloyd, stenographer, N. Y., 1807. (Pamphlet.)
[i] A reference to the Message of the President of the United States, of December 3d, 1805, to Congress, will indicate the position of affairs alluded to above. "With Spain our negotiations for the settlement of differences have not had a satisfactory issue. Spoliations during a former war, for which she had formerly acknowledged herself responsible, have been refused to be compensated but on conditions affecting other claims in no wise connected with them; yet the same practices are renewed in another war, and are already of great amount. On the Mobile, our commerce passing through that river continues to be obstructed by arbitrary duties and vexatious searches. Propositions for adjusting amicably the boundaries of Louisiana have now been acceded to. While the right is unsettled, we have avoided changing the face of things, by taking new posts or strengthening ourselves in the disputed territories, in the hope that the other powers would not, by a contrary conduct, oblige us to meet their example, and endanger conflicts of authority, the issue of which may not be easily controlled; but in this hope we have now reason to lessen our confidence. Inroads have been recently made into the territories of Orleans and the Mississippi. Our citizens have been seized and their property plundered in the very ports of the former which had been actually given up by Spain, and this by the regular officers and soldiers of that government. I have, therefore, found it necessary at length to give orders to our troops on that frontier to be in readiness to protect our citizens, and repel by arms any similar aggressions in future. Other details necessary for your full information of the state of things between this country and that, shall be the subject of another communication. In reviewing these injuries from some of the belligerent powers, the moderation, the firmness and the wisdom of the legislature will all be called into action. We ought still to hope that time and a more correct estimate of interest as well as of character will produce the justice we are bound to expect. *But should any nation deceive itself by false calculations, and disappoint that expectation, we must join in the unprofitable contest of trying which party can do the other most harm.* Some of these injuries may, perhaps, admit a peaceable remedy: where that is competent, it is always the most desirable. *But some of them are of a nature to be met by force only, and all of them may lead to it.* I cannot, therefore, but recommend such preparations as circumstances call for."

and inadmissible, holding that there was at that time a state of peace, and that, in any case, no previous knowledge or approbation of the president can justify a breach of a constitutional law.

§ 2801. A vessel, belonging to the defendant Ogden, was chartered to take Miranda and his party; upwards of two hundred men were engaged, and she sailed, laden almost entirely with articles of a warlike character, consisting of twelve hundred uniform suits, six hundred swords, and a great number of belts, pouches and cartridge boxes, forty-five hundred pikes, and a number of muskets, horsemen's pistols and blunderbusses, all of which were principally in boxes or casks. Exclusive of her complement of seventeen guns, she had on board thirty-four cannon, with several field carriages, armorers' and surgeon's chests, one hundred and fifty casks of powder, and a quantity of cannon and musket balls; all of which were bought on Ogden's credit, and sent on board with a view to the enterprise, the object of which was avowed by Miranda to be the revolutionizing of the Spanish province of Caracas. To the adventurers were promised bounty lands, &c.; and the defendant Wilson was proved to have engaged a sergeant, corporal, and twelve men, to whom he promised bounties, and paid a month's wages in advance. So soon as the vessel cleared, the men were employed in fitting handles to the pikes, &c.; and, having been joined by other vessels, the expedition actually landed, joined battle with the Spanish forces, and was completely routed. These facts, the court intimated, were sufficient to constitute the offence contemplated by the act; and provided the exhibition was begun, and the means prepared to carry it on within the United States, it was not necessary that it should be consummated without deviation of course. It was clear, said the court, that the defendant Ogden had provided and prepared the means, within the United States, of a military expedition, to be carried on from thence against the dominions of some foreign power; but that his agency in preparing the means, and the nature and destiny of the expedition, were facts of which the jury were the proper and only judges. Whether this country, at the time the offence was charged, were at peace or in war, was matter of law, and as such, to be decided by the court.[j]

§ 2802. In the case of Workman and Kerr, jointly indicted on a charge of unlawfully beginning and setting on foot a hostile expedition and military enterprise, from this country, against the Spanish provinces of East and West Florida, and those in Mexico, &c.,[k] the court decided that the means for such an expedition might be prepared by enlisting men, or inducing others to enlist them. That the traversers had induced persons to enter into a secret association to forward such a plan, and to endeavor to

[j] Trials of Smith and Ogden, &c., p. 287.

[k] Trials of James Workman and Lewis Kerr, before the United States Court for the Orleans District, on a charge of high misdemeanor, in planning and setting on foot, within the United States, an expedition for the conquest and emancipation of Mexico. New Orleans: Printed by Bradford and Anderson, corner of Chartres and Toulouse street, 1807. (Pamphlet.)

provide men and means, and that men had actually been so enlisted by these subordinates, was charged by the prosecution; and it was also shown that they had endeavored to persuade some of the officers of the United States army to put them in possession of the means for carrying it on, by seizing the arms and military stores at Fort Adams for that purpose: and the court intimated that the evidence sustained the facts.[1]

[1] The recent able and elaborate charge of Judge Judson, on the trial of the Cuban expeditionists, contains the following paragraphs:

"The cause now to be committed to you, is that of the United States against John L. O'Sullivan, Lewis Schlessinger, and A. Irvin Lewis, all of whom have been arrested. Schlessinger having given bail does not appear, and the case goes on against O'Sullivan and Lewis. The indictment is found on the 6th section of an Act of Congress, passed April 20, 1818. The section is in the following words:

"'That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or procure the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every such person so offending shall be deemed guilty of a high misdemeanor.'

"The indictment contains ninety-seven counts, setting out in different forms the offence supposed to have been committed against this act. These various forms of declaring are adopted for the purpose of meeting the phraseology peculiar to this act; at the same time it is not claimed that more than one offence has been committed. You will, therefore, be unembarrassed with these matters of form. The 10th count must be laid out of the case. In the disposition of this case much depends upon the proper construction of this act of Congress; and on this subject we are to be governed by established rules; and so far as I have been able to investigate the matter, we shall have no occasion to seek out any new or untried rules for our guide. And first of all, it is an undeniable proposition, that all penal statutes are to receive a strict construction. This is a penal statute, and it falls within this rule. The terms used are not to be extended beyond their natural import, to fix an offence on the defendants; but this rule, on the other hand, does not require any such construction as to fritter it away, and defeat its object, and annul the law itself. I will then state to you, in the outset, some of these essential rules, and point out their application. We are to look at the spirit, intent, and object of a law—what mischief it was intended to prevent, and in what manner the remedy is to be applied. What, then, is this law? Its great object—the all-pervading object of this law—is peace with all nations—national amity—which will alone enable us to enjoy friendly intercourse and uninterrupted commerce, the great source of wealth and prosperity; in short, to prevent war, with all its sad and desolating consequences. These being the objects of this law, they are sufficiently important to arrest the attention of both court and jury, and secure, to the United States and to the accused, a fair and impartial trial. Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack or invasion of another people or country, state or colony, as a military force. The engagement of men to invade or attack any other people or country, by force and strong hand—the designation of officers; the classification and arrangement of men into regiments, squadrons, battalions or companies; the divisions of the men into infantry, cavalry, artillery or riflemen; the purchase of vessels or steamboats—military stores, such as powder or ball, for an expedition,—give character to the expedition itself, provided that there is sufficient proof to satisfy the jury that they are to be used. But any expedition or enterprise in matters of commerce or of business, of a civil nature, unattended by a design of an attack, invasion or conquest, is wholly legal, and is not an expedition or an enterprise within this act. A colonization expedition or enterprise is not unlawful. It contemplates only a peaceful settlement, without intention or design to make war upon people, or to overturn their government. To constitute a misdemeanor under the law of 1818, there must have been a hostile intention connected with the act of beginning or setting on foot the expedition. This intended hostility, or this intended peaceful movement, characterizes the act of beginning or setting on foot an expedition. The one makes it military, and the other makes it colonization. How this distinctive char-

On the trial of Hertz and Perkins, in the United States Circuit Court at Philadelphia, in September, in 1855, Judge Kane stated the law as follows:

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acter shall be shown depends on the proof. A vessel, armed and equipped, with all the implements and munitions of war, with men organized into companies, might be a striking spectacle; but even then we should inquire of the proof, what they were to do, and what their destiny was. Without such qualifying proof it might still be lawful, but with it the military character might be established. In this sense, declarations of intentions would do much to develop the real object, and the object is the great thing to be sought for. A specious covering, an artifice, secret movements, or deceptive proceedings, may aid in fixing the true character of any act. These remarks lead me to the consideration of such acts as are penal under the law of 1818. The term 'expedition' is used to signify a march or voyage with martial or hostile intentions. The term 'enterprise' means an undertaking of hazard, an arduous attempt. 'Begin' is to do the first act—to enter upon. We may say, with all propriety, that to begin an enterprise is to take the first step: the initiatory movement of an enterprise, the very formation and commencement of an expedition. 'To set on foot' is to arrange, to place in order, to set forward, to put in way of being ready. Then 'to provide,' is to furnish and supply; and 'to procure the means,' is to obtain, bring together, put on board, to collect. After all these proofs are made out, the prosecution must further show that the beginning, the setting on foot, or the providing or procuring materials for such an expedition or enterprise, were within the territory or jurisdiction of the United States, and to be carried on from thence, against the territory or dominions of some foreign prince or state, colony or district, or people, with whom the United States were at peace. You will see, by a careful attention to this law, that there are four acts which are declared to be unlawful, and which are prohibited by the statute. To 'begin' an expedition—to 'set on foot' an expedition—to 'provide' the means for an enterprise; and, lastly, to 'procure' those means. It is not necessary that all these distinct provisions shall be violated to constitute the offence—the proof of either one of them will be deemed sufficient. These are put in the alternative. As an illustration of what has been said thus far, I will remark—that to purchase, charter, repair, or fit up any vessel or steamboat; to procure and put on board such vessel or steamboat, powder, ball, fire-arms, military stores, ship stores, or any of them, to be used at any place in contravention of, and with an intent to violate, this act, is proper evidence; to enlist, engage verbally, or contract with men as officers, soldiers, or musicians, to go out on such an expedition as I have defined, may be considered by the jury as providing and procuring the means of a military expedition and enterprise; and if the proof shows the additional fact, that these means were provided and procured for a military expedition or enterprise, then it is your business to consider such acts as falling directly within this law. It is not essential to the case that the expedition should start, much less that it should have been accomplished. To 'begin' is not to 'finish.' To 'set on foot' is not to accomplish. To provide and procure powder is not to put to it the match, or the percussion. It is not necessary that the vessel should actually sail, nor is it necessary that war should exist between the nation on which the descent is to be made, with another nation. The counsel for the defence, in the course of the argument, have laid down several important propositions of law, of which I have been called upon to speak to you. They put forward this as the leading proposition, to wit:—

"I. The jury are judges of the law of the case. This question has been argued at great length and with great zeal, enforcing upon you the propriety of adopting this as a rule of our proceeding. Now, why is this? The law is not so—The law never was so in the United States courts—and I think I may safely add, that it never can be so. I refer to the opinion of the late Judge Story, and especially to a very late opinion of Judge Curtis, one of the Judges of the Supreme Court of the United States, which has been read to us. These opinions settle the matter, that the court is to judge of the law, and that the jury are to understand the law as it is pronounced by the court. Judge Thompson always so held in this circuit—so, I believe, in all the other circuits. No principle can be better settled, or more universally acquiesced in. It is no advantage to the jury to possess this power, and any attempt to exercise it is a direct violation of the oath of the jury. What has surprised me is, that counsel, with all the knowledge of these decisions, should argue for hours that this is not law. Yet we have heard of such arguments here, and it becomes my duty to tell you that no countenance can be given to the proposition. But I think it requires and deserves the unqualified disapprobation from the place which I occupy.

§ 2803. "The act of Congress is in these words—I read the words material to the question, leaving out those which apply to a different state of circumstances.

"II. This expedition, whatever it might have been, had never gone forth. Now, gentlemen, this proposition is not the law of the United States, which you have sworn to support The statute does not require that the expedition should go out, and the decisions which I will soon read to you will settle this in like manner.

"III. That the law of 1818 is a neutrality law merely, and designed only to apply to a state of war. Well, this proposition must stand also corrected by numerous determinations, which I will incorporate into my remarks. Again, it is said, that

"IV. The law of 1838 shows that the law of 1818 could not operate. The law of 1838 was a temporary law, adapted to the peculiar condition of the Northern frontier; and a new rule of evidence was introduced, founded on probable cause alone, as sufficient authority to seize and stop the incursions into the Canadas—then, by this law of 1838, a new set of officers were vested with the power to take possession and stop the invasion. It is, therefore, inapplicable, and may be laid out of view.

"V. If convicted, these defendants are to be sent to the State prison. This is not so. These varied propositions of the law cannot be sustained by this court. I will have you distinctly understand that the defence cannot be aided by these propositions —they will afford no security to the defendants, and I think it peculiarly unfortunate that the defence should be placed on grounds so untenable. And I shall here entreat you by no means to hazard the cause of the defendants upon such grounds. Gentlemen of the jury, you will see now, by what follows, that all these questions of law have been settled, leaving nothing for me to do except to acquiesce in the law as it has been declared and pronounced by all the learned judges in the United States, who have passed upon the questions. The decisions have been uniform, and surely it would be worse than presumption in me, even to question what has been thus established by such high and ample authority. My business is to pronounce the law as it is, and it is yours so to receive it, and be satisfied. I hold in my hand the able opinion of the Hon. Judge Betts, delivered after full argument on this very indictment, delivered from this bench last July. Every question of law raised on this argument was then decided. How can I reverse that judgment? You know who pronounced it, and the great weight to which it is entitled, from the long experience and great learning of that judge. I find, also, by the report itself, that these questions have been submitted to the learned judge of the Supreme Court, who presides over this circuit—that he concurs in the law as there ruled; and, of course, it has become the law in my district, as well as in this, and while it stands unreversed, it is the law of the Union. I cannot stop here to read the whole report, but I will read in your presence a few extracts:—

"'This is all I deem necessary to be said in this connexion in relation to the views of the Executive Department of the government, antecedent and subsequent to the passage of the law, (and in this respect the acts of 1794 and 1818 may be regarded as identical,) showing that it was called for and always accepted and enforced as a law, no less of non-interference by our citizens by military expeditions against nations at peace with all the world, than one prohibiting acts of hostility in favor of any belligerent power against another at peace with the United States. This topic, however, being the one on which the defendants chiefly rely, they insisting the act of Congress does not apply to the facts alleged against them, and the question being of great public moment to our own citizens, and in our relations with foreign governments, it is meet the subject should be considered under other aspects. And I think the import of the law collected from its face, according to the established rules of interpretation, plainly denotes the intention of Congress to stamp as crimes acts done within our territories, designed to violate the peace and rights of a friendly people, whatever may be the relation of such people in respect to other nations. The cardinal consideration is, are they in amity with the United States, and if so, no person shall be permitted within our jurisdiction, to take any warlike measure designed to disturb that peace.'

"'I see no mode of satisfying this language, but in holding it comprehends all the acts denounced, when committed within the United States, against a friendly power, without respect to his relationship to other powers. This, it appears to me, has been the acceptation in which this act has been received by our judges and most eminent jurists since its enactment.'

"'It is no part of the description of the offence, that the expedition or enterprise shall have left the United States, and, accordingly, it can be of no essential importance to allege the particular point contemplated for its departure.'

"If any person shall, within the territory of the United States, hire or retain any person to go beyond the limits of the United States, with the intent to be enlisted in the service of a foreign prince, he shall be deemed guilty of a high misdemeanor."

"The guilty purpose must be proved, and the guilty acts to be all done within the district of New York, and it in no way qualifies or affects the character of these particulars, whether the defendants intended to put off the expedition at Castine, Galveston, or any intermediate point.

"I have occasion to refer again to the opinion of Judge Betts, contained in his charge to a grand jury of this district, and the legal argument which it embraces is so much in accordance with my own views, that I deem it proper to make it a part of my charge. The clerk will oblige me by reading it.

" 'The Act of Congress of April 10th, 1814, prescribes the laws of neutrality which our citizens are bound to observe in regard to foreign nations. The provisions are stringent, but no more so than comports with the high character for justice and good faith towards others, which it is the policy and aim of this goverment to maintain. In leaving to every citizen, as an individual, the undisputed right to expatriate himself, at his own option, and connect himself with any other nation or people, this government still possesses the unquestionable power to prohibit that citizen, individually, or in association with others, entering into engagements or measures, within the American territory, or upon American vessels, in hostility to other nations, and which may compromit our peace with them. It would be most deplorable if no such controlling power existed in this government, and if men might be allowed, under the influence of evil, or even good motives, to set on foot warlike enterprises, from our shores, against nations at peace with us, and thus, for private objects, sordid or criminal in themselves—or under the impulse of fanaticism or wild delusions—bring upon this country, at their own discretion, the calamities of war.

" 'The will of the nation is expressed, in this respect, by the statute of April, 1818. It attempts to guard against the infraction of the peace and rights of friendly powers by our own people, or by acts done within our territory, by inhibiting therein all proceedings of a warlike purpose, or tendency, against any foreign government, or people, with whom the United States are at peace. The only provisions of the statute, which come within the scope of your inquiry to the court, and to which your attention should be addressed, are contained in the 6th section The sixth section makes it a high misdemeanor for any person within the territory or jurisdiction of the United States to begin or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign power or state, or of any colony, district or people, with whom the United States are at peace.

" 'This language is very comprehensive and peremptory. It brands as a national offence the first effort or proposal by individuals to get up a military enterprise within this country against a friendly one. It does not wait for the project to be consummated by any formal array, or organization of forces, or declaration of war; but strikes at the inception of the purpose, in the first incipient step taken, with a view to the enterprise, by either engaging men, munitions of war, or means of transportation, or funds for its maintenance; and even further, it is not necessary that the means shall be actually provided and procured. The statute makes it a crime to procure those means. This would clearly comprehend the making ready, and the tender or offer of such means to encourage or induce the expedition; and may probably include also any plan or arrangements, having in view the aid and furtherance of the enterprise. Under this provision of the law, you will, therefore, inquire carefully whether any person or persons have been concerned within this district in getting up a hostile expedition against the island of Cuba; whether by them, or through their agency or influence, men have been secured, enlisted, or employed, to carry it on; whether munitions of war, money, or transport vessels have been provided here for that object; and if the facts in proof fasten on any individual a participation in such acts, it is your duty to indict him for the violation of this statute, and present him for trial before this court. It must be manifest to you, gentlemen, that these criminal designs, if undertaken, will be managed with much disguise and caution; it is not probable that soldiers will be openly enlisted, or officers commissioned, or vessels freighted to transport munitions of war, or men to the field of action. Pretences and coloring will be employed to mask the real object the parties to such oriminal proceedings contemplate. But if you discover the purpose really to be to supply the means of hostile aggression against Cuba, then

§ 2804. "The question which you have to pass upon is—did Henry Hertz hire or retain any of the persons named in these bills of indictment to go beyond the limits of the United States, with the intent to be enlisted or entered in the service of a foreign state.

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all persons connected with it, and promoting it will be answerable for the violation of the laws of the United States in the undertaking, the same as if their proceedings had been openly and avowedly intended for a hostile invasion, and waging war on that community.'

"Superadded to this authority," continued Judge Judson, "which alone would be conclusive on me, we have the opinions of Judge M'Lean, Judge Catron, Judge Story, Judge M'Kinley, and Judge M'Caleb, all to the same point, fully and powerfully sustaining the decision of Judge Betts. I think I may say to you, with entire confidence, that the law is well settled, that the acts charged in this indictment fall within this law, and that the proper defence to be urged before you was, that the government have failed to prove the allegations in the indictment, and there the defence must rest. These are wholly questions of fact, belonging to the jury; and I am the last person to invade your rights, or to interfere with your exclusive privileges in weighing the testimony in all criminal cases. I would not, if I could, do that, because there is a sufficient responsibility on me, without assuming yours. No, gentlemen, you are left free to be influenced by your own convictions of duty, in weighing this evidence. If, upon your oaths, you can say that the facts in this case are not true, then it will afford me unspeakable pleasure to hear the verdict so pronounced, because I confide this part of the case to you, and you must be responsible to your own consciences for the result. But, before this case is committed to your deliberation, it may be proper to allude to an appeal that has been made to you, which certainly requires a trifling notice. It is said here, that there has not been a conviction upon this act, by any jury. This is the appeal; and the recent trials at the South are relied upon as guides for you also. But, gentlemen, it was no fault of the law that an acquittal took place there. The fault was elsewhere; and I should tell you that the fault rested with the jury, precisely as it did many years ago in Georgia, when the much-lamented Whitney sought, in that State, to recover for a wanton interference with his rights. The law was in his favor; it was so pronounced by the court, over and over again; yet he could not have a verdict for the redress of his great wrongs, because the jurors were influenced by their interests, and by their prejudices, to have the law thus violated. The State herself was dishonored, and the jurors must have lived to feel the sting of remorse.

"But, again, it hasb een said that Colonel Burr was not convicted of treason, and could not be convicted under the Act of 1794, for a high misdemeanor. He was indicted in the District of Columbia, instead of the State of Ohio, where the crime was committed. He ought to have been indicted in the right district, and there he might have been convicted. I may be excused in a passing remark regarding what has been said by the counsel for the defence, as to the District Attorney, his preparation and management of this cause. The terms used, as you will bear me witness, were unusually severe, harsh, and reproachful, such as are not often heard in a court of justice. I am induced to this for the sole reason that I fear you may suppose, from my silence, that the attack was to be justified by the circumstance of the case. Personal assaults like these should not be made, unless there shall be found a clear warrant for them, in both the conduct and motive of the person assailed. It has been my fortune to have known the District Attorney from his youth. He is a native of my own county, born and reared up in a town adjoining that of my birth-place. He was prepared for college life in the village where I live. When he presented himself for admission at our bar, it was my lot to examine his qualifications; and as we there had an old-fashioned requirement of good character, he was reported to the court by me as being, in this particular, above all suspicion or reproach. I well remember how joyfully we received him into our fellowship, and with what entire confidence he was received and cheered onward by the public confidence. At the May session of our Legislature, in 1823, though much my junior, he was my successor to an honorable post in that body. But he left it for a more ample field, and found it in your city, where he is well known to you all, as a high-minded member of the profession, incapable in his nature of intentional wrong to any human being. Since then, I have only seen him once or twice, until the fall of 1850; but I have not been ignorant of his high position here, earned, as it has been, by a life of honorable toil. Others there may be, who have entitled themselves to as good a name, and to an equal share of public confidence, but there are none who can, for themselves, claim a better fame, or a more honorable post in the profession; and nothing in the

"Did he hire or retain a person? Whatever he did was within the territory of the United States.

§ 2805. "The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may

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course of this trial has shaken, in the least degree, my confidence in his honor and integrity. Judge ye, whether the remarks to which I have here alluded, were just in their application, or worthy the source from whence they came. There is another incident of this trial, which still lingers on my mind; but as it was a matter of personal rather than a public concern, I have some delicacy in taking the least notice of it. But, gentlemen, our relations thus far have been so friendly, that I confess I have a strong desire to carry home with me your good wishes, and for that purpose alone I may be indulged in saying, that you all must remember that while the senior counsel was opening the defence, by an attack on an officer of this court, and after he was denounced in unmeasurable terms, according to the views of the speaker, you were told 'that the court sanctioned the unlawful expedition on the treasury of the United States.' You will remember, also, that every eye, except that of the speaker, was fixed on the point of personal assault. You may remember, too, that the object of that attack, bitter and unkind as it was, sat in silence. A week has elapsed, and still the shaft is left. When this case is over, I expect to leave you, perhaps for ever; and as I desire to carry back to my home your friendship and confidence, there is but one favor to be sought at your hands. For this reason I ask the jury to place these unmerited remarks by the side of the testimony of Burtinett, and let them both be stricken from the case. Perhaps you may say, that it was my duty to have stopped all that portion of the argument which related to the law of the case, as was done recently by one of the most learned judges of the Supreme Court, Judge Curtis. Perhaps I should have done so; but on a moment's reflection you will see why I let the argument proceed. This is not my own judicial district; and as I am here in obedience to the law which has called me, and am a stranger to the jury, I did not wish even to appear to assume power which others might suppose belonged to you. I have heard it all. And again, I was equally disposed to give to these defendants every benefit of what their counsel might, by any possibility, conceive for their benefit. Hence the indulgence has been cheerfully granted; and I repeat, what cannot be too often repeated, that the defendants are entitled to every reasonable doubt arising out of the testimony. Now, gentlemen, I have endeavored to dispose of many of the difficulties and embarrassments which have hung around this case, and in some measure obscured the real merits, which are indeed so important to those defendants and to the country. In this humble effort, I hope that I may have aided you, and rendered your task somewhat less responsible. My wish and my object have been, to render the case less complicated and more simple —to present to you only the real question to be tried. It is a question of fact merely. Give yourselves no trouble and no anxiety about anything else but the facts in the case. Have the allegations in this indictment been proved? This is all. This cause is put to you to be decided on its own merits—on the truth of the allegations contained in the indictment, as they are laid, in one or any of the counts except the nineteenth. You will, of course, remember that you are a New York jury, empannelled here, and not in New Orleans, nor in Mississippi—knowing, as you do, that your verdict must be according to the evidence given in court. A single word as to the facts:

"I. From the evidence, you must be satisfied, beyond any reasonable doubt, that persons were combined to begin, or set on foot, a military expedition in the city of New York, to be carried on from thence against a territory with which the United States were at peace.

"II. If, from the evidence, you find such a combination or agreement to have been made, or understood by them, then what any one of those persons may have said or done, in relation to the expedition, becomes evidence against all.

"III. The proof must establish, in your minds, that the expedition or enterprise was a military enterprise, and evidence showing that the ends and objects were hostile or forcible against a nation at peace with the United States—then it is, to all intents and purposes, a military expedition.

"IV. The prosecution is bound to prove that act of beginning, or setting on foot, or that the means were provided or procured within the Southern District of New York.

"V. You must be satisfied, from the evidence, that these defendants have done these acts, or participated in their being done, before you can return your verdict against them.

"The testimony is now before you, and that portion of it which has been presented

hire or retain a person, with an agreement that he shall pay wages when the services shall have been performed. The hiring or retaining a servant is not generally by the payment of money, in the first instance, but by the promise to pay money when the services shall have been performed; and so a person may be *hired* or *retained* to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent.

§ 2806. "Moreover, it is not necessary that the consideration of the hiring shall be money. To give to a person a railroad ticket that cost $4, and board and lodge him for a week, is as good a consideration for the contract of hiring as to pay him the money with which he could buy the railroad ticket and pay for his board himself. If there be an engagement on the one side to do the particular thing, to go beyond the limits of the United States with the intent to enlist, and on the other side an engagement that when the act shall have been done, a consideration shall be paid to the party performing the services, or doing the work, the hiring and retaining are complete.

§ 2807. "The meaning of the law, then, is this: that if any person shall engage, hire, retain or employ another person to go outside of the United States to do that which he could not do if he remained in the United States, viz., to take part in a foreign quarrel; if he hires another to go, knowing that it is his intent to enlist when he arrives out; if he engages him to go because he has such an intent, then the offence is complete within the section. Every resident of the United States has the right to go to Halifax, and there to enlist in any army that he pleases; but it is not lawful for a person to engage another here to go to Halifax for that purpose. It is the hiring of the person to go beyond the United States, that person having the intention to enlist when he arrives out, and that intention known to the party hiring him, and that intention being a portion of the consideration, because of which he hires him, that defines the offence."

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through Mr. Johannisson, the interpreter, in a manner acceptable to both parties, requires your careful attention. To show you the important principle involved in the invaluable right of a jury trial, and as that right is to be preserved inviolate, I shall leave the evidence in your hands, without naming a witness, or commenting upon any of the testimony, either written or parol. It is your province to weigh that evidence, and apply the law as now construed to that testimony, and return your verdict accordingly. Prejudices you should have none; they are unworthy of such men, and such a cause. Partialities you cannot entertain, because your oath forbids their indulgence. You are not to convict or acquit because those accused are great men, or small men, but only because the evidence of the case makes your duty plain. The law is no respecter of persons, and the glory of our land is, that, in the hands of an upright jury, the administration of justice reaches the high and the low, the rich and the poor, with unerring equality. The law never punishes to inflict a wound. The real objects are, to reform the individual, and to prevent others from like offences, so that life, property and character may be made secure. To conclude, I will only say, do your duty to the government—do your duty to the accused, without fear or favor of any man—protect the innocent, but punish those who may have violated your laws. Let the evidence in court and your conscience be your guide. This will give you rest and peace."

(For forms of indictment, see Wh. Prec. 1121, &c.)

CHAPTER III.

CUTTING TIMBER ON LANDS RESERVED TO THE UNITED STATES.

A. STATUTES.
UNITED STATES.
Cutting timber on lands reserved or purchased for the U. States, § 2808.
Loading ship with same, § 2809.
Penalty to informer, § 2810.
B. OFFENCE GENERALLY, § 2811.

A.—STATUTES.

UNITED STATES.

§ 2808. *Cutting timber on lands reserved or purchased for the United States.*—That if any person or persons shall cut, or cause or procure to be cut, or aid, assist or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live oak or red cedar tree or trees, or other timber, standing, growing or being on any lands of the United States, which in pursuance of any law passed, or hereafter to be passed, shall have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the navy of the United States; or if any person or persons shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands, which shall have been reserved or purchased as aforesaid, any live oak or red cedar tree or trees, or other timber, unless duly authorized so to do by order, in writing, of a competent officer, and for the use of the navy of the United States; or if any person or persons shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live oak or red cedar tree or trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing, any live oak or red cedar trees, or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export dispose of, use or employ the same in any manner whatsoever, other than for the use of the navy of the United States; every such person or persons, so offending, on conviction thereof before any court having competent jurisdiction, shall, for every such offence, pay a fine not less than treble the value of the tree or trees, or timber so cut, destroyed or removed, and shall be imprisoned not exceeding twelve months. —(Act of March 2, 1831, sect. 1; 4 Stat. at Large, 472.)

2809. *Loading ship with same.*—That if the master, owner, or consignee of any ship or vessel shall, knowingly, take on board any timber cut on lands which shall have been reserved or purchased as aforesaid, without proper authority, and for the use of the navy of the United States; or shall take on board any live oak or red cedar timber, cut on any other lands of the United States, with intent to transport the same to any port or place within the United States, or to export the same to any foreign country, the ship or vessel on board of which the same shall be taken, transported or seized, shall, with her tackle, apparel and furniture, be wholly forfeited to the United States, and the captain or master of such ship or vessel, wherein the same shall have been exported to any foreign country, against the

provisions of this act, shall forfeit and pay to the United States a sum not exceeding one thousand dollars.—(Ibid. sect. 2.)

§ 2810. *Penalty to informer.*—That all penalties and forfeitures incurred under the provisions of this act, shall be sued for, recovered and distributed, and accounted for, under the directions of the Secretary of the Navy, and shall be paid over, one-half to the informer or informers, if any, or captors, where seized, and the other half to the commissioners of the navy pension fund, for the use of said fund; and the commissioners of the said fund are hereby authorized to mitigate, in whole or in part, and on such terms and conditions as they shall deem proper, and order, in writing, any fine, penalty or forfeiture incurred under this act.—(Ibid. sect. 3.)

B.—Offence generally.

§ 2811. In an indictment charging the defendant with being employed in "removing from the lands of the United States, at the mouth of the river Muskegon, in the county of Ottowa, and district of Michigan, a large amount of timber, to wit: one hundred thousand shingles and twenty cords of shingle bolts," it was held, that this description was too vague and uncertain; that the locality of the trespass was inseparably connected with the offence, and the particular section or quarter section of the public domain must be stated, so as to protect the defendant from another trial, for the same offence.[a]

§ 2812. The term timber signifies the standing and the felled trees prepared for transportation to a vessel or saw mill, such as saw logs, or lumber in bulk; but does not embrace any article manufactured from the tree, as shingles or boards.[b]

It is not necessary, however, to state the class of the lands.[c]

§ 2813. It is not necessary in an indictment for removal, to allege that the timber was removed from the land on which it was grown, or from which it was cut. But it must be stated that it was removed from the lands of the United States, specially described according to the public survey.[d]

The allegation that the defendant knowingly committed the act, is unnecessary.[e]

The government must prove the cutting on the lands specified; the defendant may rebut the same, by showing circumstances of ignorance as to the section lines or misstate. The proof must correspond with the charge —cutting oak is not cutting pine timber.[f]

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[a] U. S. *v.* Schuler, 6 McLean, 28.
[b] Ibid.
[c] U. S. *v.* Thompson, Ibid. 56.
[d] U. S. *v.* Schuler, 6 McLean, 28.
[e] Ibid.; see ante, as to scienter, § 297.
[f] U. S. *v.* Darton, Ibid. 46.

CHAPTER IV.

BRIBERY.

STATUTES.

PENNSYLVANIA.

§ 2813 (*a*). *Embracery.*—If any person shall attempt to corrupt or influence any juror in a criminal or civil court, or any arbitrator appointed according to law, by endeavoring, either in conversation or by written communication, or by persuasion, promises or entreaties, or by any other private means to bias the mind or judgment of such juror or arbitrator as to any cause pending in the court to which such juror has been summoned, or in which such arbitrator has been appointed or chosen, except by the strength of evidence or the arguments of himself or his counsel during the trial or hearing of the case, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, or suffer an imprisonment not exceeding one year, or both, or either, at the discretion of the court.—(Rev. Acts, 1860, Bill I., sec. 13.)

§ 2813 (*b*). *Bribery.*—If any person shall directly or indirectly, or by means of, and through any artful and dishonest device whatever, give or offer to give any money, goods or other present or reward, or give or make any promise, contract or agreement, for the payment, delivery, or alienation of any money, goods or other bribe, in order to obtain or influence the vote, opinion, verdict, award, judgment, decree, or behaviour of any member of the general assembly, or any officer of this commonwealth, judge, juror, justice, referee or arbitrator, in any bill, action, suit, complaint, indictment, controversy, matter or thing whatsoever, depending or which shall depend before him or them, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment by separate or solitary confinement at labor, not exceeding one year; and the member of assembly, or officer, judge, juror, justice, referee or arbitrator, who shall accept or receive, or agree to accept or receive such bribe, shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years.—(Ibid. sect. 48.)

§ 2813 (*c*). *Witness testifying to be exempt from prosecution.*—No witness shall be excused from testifying in any criminal proceeding, or in any investigation or inquiry before either branch of the general assembly, or any committee thereof, touching his knowledge of the aforesaid crimes, under any pretence or allegation whatsoever; but the evidence so given, or the facts divulged by him, shall not be used against him in any prosecution under this act: *Provided*, That the accused shall not be convicted on the testimony of an accomplice, unless the same be corroborated by other evidence, or the circumstances of the case.—(Ibid. sect. 49.)

§ 2813 (*d*). *Taking bribes by electors.*—If any elector, authorized to vote at any public election, shall directly or indirectly accept or receive, from any person, any gift or reward in money, goods, or other valuable thing, under an agreement or promise, express or implied, that such elector shall give his vote for any particular candidate or candidates at such election, or shall accept or receive the promise of any person that he shall thereafter receive any gift or reward in money, goods, or

other valuable thing, any office, appointment or employment, public or private, or any personal or pecuniary advantage whatsoever, under such an agreement or promise, express or implied, such elector shall be guilty of a misdemeanor, and shall, on conviction of either of the said offences, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding six months.—(Ibid. sect. 50.)

§ 2813 (*e*). *Corruptly influencing and intimidating electors.*—Any person who shall directly or indirectly give, or offer to give, any such gift or reward to any such elector, with the intent to induce him to vote for any particular candidate or candidates at such election, or shall directly or indirectly procure or agree to give any such gift or reward to such elector, with the intent aforesaid, or shall, with the intent to influence or intimidate such elector to give his vote for any particular candidate or candidates at such election, give, offer, or promise to give to such elector, any office, place, appointment or employment, or threaten such elector with dismissal or discharge from any office, place, appointment or employment, public or private, then held by him, in case of his refusal to vote for any particular candidate or candidates at such election, the person so offending shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding two years.[g]—(Ibid. sect. 51.)

OHIO.

§ 2813 (*f*). *Definitions.*—That if any person or persons shall directly or indirectly promise, offer or give, or cause or procure to be promised, offered or given,

[g] Section 49. "This section is an amendment and extension of the act of 3d March, 1847, entitled 'An Act to define and punish the offence of bribery.' Pamphlet Laws, 217. Brightly's Digest, 103, No. 1; and the one hundred and sixty-first section of the act of 14th April, 1834, entitled 'An Act relative to the organization of the courts of justice.' Pamphlet Laws, 341. Brightly's Digest, 103, Nos. 2, 3, 4. A distinction, however, has been made between the party offering or attempting to bribe any public functionary mentioned in the act, and the public functionary receiving or agreeing to receive such bribe. The breach of his official oath and the betrayal of his public trust in such public funotionary rendering his crime of much deeper malignity and worthy of more marked and severe punishment.

Section 50. This section, with a slight verbal amendment, is a transcript of the act of the 13th March, 1855, entitled 'A supplement to an act to define and punish the offence of bribery, passed the third of March, one thousand eight hundred and forty-seven.' Pamphlet Laws, 73. Brightly's Digest, 1114, No. 1.

Sections 51 and 52. These sections will be found to be amendments of the existing laws punishing the bribery of electors; a crime which saps the very foundation of our entire political system. Substantially, they are the same as the one hundred and twenty-second and one hundred and twenty-third sections of the act of the 2d July, 1839, entitled 'An Act relating to the elections of this Commonwealth.' Pamphlet Laws, 519. Brightly's Digest, 293, Nos. 100, 101, except that the offences have been more precisely defined and the punishments thereof made to bear a more just relation to the enormity of the crimes.

Sections 53, 54 and 55. These sections are consolidations and amendments of the acts of the 17th February, 1762, entitled 'An Act for the more effectual suppressing and preventing lotteries.' 1 Smith's Laws, 246. Brightly's Digest, 399, No. 25. Of the act of the 20th January, 1792, entitled 'An Act to prevent the sale of lottery tickets within this Commonwealth.' 3 Smith's Laws, 60. Of the act of the 2d of March, 1805, entitled 'An Act for the more effectual prevention of excessive and deceitful gaming, and to prevent unlawful sales of chances of lottery tickets.' 4 Smith's Laws, 210. Of the second section of the act of the 1st of March, 1833, entitled 'An Act for the entire abolition of lotteries.' Pamphlet Laws, 60. Brightly's Digest, 399, Nos. 26 and 27; and of the third section of the act of the 16th March, 1847, entitled 'An Act declaring obstructions to private roads to be a public nuisance, and for other purposes.' Pamphlet Laws, 476. Brightly's Digest, 399, No. 27." (Revisors' note.)

any money, goods, right in action, present, reward, or any other valuable thing whatever, or any promise, contract, undertaking, obligation, or security, for the payment or delivery of any money, goods, right in action, present, reward, or any other valuable thing whatever, to any officer or public agent after his election or appointment, and either before or after he shall have qualified as such, with intent—

First. To influence his vote or decision on any question, matter, cause or proceeding which may then be pending, or may by law be brought before him as such officer or agent, or;

Second. To induce him to neglect or omit the performance of his duty as such officer or agent, or to perform such duty with partiality or favor, or in consideration of his having neglected or omitted the performance of such duty, or of his having performed it with partiality or favor, or;

Third. To induce him to give, procure or to assist to procure, or in consideration of his having given, procured or assisted to procure, by his act, interest influence, or other means whatever, any public appointment, office, place of trust or profit, or any preferment or emolument, or any public contract, or any false specification, plan, drawing, certificate, or estimate under such contract. Every such person and the officer or agent who shall in any wise solicit, accept or receive any such money, goods, right in action, present, reward, or any other valuable thing whatever, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right in action, present, reward, or other valuable thing whatever, or any part thereof, shall, on conviction thereof, be punished as provided in the second section of this act.—(Act of March 19, 1860, sect. 1.)

§ 2813 (*g*). *Penalties.*—That the officer, public agent, or other person so convicted, shall be fined not less than the amount or value of the thing so promised, offered or given, or so solicited, accepted or received, nor more than three times such value or amount, or be imprisoned in the county jail not more than thirty days, or both; and if a public agent or any officer other than a state officer be so convicted, he shall be immediately removed from office or employment by order of the court: *Provided*, That the execution of such order, when the court has signed a bill of exceptions, shall, on motion of the defendant, be suspended until the determination of an application for a writ of error, but not longer than thirty days, unless such writ be allowed.—(Ibid. sect. 2.)

§ 2813 (*h*). *Definition of "officer"—"Public agent."*—The word "officer" shall be held to include all state officers, including the senators and representatives in the general assembly, all county, township, city, village, school and other officers deriving their authority under the constitution or laws of this state, and the deputies of all officers. The words "public agent" shall be held to include trustees, commissioners, architects, superintendents, engineers, surveyors, and all other persons acting in a subordinate capacity, excepting contractors, mechanics and laborers, in the purchase, laying out, construction, repair or management of any public ground, work, building, improvement or institution.—(Ibid. sect. 3.)

§ 2813. (*i*). *Mode of prosecution.*—All prosecutions under the provisions of this act shall be by indictment before the court of common pleas in the county where the offence shall have been committed.—(Ibid. sect. 4.)

§ 2813 (*k*). *Limitation of actions.*—This act shall be given specially in charge to the grand jury by the judges of the courts of common pleas, but no prosecution shall be instituted under it unless it shall be commenced within one year from the commission of the offence.—(Ibid. sect. 5.)

§ 2814. Bribery, as a common law offence, is defined by Blackstone to be where a judge or other person connected with the administration of justice seeks an undue reward to influence his behavior in office.[a] Sir W. Russell,[b] extends it to all cases where any undue reward is received or offered by or to any person whatsoever, whose ordinary business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity.[c] To attempt to bribe, even though the offence be not consummated, is a misdemeanor at common law.[d]

§ 2815. In conformity with these views it has been held indictable at common law to be concerned either as actor or receiver in the bribery or attempt at bribery of an elector at any governmental election;[e] of a cabinet minister and member of the privy council;[f] of a commissioner of the revenue;[g] of a member of the State legislature;[h] of a justice of the peace, even though the case in which the bribe is offered is not yet instituted;[i] and of a sheriff, to induce him to summon jurors to be nominated by the defendant.[j] And the same rule has been applied to a corrupt agreement between A. and B., that A. shall vote for C. as commissioner, in consideration that B. will vote for D. as Clerk.[k]

[*For U. S. Statute against corrupting jurors, see act of March* 2, 1831, § 2, 4 *stat.* 488. *Bright. Dig.* 213. *As to Bribery of Custom House officer, see act of March* 2, 1799, § 88, 1 *Stat.* 695. *As to Bribery of member of Congress or public officer, see act of June* 20, 1853, § 6, 10 *stat.* 171.]

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[a] 4 Blac. Com. 139. [b] 2 Russ. on Crimes, 122.
[c] R. *v.* Beale, cited in R. *v.* Gibbons, 1 East R. 183.
[d] 2 Russ. on Crimes, 124. [e] R. *v.* Pitt, 3 Burr, 1335.
[f] Vaughan's case, 4 Burr, 2494.
[g] U. S. *v.* Norvell, Whart. St. Trials, 189.
[h] Com. *v.* McCook, cited in Whart. Prec. 1012, n.
[i] Barefield *v.* State, 14 Ala. 603.
[j] Com. *v.* Chapman, 1 Virg. Cases, 138.
[k] Com. *v.* Callaghan, 2 Va. Cases, 460. For forms of indictment, see Wh. Prec., as follows:

(1012) 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.
(1013) Endeavoring to bribe a constable
(1014) Bribery of a judge of the United States, on the act of April 30, 1790, s. 21.
(1015) Against a justice of the Court of Common Pleas for accepting a bribe.
(1016) Corrupt interference with an election. First count—Offering money to a voter to vote for a particular member of parliament.
(1017) Second count—Actually giving a bribe.
(1018) Attempting to influence a voter by threatening to discharge him from employment. Mass. Stat. 1852, chap. 321.
(1022) Embracery by persuading a juror to give his verdict in favor of the defendant, and for soliciting the other jurors to do the like.

BOOK VIII.

OFFENCES ON THE HIGH SEAS.

CHAPTER I.

PIRACY.

A. STATUTES.

UNITED STATES.

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A.—STATUTES.

UNITED STATES.

§ 2816. *Piracy.—Mutiny.*—If any person or persons[a] shall commit upon the high

[a] (For the notes to this and the following sections of this chapter, I am indebted to Mr. Brightly's Digest of the U. S. Laws.) The act is limited in its operation to offences committed by or upon citizens of the United States. United States *v.* Klintock, 5 Wh. 144, 152. United States *v.* Furlong, Ibid. 184. United States *v.* Gilbert, 2 Sumn. 88-9. United States *v.* Howard, 3 W. C. C. 340. It does not apply to those committed on board of ships belonging exclusively to subjects of a foreign state, and

seas,[b] or in any river, haven, basin or bay, out of the jurisdiction of any particular state,[c] murder or robbery,[d] or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death;[e] or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel,[g] or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt[h] in the ship; every such offender shall be deemed, taken and adjudged to be a pirate[i] and felon, and being thereof convicted, shall suffer death;[k] and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.[l]—(Act of 30th April, 1790, sect. 8, 1 Stat. 113.)

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then under the acknowledged jurisdiction of a foreign sovereign. United States *v.* Palmer, 3 Wh. 610, 631–2. United States *v.* Gibert, 2 Sumn. 88. United States *v.* Kessler, Bald. 15. But it extends to those which are committed on board of a piratical vessel, then in the possession of pirates, and acknowledging the jurisdiction of no recognized government. United States *v.* Klintock, 5 Wh. 144. United States *v.* Furlong, Ibid. 184.

[b] The term "high seas," in this act, means any waters on the sea coast, which are without the boundaries of low water mark. United States *v.* Ross, 1 Gall. 524. United States *v.* Furlong, 5 Wh. 184. And see United States *v.* Grush, 5 Mas. 290. The Harriet, 1 Story, 259. United States *v.* Robinson, 4 Mas. 307. United States *v.* Wiltberger, 5 Wh. 76.

[c] It is not the offence committed, but the place in which it was committed, which must be out of the jurisdiction of a state, to bring the case within the jurisdiction of the federal courts; and therefore they have no jurisdiction to try an indictment for murder committed on board a ship of war lying in the harbor of Boston, within the jurisdiction of the State of Massachusetts. United States *v.* Bevans, 3 Wh. 336.

[d] The terms murder and robbery, as used in this act, are to be understood as defined at common law. United States *v.* Magill, 1 W. C. C. 463. United States *v.* Jones, 3 Ibid. 209. United States *v.* Palmer, 3 Wh. 610.

[e] These words do not relate to murder or robbery, but to the words "or any other offence," immediately preceding. To make a robbery upon the high seas piracy, it is not necessary that it should be punishable by death, if committed within the body of a county. United States *v.* Palmer, 3 Wh. 610. United States *v.* Jones, 3 W. C. C. 209. United States *v.* Hutchings, 2 Wh. Cr. Cas. 543.

[g] To constitute the offence of running away with a vessel, it must appear that the command of the vessel was taken from the captain by the accused, or without the consent of the captain, for some time, no matter how long, and that the act was done feloniously, and with intent to convert the vessel and cargo to the use of the parties concerned in the act. United States *v.* Haskell, 4 W. C. C. 402. For form of indictment, see Whart. Prec. § 1070–5.

[h] See *infra*, 44, as to what constitutes the crime of making a revolt; and altering the punishment. And see United States *v.* Haskell, 4 W. C. C. 405. United States *v.* Sharp, Pet. C. C. 118. United States *v.* Peterson, 1 W. & M. 305. For form of indictment, see Whart. Prec. § 1061.

[i] The crime of piracy is defined, with reasonable certainty, by the law of nations. United States *v.* Smith, 5 Wh. 153. A pirate is one who acts solely by his own authority, without any commission or authority from a sovereign state, seizing by force, and appropriating to himself without discrimination, every vessel he meets with. Davison *v.* Seal-skins, 2 Paine, 324. See United States *v.* Jones, 3 W. C. C. 228; 2 Opin. 19. See also act 3 March, 1819, § 5. 3 Stat. 510.

[k] An indictment which charges, in the same count, an offence made capital by one section of an act of Congress, and another offence, declared in another section of the same law to be a misdemeanor, is bad. United States *v.* Sharp, Pet. C. C. 131. For forms of indictments, see Whart. Prec. § 1061–79.

[l] See Ex parte Bollman, 4 Cr. 136. United States *v.* Magill, 1 W. C. C. 463. United States *v.* Thompson, 1 Sumn. 168.

§ 2817. *Under color of foreign commission.*—If any citizen[m] shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon and robber, and on being thereof convicted shall suffer death.—(Ibid. sect. 9.)

§ 2818. *Accessories before the fact.*—Every person who shall, either upon the land or the high seas, knowingly and wittingly aid and assist, procure, command, counsel or advise any person or persons, to do or commit any murder or robbery, or other piracy aforesaid,[n] upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, counselling or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be accessory to such piracies before the fact,[o] and every such person being thereof convicted shall suffer death.—(Ibid. sect. 10.)

§ 2819. *Accessories after the fact.*—That after any murder, felony, robbery or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall on the land or at sea receive, entertain or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall, he, and are hereby declared, deemed and adjudged to be accessory to such piracy or robbery, after the fact;[p] and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.—(Ibid. sect. 11.)

§ 2820. *Manslaughter. Attempts to commit piracy, &c. Corresponding with pirates. Endeavoring to make a revolt.*—If any seaman[q] or other person shall commit manslaughter[r] upon the high seas,[s] or confederate, or attempt or endeavor to corrupt any commander, master, officer or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares or merchandise, or to turn pirate, or to go over to or confederate with pirates,[t] or in anywise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or

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[m] The sole object of this section is to render a citizen who offends against the United States or their citizens, under color of a foreign commission, punishable in the same degree as if no such commission existed. United States *v.* Wiltberger, 5 Wh. 100. United States *v.* Bowers, Ibid. 201. 2 Wh. Cr. Cas. xxx. See 3 Opin. 120.

[n] The 10th and 11th sections, as to accessories, refer to the acts of piracy mentioned in the 8th section. United States *v.* Howard, 3 W. C. C. 340.

[o] For form of indictment, see Whart. Prec. § 1080.

[p] See form of indictment; Whart. Prec. § 1081.

[q] The mate is a seaman, within the meaning of this section. United States *v.* Savage, 5 Mas. 460.

[r] The act does not define the offence of manslaughter. This is to be determined by the common law. United States *v.* Armstrong, 2 Curt. C. C. 451.

[s] The federal courts have not jurisdiction of manslaughter, where the blow is struck at sea, and the death occurs on land. United States *v.* Armstrong, 2 Curt. C. C. 447. S. P., United States *v.* Magill, 1 W. C. C. 463. United States *v.* Wiltberger, 5 Wh. 76. United States *v.* Imbert, 4 W. C. C. 702. But now, see act of 1857.

[t] See United States *v.* Howard, 3 W. C. C. 340.

if any person or persons shall any ways consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman[u] shall confine the master of any ship or other vessel,[v] or endeavor to make a revolt in such ship;[w] such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.—(Ibid. sect. 12.)

§ 2821. *Casting away vessels.*—Any person, not being an owner, who shall on the high seas,[x] wilfully and corruptly cast away, burn or otherwise destroy[y] any ship or other vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done,[z] and being thereof lawfully convicted, shall suffer death.—(Act of 26th March, 1804, sect. 1, 2 Stat. 290.)

§ 2822. *By owners, with intent to defraud underwriters.*—If any person shall, on the high seas, wilfully and corruptly cast away, burn or otherwise destroy any ship or vessel of which he is owner, in part or in whole, or in anywise direct or procure the same to be done, with intent or design[a] to prejudice any person or persons[b] that hath underwritten, or shall underwrite any policy or policies of insurance thereon, or if any merchant or merchants that shall load goods thereon, or of any other owner or owners of such ship or vessel, the person or persons offending therein being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death.—(Ibid. sect. 2.)

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[u] This includes the cooper of a ship. United States *v.* Thompson, 1 Sumn. 168. And the mate. United States *v.* Savage, 5 Mas. 460. It is not necessary that the offences in this clause should have been committed on the high seas. United States *v.* Keefe, 3 Mas. 475. United States *v.* Hamilton, 1 Ibid. 443. United States *v.* Stevens, 4 W. C. C. 548.

[v] This extends to all restraints of the personal liberty of the master, in freely going about the ship, by present force, or threats of bodily injury. United States *v.* Hemmer, 4 Mas. 105. United States *v.* Smith, 3 W. C. C. 78. United States *v.* Bladen, Pet. C. C. 213. It is sufficient that there is a personal seizure of the master, although it may be for the purpose of inflicting personal chastisement upon him. United States *v.* Savage, 5 Mas. 460. So, if the master strikes the seaman, and is so firmly held that he cannot extricate himself, the seaman is guilty of confining the captain. United States *v.* Smith, 3 W. C. C. 535. But the act of confinement must be feloniously done. United States *v.* Henry, 4 Ibid. 428. It must be an illegal restraint; for it is no offence for a seaman to confine the master for a justifiable cause, or in justifiable self-defence. United States *v.* Thompson, 1 Sumn. 168.

[w] The act of 1835, *infra*, § 2759 *(c)*, declares what acts shall constitute the crime of revolt; and therefore an indictment for an attempt to create a revolt, must set forth specifically the acts which constitute the offence. United States *v.* Almeida, Whart. Prec. § 1061, n. And see United States *v.* Smith, 1 Mas. 147. United States *v.* Gardner, 5 Ibid. 402. United States *v.* Barker, Ibid. 404. United States *v.* Morrison, 1 Sumn. 448. United States *v.* Haskell, 4 W. C. C. 402. United States *v.* Kelly, Ibid. 528. S. C., 11 Wh. 417. United States *v.* Peterson, 1 W. & M. 305 United States *v.* Forbes, Crabbe, 558. United States *v.* Nye, 2 Curt. C. C. 225. See, also, *infra*, 45, as to the definition and punishment of this offence.

[x] See United States *v.* Robinson, 4 Mas. 307.

[y] The legal meaning of the term "destroy," as used in this act, is to unfit the vessel for service, beyond the power of recovery by ordinary means. This, as to the extent of the injury, is synonymous with "cast away." United States *v.* Johns, 1 W. C. C. 363. S. C., 4 Dall. 412. United States *v.* Vanranst, 3 W. C. C. 146. 2 Wh. Cr. Cas. xxxvii.

[z] The common law doctrine of principal and accessory prevails in the construction of this act. Jacobson's Case, cited 2 Wh. Cr. Cas. xxxvi. 2 City Hall Rec. 131.

[a] The law punishes the act when done with an intent to prejudice; it does not require that there should be an actual prejudice. United States *v.* Amedy, 11 Wh. 410.

[b] A corporation is a person within the meaning of the act. United States *v.* Amedy, 11 Wh. 392.

§ 2823. *Robbery to be deemed piracy.*—If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate;[c] and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore shall, commit robbery, such person shall be adjudged a pirate; and on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: *Provided*, That nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court.—(Act of 15th May, 1820, sect. 3, 3 Stat. 600.)

§ 2824. *Murder, where the party dies on land, &c.*—If any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder,[d] or rape, or shall, wilfully and maliciously, strike, stab, wound, poison or shoot at, any other person, of which striking, stabbing, wounding, poisoning or shooting such person shall afterwards die, upon land, within or without the United States, every person so offending, his or her counsellors, aiders or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death.—(Act of 3d March, 1825, sect. 4, 4 Stat. 115.)

§ 2825. *Offences in foreign ports.*—If any offence shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States,[e] while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offence shall be cognizable and punishable by the proper circuit court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or state: *Provided always*, That if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States.—(Ibid. sect. 5.)

§ 2826. *Attacking vessels with intent to plunder.*—If any person or person, upon the high seas, or in any arm of the sea, or in any river, haven, creek basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall, by surprise or by open force or violence, maliciously attack or set upon, any ship or vessel belonging in whole or part to the United States, or to any citizen or citizens thereof, or to any other person whatso-

[c] See United States *v.* Gibert, 2 Sumn. 21. United States *v.* Kessler, Bald. 15.

[d] This section does not extend to the crime of manslaughter. United States *v.* Armstrong, 2 Curt. C. C. 451.

[e] It is the character of the vessel, and not that of the offender, that decides the question of jurisdiction, under this section. United States *v.* Kessler, Bald. 29-30. United States *v.* Imbert, 4 W. C. C. 702.

ever, with an intent unlawfully to plunder the same ship or vessel, or to despoil any owner or owners thereof of any moneys, goods or merchandise laden on board thereof, every person so offending, his or her counsellors, aiders or abettors, shall be deemed guilty of felony; and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.—(Ibid. sect. 6.)

§ 2827. *Entering vessels with intent to commit a felony. Maliciously destroying mooring, &c.*—If any person or persons, upon the high seas, or in any other of the places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any ship or vessel, boat, or raft; or if any person or persons shall wilfully and maliciously, cut, spoil or destroy any cordage, cable, buoys, buoy-rope, headfast or other fast, fixed to any anchor or moorings, belonging to any ship, vessel, boat or raft; every person, so offending, his or her counsellors, aiders and abetters, shall be deemed guilty of felony, and shall, on conviction thereof be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence.—(Ibid. sect. 7.)

§ 2828. *Plundering vessels in distress, &c. Obstructing escape from wrecks. Wrecking vessels.*—If any person or persons shall plunder, steal or destroy any money, goods, merchandise or other effects, from or belonging to any ship or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded or cast away, upon the sea, or upon any reef, shoal, bank or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States,[f] or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship or vessel, boat or raft, or the wreck thereof; or, if any person or persons shall hold out or show any false light or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger, or distress or shipwrick; every person, so offending, his or her counsellors, aiders and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.—(Ibid. sect. 9.)

§ 2829. *Forcing seamen ashore.*—If any master or commander of any ship or vessel, belonging, in whole or in part, to any citizen or citizens of the United States, shall, during has being abroad, maliciously,[g] and without justifiable cause,[h] force[i] any officer, or mariner of such ship or vessel, on shore; or leave him behind, in any foreign port or place; or refuse to bring home again all such of the officers and

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[f] This section punishes thefts of goods belonging to vessels in distress, though committed above high water mark. It is within the constitutional grant to Congress of the power to regulate commerce. United States *v.* Coombs, 12 Pet. 72.

[g] "Maliciously," in this statute, means against a knowledge of duty. United States *v.* Coffin, 1 Sumn. 394. If the act be done under a mistaken sense of duty, it is no offence within the statute. United States *v.* Ruggles, 5 Mas. 192.

[h] "Justifiable cause" does not mean such a cause as, in the mere maritime law, might authorize a discharge; but such a cause, as the known policy of the American laws on this subject contemplates, as a case of moral necessity, for the safety of the ship and crew, or the due performance of the voyage. United States *v.* Coffin, 1 Sumn. 394.

[i] This offence may be committed, although no physical force was used; as if the mate left the ship under a well grounded fear of his life had he remained on board. United States *v.* Riddle, 4 W. C. C. 644.

mariners of such ship or vessel, whom he carried out with him,[j] as are in a condition to return, and willing to return,[k] when he shall be ready to proceed in his homeward voyage; every master or commander, so offending, shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding six months, according to the aggravation of the offence.[l]—(Ibid. sect. 10.)

§ 2829 (*a*). *Burning vessels.*—If any person or persons shall, wilfully and maliciously, set on fire, or burn or otherwise destroy, or cause to be set on fire, or burnt or otherwise destroyed, or aid, procure, abet, assist in setting on fire, or burning or otherwise destroying, any ship or vessel of war of the United States, afloat on the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, suffer death: *Provided*, That nothing herein contained shall be construed to take away or impair the right of any court martial to punish any offence, which, by the law of the United States, may be punishable by such court.—(Ibid. sect. 11.)

§ 2829 (*b*). *Assault with intent to commit a felony.*—If any person or persons, upon the high seas,[m] or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging in whole or in part to the United States, or any citizen or citizens thereof, shall, with a dangerous weapon,[n] or with intent to kill, rob, steal or to commit a mayhem, or rape, or to perpetrate any other felony, commit an assault on another,[o] such person shall, on conviction thereof, be punished by fine, not exceeding three thousand dollars, and by imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence.—(Ibid. sec. 12.)

§ 2829 (c). *Definition of revolt and mutiny*—If any one or more of the crew[p] of any American ship[q] or vessel on the high seas, or on any other waters within the

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[j] This act enumerates three distinct offences, viz.: 1. Maliciously, and without justifiable cause, forcing an officer or mariner on shore in a foreign port. 2. Maliciously, or without justifiable cause, leaving any officer or mariner behind in a foreign port. 3. Mal ciously, and without justifiable cause, refusing to bring home again all the officers and mariners of the ship, in a condition to return, and willing to return. United States *v.* Netcher, 1 Story, 307.

[k] It is not necessary to complete the first and second of the enumerated offences, that the officer or mariner should be in a condition to return, and willing to return. These latter words apply only to the third and last of the enumerated offences. United States *v.* Netcher, 1 Story, 307.

[l] For form of indictment, see Whart. Prec. § 931.

[m] See United States *v.* Grush, 5 Mas. 290. United States *v.* Terrel, Hemp. 422.

[n] In an indictment for an assault with an axe, it will be inferred that it was a deadly weapon without such allegation. Dollashide *v.* United States, 1 Morris, 233. The danger referred to, is danger to life. It is a question for the jury. United States *v.* Small, 2 Curt. C. C. 241.

[o] The offence is complete, though the person assaulted were not one of the crew. United States *v.* Small, 2 Curt. C. C. 242. The offence described in this act is a misdemeanor and not a felony; and it is not necessary, in an indictment under it, to charge that the assault was committed feloniously, or with intent to perpetrate a felony. United States *v.* Gallagher, 2 Paine, 447.

[p] Foreign seamen on board of American ships are subject to punishment under this act. United States *v.* Peterson, 1 W. & M. 306.

[q] A ship engaged in a whaling voyage, without having surrendered her register, or taking out an enrolment and license, pursuant to the act of 1793, is not an American ship within the provision of this act. United States *v.* Rogers, 3 Sumn. 342. But it is enough, in the first place, to show that the vessel sailed from and to an American port, and was apparently controlled by citizens of the United States. United States *v.* Peterson, 1 W. & M. 306.

admiralty and 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[r] and felony; and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence. And the offence of making a revolt in a ship, which now is, under and in virtue of the eighth section of the act of congress, passed the 30th day of April, in the year of our Lord 1790, punishable as a capital offence, shall, from and after the passage of the present act, be no longer punishable as a capital offence, but shall be punished in the manner prescribed in the present act, and not otherwise.—(Act of 3d March, 1825, sect. 1, 4 Stat. 775.)

§ 2829 (*d*). *Endeavoring to make a revolt.*—If any one or more of the crew of any American ship or vessel on the high seas, or any other waters, within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny[s] on board such ship or vessel; or shall combine, conspire or confederate with any other person or persons on board to make such revolt or mutiny;[t] or shall solicit, incite or stir up any other or others of the crew to disobey or resist the lawful orders of the master or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust therein; or shall assemble with others in a tumultuous and mutinous manner; or make a riot on board thereof; or shall unlawfully confine the master, or other commanding officer thereof; every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.[u]—(Ibid. sect. 2.)

§ 2829 (*e*). *Maltreating crews of vessels.*—If any master or other officer of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred

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[r] Revolts on shipboard are to be considered as defined by this act, and consist not only in attempts to usurp the command from the master, or to transfer it to another, or to deprive him of it for any purpose by violence, but in resisting him in the free and lawful exercise of his authority. United States *v.* Peterson, 1 W. & M. 305. But a mere disobedience of orders by one or two of the seamen, without combining with the others, or offensive or insolent language, is not a revolt. United States *v.* Forbes, Crabbe, 558. Since the passage of this act, an indictment for revolt must set forth specifically the acts which constitute the offence. United States *v.* Almeida, Whart. Prec. § 1061.

[s] See *supra*, § 2959 (c), for the definition of a revolt or mutiny. For forms of indictments, see Whart. Prec. § 1062–6.

[t] To sustain an indictment for an endeavor to make a revolt, a confederacy or combination must be shown, between two or more of the seamen, to refuse to do further duty on board the ship, and to resist the lawful commands of the officers. United States *v.* Cassedy, 2 Sumn. 582. See United States *v.* Peterson, 1 W. & M. 305–6. United States *v.* Nye, 2 Curt. C. C. 225. Where there is a deviation from the voyage in the shipping articles, a refusal of the seamen subsequently to do duty, on that account, does not amount, in law, to an endeavor to commit a revolt. United States *v.* Matthews, 2 Sumn. 470.

[u] See § 2820, and notes.

or revenge, and without justifiable cause,[v] beat, wound or imprison any one or more of the crew[w] of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punishment;[x] every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.[y]—(Ibid. sect. 3.)

§ 2829 (*f*). *Piratically running away with vessels, or yielding them voluntarily to pirates.*—If any captain, or other officer or mariner, of a ship or vessel on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, shall piratically or feloniously run away with such ship or vessel, or any goods or merchandise on board such ship or vessel to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; every such person so offending shall be deemed guilty of felony, and, on conviction thereof, shall be punished by fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both, according to the nature and aggravation of the offence.[z]—(Act of 8th August, 1846, sect. 5, 9 Stat. 73.)

§ 2829 (*g*). *When aliens to be deemed pirates.*—Any subject or citizen of any foreign state, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted and punished before any circuit court of the United States for the district into which such person may be brought, or shall be found, in the same manner as other persons charged with piracy may be arraigned, tried, convicted and punished in said courts.—(Act of 3d March, 1847, sect. 1, 9 Stat. 175.)

§ 2829 (*h*). *Wilfully attempting to destroy vessels at sea.*—Any person not being an owner, who shall, on the high seas, wilfully, with intent to burn or destroy, set fire to any ship or other vessel, or otherwise attempt the destruction of such ship or other vessel, being the property of any citizen or citizens of the United States, or procure the same to be done, with the intent aforesaid, and being thereof lawfully convicted, shall suffer imprisonment to hard labor, for a term not exceeding ten years, nor less than three years, according to the aggravation of the offence.[a]—(Act of 29th July, 1850, sect. 7, 9 Stat. 441.)

[*As to jurisdiction, see post*, § 2858.)

§ 2829 (*i*). *Jurisdiction.*—Any offence committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or

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[v] It must be proved, not only that the act was without justifiable cause, but that it was malicious; that it was a wilful departure from a known duty. Since the passage of the act abolishing the punishment of flogging in the navy, and in vessels of commerce, a punishment by flogging is without justifiable cause. That act prohibits corporeal punishment by stripes, inflicted with a cat, and any punishment which in substance and effect amounts thereto. United States *v.* Cutler, 1 Curt. C. C. 501–2. It does not prohibit all corporeal punishment. Ibid. 516.

[w] This includes the officers. United States *v.* Winn, 3 Sumn. 209. See United States *v.* Cassedy, 2 Ibid. 582.

[x] Flogging is not a cruel and unusual punishment, within the meaning of this act; for it had not been abolished at the time of its passage. If now inflicted, the defendant should be indicted for beating and wounding the seaman. United States *v.* Collins, 2 Curt. C. C. 194.

[y] For forms of indictments under this act, see Whart. Prec. § 925–30.

[z] For forms of indictment, see Whart. Prec. § 1070–5.

[a] For form of indictment, see Whart. Prec. § 575.

place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, or any other person belonging to the company of said ship, or any other passenger, shall be cognizable and punishable by the proper circuit court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or state: *Provided always*, That if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States.—(Act of March, 1825, sect. 5.)

[*For manslaughter on the high seas, where the party dies on land, see* § 2692. *For attempts, &c., see* § 1264.]

B.—Offence generally.

§ 2830. Piracy, being beyond the jurisdiction of the common law, was, it seems, originally, no felony thereat, and before the statute of 28 Hen. VII. c. 15, was punishable only by the civil law. On a point argued at the Old Bailey, before Holt, C. J., Treby, C. J., Powell, Powys, Wark, Rokesby, and Turton, it was held *per cur.* that "no attainder of piracy wrought corruption of blood, for it was no offence at common law."[b] But it would appear to have been ever recognized as an offence against the law of nations, and Blackstone[c] refers to the enactments on that subject as "the principal cases in which the statute law of England interposes to aid and enforce the law of nations as a part of the common law." And it is in this sense Hawkins[d] is to be understood, when he defines a pirate at the common law to be one who commits any of these acts of piracy, robbery, and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.

§ 2831. The constitutional powers of Congress to "define and punish piracies," &c., has been variously exercised by the statutes now in force; among others, by the act 3d March, 1819, c. 76, § 5, (now, however, expired by limitation,) which simply referred to the crime of piracy *as defined by the law of nations;* and this was held by the Supreme Court[e] to be a constitutional use of its power. All writers concur, say the court, in holding that robbery, or forcible depredation upon the sea, *animo furandi*, is piracy,[f] and by *robbery*, is meant by our laws concerning piracy, (*e. g.* the act of 1790,) the crime of robbery as recognized and defined at common law.[g] Under this act it has been settled that a robbery committed on the high seas, although not punishable, were it committed on land, with death by the laws of the United States, is made piracy, and as such, is within the jurisdiction of the circuit courts.[h]

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[b] R. *v.* Morphes, 1 Salk. 85. [c] 4 Com. 71, 73. [d] Pl. Cor., b. 1, c. 37.
[e] U. S. *v.* Smith, 5 Wheat. 159, 161; U. S. *v.* Pirates, Ib. 184.
[f] See a collection of the doctrines of the civil, the maritime and the common law, and the law of nations, in a learned and comprehensive note to U. S. *v.* Smith, 5 Wheaton, 163–180, which is now known to have been written by Mr. Justice Story, who delivered the opinion of the court in that case. (1 Story's Life of Story, 283.)
[g] U. S. *v.* Palmer et al., 3 Wheat. 630. [h] Ibid. 626.

§ 2832. The earliest legislation of Congress upon this subject was the act of 30th April, 1790, in which the phrase "high seas" is used as the *locus in quo* of the crimes it was designed to punish, and it has been made the subject of some examination. The doctrine of Chief Justice Marshall, in U. S. *v.* Burr,[i] that in the interpretation of terms used in statutes, the definition given to them by the elementary common law writers, is to be highly regarded, is here of much importance. It has been determined by the Supreme Court, that a vessel lying in an open roadstead of a foreign country, may be said to be on the high seas. "It is historically known," it was remarked, "that in prosecuting trade with many places, vessels lie at anchor in open situations, and especially where the trade winds blow, under the lee of land. Such vessels are neither in a river, haven, basin, nor bay, and are nowhere, unless it be on the seas. Nor can it be objected that it was within the constitutional limits of a foreign state; for those limits, though neutral to war, are not neutral to crime.[j]

§ 2833. The plundered vessel, in this case, was at anchor within a marine league of the shore, in an open roadsted, where vessels only ride under shelter of the land when the course of the winds is invariable; and on the same occasion it was decided that the words "out of the jurisdiction of any particular state," in the act of 1790, sect. 8, mean out of the jurisdiction of any particular state of the Union.

§ 2834. In the same section, the words "which if committed in the body of a county," do not relate to "murder," and "robbery," but to the words immediately preceding them, "or any other offence."[k]

§ 2835. It was held, in another case, that the United States courts have jurisdiction under the act of 30th April, 1790, c. 36, of murder or robbery committed on the high seas, although not committed on board a vessel belonging to citizens of the United States; as if she had no national character, but was held by pirates, or persons not lawfully sailing under the flag of any foreign uation. If the offence be committed on board of a foreign vessel by a citizen of the United States,[l] or on board a vessel of the United States, by a foreigner, or by a citizen or a foreigner on board a piratical vessel, the offence is equally cognizable by the United States courts. And it was said that, in such a case, it made no matter whether the offence was committed on the vessel, or on the sea, by throwing a person overboard, and drowning him; or shooting him when in the sea.[m] All persons, on board all vessels which throw off their national character, by cruising piratically, are within the act.[n] But it is clear that piracies committed on land, or within the waters over which any particular state of the United States has jurisdiction, are not cognizable, under the act, by the United States courts.[o] The same limitation was adopted, after a

[i] 4 Wheat. 471.
[j] U. S. *v.* Pirates, 5 Wheat. 184.
[k] U. S. *v.* Jones, 3 Wash. C. C. 209.
[l] U. S. *v.* Jones, 3 Wash. C. C. 209.
[m] U. S. *v.* Holmes, 5 Wheat. 412.
[n] U. S. *v.* Furlong, 5 Wheat. 152.
[o] U. S. *v.* Holmes, 5 Wheat. 412; Ex parte Bollman & Swartwout, 4 Cranch, 75.

careful review of the authorities, by the late learned Judge Hopkinson, in a case which is understood to have received the concurrence of his associate, Mr. Justice Baldwin.[p]

§ 2836. It has been further determined, that, under the acts of 30th April, 1790, sects. 8, 9 and 10; of 15th May, 1820, sect. 3; and of 3d March, 1855; acts of piracy, when committed by citizens of a foreign country, in foreign vessels, are not punishable by the United States Courts.[q]

§ 2837. It has been held by Mr. Justice Washington, that no orders from a superior officer will justify a subordinate in the commission of what the latter knows, or ought to know, to be piracy.[r] But the simple fact of presence on board the piratical vessel, where there was no original piratical design, is not *per se* to affect a party with the crime. In order to affect all the officers and crew of a piratical vessel with guilt, the original voyage must have been taken with a piratical design, and the officers and crew have known and acted upon such design; otherwise those only are guilty who actively co-operated in the piracy. All who are present, acting or assisting in the offence, are to be deemed principals.[s]

The same rule applies to presence on board the vessel where the piracy was committed.[t]

§ 2838. A pirate being *hostis humani generis*, and having utterly forfeited all national character,[u] is lawful spoil to be attacked and captured on the ocean by the public or private ships of every nation;[v] nor is there any exception to the rule, that robbery on the high seas is piracy, to be found in favor of commissioned privateers, in any act of Congress, in the common law, or in the law of nations. The act of Congress on the subject of privateers, of June 26th, 1812, was held not to repeal any of the provisions of the law relating to piracy.[w] But to convict such, or any other persons, it was held in the same case that it must be proved not only that they participated in the taking of property not liable to capture, but that they did it feloniously. There need be no personal violence to constitute piracy within the act of 30th April, 1790, sect. 9; if the *animus furandi* appears it is sufficient.[x]

§ 2839. Under the provisions of the act of 3d March, 1847, sect. 1,[y] any subject of a foreign state, found and taken in the commission of any acts, which by treaty between our government and his own are made piracy, shall be proceeded against as a pirate in the circuit courts; but as long ago as 1820, the Supreme Court adjudicated certain points that seem to have involved very similar doctrines. It was held that a citizen of this country, fitting out a vessel in a port here, to cruise against a power in

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[p] U. S. *v.* Kessler, 1 Baldwin, 20.
[q] U. S. *v.* Kessler, 1 Baldwin, 32; U. S. *v.* Palmer, 3 Wheat. 632.
[r] U. S. *v.* Jones, 3 Wash. C. C. 209.
[s] U. S. *v.* Gilbert et al., 2 Sumner, 19.
[t] U. S. *v.* Jones, 3 Wash. C. C. 209.
[u] U. S. *v.* Pirates, 5 Wheat. 184.
[v] The Marianna Flora, 11 Ibid. 1.
[w] U. S. *v.* Jones, 3 Wash. C. C. 209.
[x] U. S. *v.* Tully, 1 Gallis, 247.
[y] Ante, § 2828.

amity with us, is not protected by a foreign commission from punishment for any offence committed against vessels of the United States; and likewise that a piracy committed by a foreigner from on board any vessel of piratical character, upon any other vessel whatever, is punishable under the act of 1790, sect. 8, which is not repealed by the act of 3d March, 1819, sect. 5,[z] and which makes punishable in our courts, a crew acting in defiance of all laws and not acknowledging, or by their conduct virtually denying, obedience to any government whatsoever.[a] This was on the ground that a piratical vessel has no national character remaining;[b] accordingly it was held in the Circuit Court for the District of Pennsylvania and New Jersey,[c] that the crime of robbery, committed by a foreigner on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act of 1790, and therefore is not punishable in our courts, and this is the doctrine as settled by the Supreme Court.[d] In Howard's case, Mr. Justice Washington construed sections 10 and 11 of the act of 1790, relative to accessories, as referring to section 8 of the same act.

§ 2840. A confederacy by citizens of this country, whether on land, or on board of an American ship, with such as are sea-robbers or pirates by the law of nations, or the yielding of a vessel by a citizen to them, is within the provisions of sect. 8 of the act of 1790: so also, any intercourse with pirates, calculated to promote their views, or an endeavor by a mariner to corrupt the master, so as to induce him to go over to them.[e]

§ 2841. The meaning of the act of March 2, 1819, sects. 1 and 2, was examined by the Supreme Court in the case of Harmony et al., claimants of the brig Malek Adhel *v.* The United States.[f] The vessel in question was armed with a cannon and some ammunition, and there were also pistols and daggers on board, but nothing other than the usual equipments of a vessel of her class, bound on an innocent commercial voyage from New York to a Pacific port. Whatever illegal acts were done after her departure, were entirely without the knowledge or approbation of her owners. But it appeared conclusively that her commander seemed to have had but a wild notion of the nature of his duty; and after stopping by force or otherwise, several vessels on the seas, and taking therefrom whatever he fancied, his progress was finally arrested by his brig's being seized by an American man-of-war, and sent into Baltimore for adjudication. On this posture of the case, the Supreme Court decided that the Malek Adhel was undoubtedly an "armed vessel" within the intent of the act of 1819, which neither takes nor suggests any distinction as to the objects, or purpose, or character of the armament, whether it be for offence or defence, lawful or unlawful. It was further held that by the words "piratical aggressions," is meant

[z] U. S. *v.* Pirates, 5 Wheaton, 184.
[a] U. S. *v.* Klinbock, 5 Ibid. 144; U. S. *v.* Pirates, Ibid. 184.
[b] Ibid.
[c] U. S. *v.* Howard, 3 Wash. C. C. 340.
[d] U. S. *v.* Palmer, 3 Wheat. 610.
[e] U. S. *v.* Howard, 3 Wash. C. C. 340.
[f] 2 How. 210.

such offences as pirates are in the habit of perpetrating, whatever the nature, whether plunder, revenge, hatred, or wanton abuse of power; and consequently that actual, plunder, or intent to plunder, need not appear to bring the case within the compass of the act; any piratical aggression, search, restraint or seizure being sufficient. Under the act, however, though the offending vessel may be condemned and sold, and the proceeds distributed between the United States and the captors, at the discretion of the court, whether the owners be innocent or ignorant or not, there is no authority for the condemnation of the cargo. It is true that the law of nations will occasionally confiscate the cargo as well as the vessel, but this can only be in heinous and gross instances.[f]

§ 2842. An attack by an armed merchantman upon an American vessel, with intent to cripple or destroy her upon a mistaken idea that she was a pirate, made with no piratical purpose, is not a piratical aggression under the act of 1819, nor is it a case of hostile aggression for which the property taken *in delicto* is subject to confiscation by the law of nations. But the mere fact that she was a foreign ship, would afford no protection to her in our courts, whatever might be the effect of her confiscation in our diplomatic relations with other countries. American vessels offending against our laws may be seized upon the ocean, and foreign vessels thus offending within our territorial jurisdiction may be chased and captured on the ocean, and sent back for adjudication; but the pursuer is of course liable to costs and damages, if he cannot establish his captive's guilt. Nevertheless, a national armed vessel, whose right of approach is as perfect as the other's right of flight, who is embroiled with a foreign trader on the high seas, in consequence of the latter's endeavoring to check, by force, a chase which the former had instituted on account of a natural and proper desire to ascertain her character; and who, after open hostilities founded on mutual error, captures and seizes the foreign trader, and sends her home for adjudication, is not liable for costs or damages. Every case must to a great extent be controlled by its own circumstances, and a foreign trader with the most peaceful and just designs in the world, may readily so conduct herself towards other vessels as to leave to a man-of-war, whose duty it is to rid the seas of everything in the shape of a pirate, no alternative but to seize her and send her into port for adjudication.[g]

§ 2843. When a civil war rages in a foreign nation, one part of which separates from the old established government and erects itself into a distinct government, the courts of the United States must view such newly

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[f] 2 How. 10; Marianna Flora, 11 Wheat. 37. And for a collection of the authorities on this point, see note in 2 Wheat. (note 3d, as stated in 2 How. 234,) Appendix, No. I., p. 37. The notes and appendixes of the various volumes of Wheaton's Reports, it may be here noticed, contain much information on the subject of maritime law; and the reader who is disposed to go further into the principles and practice in the prize causes, will find, in Vol. 1, Appendix, No. II., p. 494–506, and in Vol. 2, App., No. I., p. 1–18, two notes on those points, prepared with great care, by Mr. Justice Story. (1 Story's Story, 283.)

[g] Marianna Flora, 11 Wheaton, 38.

constituted government as it is viewed by the legislature and executive departments of the government of the United States. If our own government remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.[h]

§ 2844. The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly created government.

§ 2845. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government, may be established otherwise, should it be impracticable to prove the seal.[i] A commission issued by Aury, as "Brigadier of the Mexican republic," (a republic whose existence was unknown and unacknowledged,) or as "Generalissimo of the Floridas," (a province in the possession of Spain,) will not authorize armed vessels to make captures at sea.[j]

§ 2846. To prove the nationality of property in the plundered vessel or cargo, the registry, invoices, bills of sale, &c., are the usual evidence, though not the only, nor always the best. Where they are inaccessible at the trial, under circumstances free from suspicion, the oath of the captain is enough.[k] But on an indictment for piracy, a commission from a government whose independence has not been recognized by this country, may be given in evidence to the jury merely as a paper found on board the vessel; it cannot be received to justify piratical acts committed under it.[l] The seal of a government not recognized proves nothing.[m] A nation becomes independent from its own declaration, as it respects its own government; and independent as to other nations when recognized by them.[n]

§ 2847. The venue is sufficiently laid in the indictment as "on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state."[o]

§ 2848. Where one count charges the prisoner with piracy in piratically running away with his ship's cargo, and the other with larceny of the same cargo, and the verdict is, guilty of the last count only, judgment will not be arrrested.[p]

§ 2849. A vessel owned by American owners, sailing to and from an American port, under an American captain and under a contract made here, is *prima facie* American, under the Crimes' Act.

§ 2850. The subject of the national character of vessels is one of some

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[h] The Josefer Segunda, 5 Wheat. 338; U. S. *v.* Palmer, 3 Wheat. 610.
[i] Ibid. [j] U. S. *v.* Klintock, 5 Id. 144.
[k] U. S. *v.* Pirates, Ib. 184; Washington, J., in U. S. *v.* Jones, Pamph., Philadelphia, 1813, p. 11.
[l] Marshall, C. J., in U. S. *v.* Hutchings, 2 Wheeler's C. C. 543.
[m] Ibid. [n] Ibid. [o] U. S. *v.* Gilbert, 2 Sumner, 19; U. S. *v.* Jones, ut supra.
[p] U. S. *v.* Peterson, 1 Woodbury & Minot, 306; ante, § 414–423; U. S. *v.* Stetson, 3 Ib. 166.

importance under this head, but the present is hardly the place to go into such a disquisition. It may only be noted that the commission of a public vessel signed by the proper authorities, is perfect and complete proof of her national character,[t] provided our country recognises its nation. But where a vessel is seized or confiscated under an authority which our courts are bound to regard as usurped and illegal, the crew may meritoriously recapture it.[u]

§ 2851. To constitute piracy within the act of 1790, § 9, by "piratically and feloniously" running away with a vessel, personal force and violence are not necessary.[v]

§ 2852. The "piratically and feloniously" running away with a vessel, within the act, is the running away with a vessel, with an intent to convert the same to the taker's own use, against the will of the owner. The intent must be *animo furandi*.[w]

§ 2853. There is a distinction between the crimes of murder and piracy. The latter is an offence within the criminal jurisdiction of all nations; not so with murder, it is punishable under the laws of each state.[x]

§ 2854. In an indictment for a piratical murder, (under the act of the 30th April, 1790, c. 36, sect. 8,) it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States; but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel.[y]

§ 2855. An indictment for manslaughter on the high seas, charging that the prisoner committed it, first, by casting A. B. from a vessel, &c., whose name was unknown, and second, by casting him from the long-boat of the ship W. B., &c. is sufficiently certain.[z]

The character of the technical averments in piracy has been already considered.[a]

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[t] Santissima Trinidad, 7 Wheat. 283.
[u] Williams *v.* Suffolk Ins. Co., 3 Sumner, 278.
[v] U. S. *v.* Tully, 1 Gallis. C. C. R. 247.
[w] Ibid.; Curtis on Merchant Seamen, 120.
[x] U. S. *v.* Furlong, 5 Wheat. 185; 4 Cond. R. 623.
[y] U. S. *v.* Furlong, 5 Wheat. 184; Curtis on Merchant Seamen, 120.
[z] U. S. *v.* Holmes, Wallace, Jr., 1; see ante, § 1028.
[a] Ante, § 403.

For forms of indictment, for this class of offences on the high seas, see Wh. Prec., as follows:—

(1061) Making a revolt.
(1062) Endeavoring to make a revolt.
(1063) Same, setting out the "endeavor," to consist in a conspiracy, &c.
(1064) Setting out the endeavor to consist in a solicitation of others to neglect their duty, &c.
(1065) Setting out the endeavor to consist in an assemblage of the crew in a riotous manner, &c.
(1066) Laying the time with a continuendo.
(1067) Piracy at common law.
(1068) Rioting on board ship.
(1069) Confining the master, &c.
(1070) Piratically and feloniously running away with a vessel, and aiding and abetting therein, &c., and assaulting master.
First count, running away with vessel.
(1071) Running away with goods, &c.

CHAPTER II.

MALTREATMENT OF THE CREW.

A. STATUTES.
UNITED STATES, § 2861.
B. OFFENCE GENERALLY, § 2862.

A.—STATUTES.

UNITED STATES.

§ 2861. *Officer maliciously maltreating crew.*—[See Ante, § 2829.(e)]

B.—OFFENCE GENERALLY.

§ 2862. By the word "crew," in the act of 3d March, 1835, sect. 3, is meant all the officers and common seamen, except the master; and that the offence therein described may be committed upon the first mate.[a] But the master has an undoubted authority to punish corporeally and summarily, the negligence or misconduct of his men.[b] Of his own discretion, no mate or subordinate officer has any right to punish a seaman, and if the master tacitly consents thereto, being present, he becomes responsible for it; but in the master's absence, the next highest officer succeeding him is clothed with all his authority.[c] Every exception to this general principle must, however, be made in favor of those cases where prompt and instantaneous action is demanded of the mate or other officers by the necessities of the case, as to subdue mutinous or flagrant disorders,[d] though the punishment must always be reasonable, and not with instruments unlawful for the exigency.[e] Where the necessity actually existed, however, quantum of punishment will not be too nicely measured in the court.

§ 2863. It has been said that a master occupies to his crew a position resembling that of a parent to a child, or a master to an apprentice.[f] He has a right to respectful demeanor as well as obedience;[g] but this right would be fruitless, unless he is justified in reasonably enforcing it when virtually denied, by punishment inflicted by himself.[h] He may chastise corporeally as well as confine, when treated impertinently, or disobeyed.[i] But he must not punish for mere immorality as a man, if the offender conducted himself properly as a seaman,[j] nor must he chastise for offences

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[a] U. S. *v.* Winn, 3 Sumner, 209.
[b] Bangs *v.* Little, Ware, 506; U. S. *v.* Hunt, 2 Story, 120; Turner's case, Ware, 83.
[c] U. S. *v.* Taylor, 2 Sum. 584.
[d] U. S. *v.* Hunt, 2 Story, 120.
[e] Carlton *v.* Davis, Davies, 221.
[f] U. S. *v.* Freeman, 4 Manson, 512; Fuller *v.* Colby, 3 Woodb. & Minot. 13; Bangs *v.* Little, Ware, 506; see ante, 349.
[g] U. S. *v.* Smith & Coombs, 3 Wash. C. C. 525; 4 Ib. 340; Ware, 224.
[h] U. S. *v.* Freeman, 4 Mason, 511; Thorne *v.* White, 1 Pet. Adm. 171.
[i] Michaelson *v.* Denison, 3 Day, 294; Thompson *v.* Busch, 4 Wash. C. C. 340.
[j] Ware, 506.

as a seaman in a manner indecent.[k] And in progression with the necessity of the case, he may use suitable and needful weapons to compel obedience,[l] keeping in mind, however, that weapons, and especially deadly weapons, should be used only to prevent future or impending, and not past disobedience.[m]

§ 2864. For impudent conduct or language, it seems a master may box a mariner's ears, without the punishment being either unusual or oppressive, and if the latter draws a knife, or arms himself with an axe thereon, he places himself in an unlawful position. He has no right, by the force or even the intimidation which such a course naturally may effect, to resist his arrest either for the original impudence or the use of the weapons, not to make terms for his surrender; and the ship's officers may employ what means they think best to compel him to obedience, and to suppress conduct mutinous, insubordinate, and dangerous to the lawful safety of the vessel or cargo, and may pursue him to the prow (which is traditionally a sailor's sanctuary) or any other part of the ship. If improperly punished, the law affords the sailor an ample remedy on reaching port; and in most cases, in the language of Mr. Justice Woodbury, summary corporeal punishment for slight offences is not advisable, in the present age. Wherever convenience allows, a little time for reflection on the one part, and repentance on the other, is recommended.[n] But to convict the master under this act, two things must be proven: 1, malice, (*i. e.*, wilfulness, or a wilful intention to do a wrong act,) hatred or revenge; and 2, want of justifiable cause to inflict the injury.[o]

§ 2865. The act abolishing the punishment of flogging in the navy, and in vessels of commerce, is not a penal law, and no indictment can be framed upon it. It applies to whaling ships, which are "vessels of commerce" within the meaning of the act.[p] It prohibits corporeal punishment by stripes, inflicted with a cat, and any punishment which in substance and effect amounts thereto.[q] The degree of such punishment is not material; it is the kind of punishment which is alone to be considered.[r]

§ 2866. It is a question of fact for the jury, whether the punishment inflicted was, in substance and effect, the punishment of flogging.[s]

§ 2867. Under an indictment founded on the third section of the act of March 3, 1835,[t] if the punishment inflicted was flogging, it was without justifiable cause. But it is incumbent on the government to prove, not only that the act was without justifiable cause, but that it was malicious, that it was a wilful departure from a known duty. If the master knew that his act was illegal, it was malicious, in the sense of this act of 1835.[u]

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[k] 1 Story, 101.
[l] 3 Day's R. 295; 1 Pet. Adm. R. 118; Bee's Adm. R. 238, 239; 1 Woodb. & Minot, 305; Ware, 223; Curtis on Adm. 89, 90.
[m] 3 Wash. C. C. R. 526; 3 W. & Minot, 15; 1 Pet. Adm. R. 118.
[n] Fuller *v.* Colby, 3 W. & Minot, 15.
[o] U. S. *v.* Taylor, 2 Sum. 584.
[p] U. S. *v.* Cutler, 1 Curtis, 502.
[q] Ibid.
[r] Ibid.
[s] U. S. *v.* Cutler, 1 Curtis, 502.
[t] 4 Stat. at Large, 776.
[u] U. S. *v.* Cutler, 1 Curtis, 502.

CHAPTER III.

REVOLT AND ENDEAVOR TO MAKE A REVOLT.[a]

A. STATUTES.
UNITED STATES, § 2829 (c).
B. OFFENCE GENERALLY, § 2868.

A.—STATUTES.

UNITED STATES.—(See ante, § 2829) (c).

B.—OFFENCE GENERALLY.

§ 2868. The Crimes' Act of 1790, c. 36, sect. 12, not defining the offence of endeavoring to make a revolt, the courts took an early opportunity to give a judicial definition of it,[b] and this definition was subsequently adopted by the act of 1835.[c] The offence, it is said by the Supreme Court, consists in the endeavor of a crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, with the intent to remove him from his command; or against his will to take possession of the vessel, by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.[d] A revolt is a usurpation of the authority and command of the ship, and an overthrow of that of the master or commanding officer. Any conspiracy to accomplish such an object, or to resist a lawful command of the master for such purpose, or any endeavor to stir up others of the crew to such resistance, is an endeavor to commit a revolt, within the meaning of the 12th section of the statute of 1790, c. 9.[e]

§ 2869. Where the crew of a vessel by their overt acts entirely overthrow the authority of the master in the free management of the ship, and the free exercise of his rights and duties on board, it is a revolt.[f]

A combination by the crew to prevent the vessel going to sea, pursuant to the order of the master, is an attempt to commit a revolt.[g]

§ 2870. "An endeavor to make a revolt," said Mr. Justice Story on another occasion, when sitting as circuit judge, "within the act, is an endeavor to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is, in effect, an endeavor to make a mutiny among the crew of the ship.[g] Mere insolent conduct to the

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[a] There are various other offences for whose commission on the high seas the law has made special provision; but they are more properly referred to other heads. (Vide the preceding chapters upon Homicide, Rape, Mayhem, Assault, Burglary, Arson, Larceny, Receiving Stolen Goods, Embezzlement, and Malicious Mischief.)

[b] U. S. *v.* Kelly, 11 Wheat. 417.

[c] Ante, § 2856.

[d] 1 Wheat. 417; ante, § 2856.

[e] U. S. *v.* Hemmer, 4 Mason, 105.

[f] U. S. *v.* Forbes, Crabbe, 558.

[g] U. S. *v.* Nye, 2 Curtis, C. C. 225.

[g] U. S. *v.* Smith, 1 Mason, 147.

master, disobedience of orders, or violence committed on the person of the master, unaccompanied by other acts, showing an intention to subvert his command as master, is not sufficient. Mere conspiracy of the crew to displace the master, unaccompanied by overt acts, is not sufficient. Neither is concert among the crew to that event essential to constitute the offence.[h] The offence of revolt, or endeavoring to make a revolt, may be committed in any kind of a vessel.[i] One who joins in the general conspiracy, and by his presence countenances acts of violence, but who does not individually use force or threats to compel the master to resign the command of the vessel, is guilty of the offence of confining the master.[j]

A master is prevented in the free and lawful execution of his authority, within the meaning of the act of 1835, if he be prevented from carrying into effect any one lawful command; and a command to continue the business of whaling is *prima facie* lawful A combination to refuse to pursue such business is not, of itself, the intimidation required to constitute the crime of revolt, but it may be the means of intimidation. Such combination and intimidation may be lawful. If, from the improper conduct of the captain, the crew have good reason to believe, and do believe, that they will be subjected to unlawful and cruel or oppressive treatment, or that a great wrong is about to be inflicted on one of their number, they have a right to take reasonable measures for his or their own protection. What would be reasonable measures must depend upon the nature and extent of the wrong, and upon the means of prevention, having regard to the importance of preserving the authority of the master, as well as to the importance of protecting the crew.[jj]

§ 2871. On an indictment for endeavoring to make a revolt in a ship, it is not necessary to prove that it was committed on the high seas,[k] but a confederacy between two or more of the crew to refuse to do their lawful duty must be shown,[l] under the act of 1835, sect. 2. It had before been held, that no previous deliberate combination for mutual aid and encouragement, or any preconcerted plan of operation was necessary to bring it within the act of 1790, sect. 12.[m] The interposition of the crew, by force and intimidation, preventing the master's lawful punishment of a seaman,[n] or a combination not to do duty, though no further orders were given,[o] were within the act. But this offence is now to be considered and punished only as provided for by the act of March 3d, 1835,[p] and under it the mere resistance to the master's lawful authority, or assembling with others in a mutinous and tumultuous manner, so as to endanger the police of the vessel, is a crime.

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[h] U. S. *v.* Kelley, 4 Wash. C. C. R. 528. [i] Ibid. [j] Ibid.
[jj] U. S. *v.* Borden, 21 Law Rep. 100.
[k] U. S. *v.* Hamilton, 1 Mason, 147; U. S. *v.* Keefe, 3 Ib. 475.
[l] U. S. *v.* Cassidy, 2 Sumner, 582.
[m] U. S. *v.* Morrison, 1 Ib. 448. [n] Ibid.
[o] U. S. *v.* Barker, 5 Mason, 404; U. S. *v.* Gardner, Ib. 402.
[p] Woodbury, J., in U. S. *v.* Peterson, 1 W. & M. 309.

Foreign seamen on board American ships are to be treated by our laws as though of our country; and so are American seamen put on board at a foreign port by an American consul;[q] but a whaling vessel, not having surrendered her register, or taken out an enrolment and license, as prescribed by the act of 1793, c. 52, is not "an American ship," within the act of 1835; and therefore its crew are not, under that act, indictable for an endeavor to make a revolt.[r]

To make an endeavor to commit a revolt, under the act of 1790, there must have been some effort or act to stir up others of the crew to disobedience;[s] in fact, to create a virtual mutiny on board;[t] and where a crew had signed their articles with a particular master, who for a reasonable cause was removed, and they combined to resist and refuse all duty under his successor; this was within sect. 12, act of 1790.[u]

It was held a sufficient defence, however, to such an indictment, that the endeavor, &c., was to compel the master to return to port on account of the unseaworthiness of the ship, provided they acted *bona fide* on reasonable and apparently true grounds; and this whether it be doubtful if the ship is seaworthy or not. If clearly the former, of course the defence fails.[v] These, said Mr. Justice Story, are the general principles of law, and depend on no particular statute. Nor was the crew's refusal, because of a deviation from the voyage in their shipping articles, to do duty, held to amount to an endeavor to commit a revolt, under the act of 1835.[w]

An indictment under this act, charging that the prisoners "then and there did make a revolt," does not adequately describe the offence; the particulars must be set forth.[x]

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[q] Woodbury, J., in U. S. *v.* Peterson, 1 W. & M. 309; U. S. *v.* Sharp, 1 Pet. C. C. 118, 121.

[r] U. S. *v.* Rogers, 3 Sumner, 342.

[s] U. S. Savage, 5 Mason, 460; U. S. *v.* Kelly, 11 Wheaton, 417.

[t] 1 Mason, 147.

[u] U. S. *v.* Haines, 5 Ibid. 272.

[v] U. S. *v.* Ashton, 2 Sumner, 13.

[w] U. S. *v.* Mathews, Ib. 470.

[x] U. S. *v.* Almeida, (D. C. U. S.) 1 Wheat. Dig. 378; Wharton's Prec. 1061-2.

"The indictment," said Judge Kane, in the latter case, "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 'endeavor 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 'endeavoring 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. *v.* 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.* Cassady, 2 Sumn. 582; U. S. *v.* Rogers, 3 Sumn. 342. Now, as we have already remarked, the charge for such an offence as was the subject of all these cases, resting merely in the endeavor, not going to the perfected act, was, according to all

§ 2872. The omission to release the master when the exigency which

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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 endeavoring to make a revolt, however strong the evidence might be. (See U. S. 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 divison 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 Story, 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 labor, 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 disposition 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 offences 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 recognised 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, in a darkened state-room, with a

required his confinement is over, is a new and continuing imprisonment,[y] which is a revolt under the act.[z]

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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 but of 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 mere direct description 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, or, 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.

[y] Ibid.; cited I Whart. Dig., 5th ed. 578.

[z] "The offence of endeavoring to commit a revolt," says Mr. Curtis, (Rights and Duties of Merchant Seamen, 125,) "had not been defined in the act, and a judicial construction alone could determine it. The Supreme Court of the United States, in 1826, held that it was competent to the court to give a definition of it, and that it consists in the endeavor of a crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. It had been supposed that the terms of this definition did not include cases where the seamen merely conspired together not to do duty on board until the master had complied with their wishes in respect to some particular object, without aiming at an actual removal of him, by physical force, from the command of the ship." But in a subsequent case in the Circuit Court of the United States for Massachusetts district, Story, J., explained that such was not the understanding of the court when that definition was laid down. "The language," said he, "does not import that the removal from command must be by physical force. The court look to the fact, whether there is an overthrow of the master's authority, or a removal of him from his command, intended; and not to the mode by which it is accomplished. The overthrow of authority may be just as complete, the removal from command may be just as effectual, by a universal disobedience to all orders, producing an actual suspension of the master's authority or command, as by actual force, or personal imprisonment, or driving the master on shore."

The same learned judge has repeatedly defined this offence to be in effect an endeavor to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers. A mere act of disobedience to the lawful command of the officers is not of itself an endeavor to make a revolt; but to amount to the offence, it must be combined with the attempt to excite others of the crew either to a general resistance or disobedience of orders, or a general neglect and refusal of duty, or to resist a single lawful order of the master, or to compel him to yield up his authority in a single case. Actual disobedience to some order given is not necessary to constitute the offence. If the crew have combined together to disobey orders and to do no duty, the offence is complete by such combination, although no orders have been subsequently given; but it is not necessary that there be any previous deliberate combination for mutual aid or encouragement, or any preconcerted plan of operations to effect the illegal object. However sudden may be the occurrence, or unexpected the occasion of such disobedience or resistance, those who take a part in it, whether by words or by deeds, by direct acts of aid or assistance, or by encouragement or incitement, are in contemplation of law guilty of the offence. Their

§ 2872.(*a*) To constitute the offence of confining the captain, the act of confining must be feloniously done.[a] Any such confinement, whether by depriving him of the use of his limbs, or by shutting him in the cabin, or by intimidation preventing him from the free use of every part of the vessel, amounts to a confinement of the master within the 12th section of the Act of Congress of April 2d, 1799, c. 38.[b] To take hold of the master on the deck, and afterwards present a pistol at his breast in the cabin, thereby preventing his going on deck, is a confinement under the act.[c] Such confinement is not limited merely to a seizure of the master, and preventing the moving of his body, or to locking him up in a particular place, as a cabin or state-room, but extends to all restraints of personal liberty in freely going about the ship, by present force, or threats of bodily injury.[d] The offence, if committed within the mouth of a foreign river which is a mile and a half wide, is within the Act of Congress.[e] If the master of a vessel is restrained from performing his duties by such mutinous conduct in his crew, as would reasonably intimidate a firm man, this is a confinement within the meaning of the Act of Congress.[f] The circumstance that the master went armed to every part of the ship, if it was necessary for his safety that he should protect himself, will not vary the case.[g]

§ 2872(*b*). A master of a vessel may so conduct himself as to justify the officers and crew in placing restraints upon him, to prevent his committing acts which might endanger the lives of all the persons on board; but an excuse of this kind must be listened to with great caution, and such measures should cease whenever the occasion for them ceases.[h] Seizing the person of the master, although the restraint is but momentary, is a confinement provided by law; and such conduct is not excused or justified by a previous battery on the seamen, to enforce a command which the seamen ought to have performed.[i] To constitute a confinement of the master within the purview of the same act, it is sufficient that there is a personal seizure or restraint of the master, although it may be for the purpose of inflicting personal chastisement.[j]

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conduct, under such circumstances, amounts to an endeavor to commit a revolt by overthrowing, *pro hac vice*, the lawful authority of the commanding officer of the ship.

The offences of mutiny and revolt, of an attempt at mutiny and revolt, and confining the master, have been further defined and punished by a subsequent statute. To sustain an indictment for an endeavor to commit a revolt under the second section of this act, a confederacy or combination must be shown between two or more of the seamen to refuse to do further duty on board the ship, or to resist the lawful commands of the officers.

[For forms of indictments, see Wh. Prec. § 1061, etc.]

[a] U. S. *v.* Henry, 4 Wash. C. C. R. 428.

[b] U. S. *v.* Sharp, et al., 1 Peters' C. C. R. 118.

[c] U. S. *v.* Stevens, 4 Wash. C. C. R. 548.

[d] U. S. *v.* Hemmer, 4 Mason, 105.

[e] U. S. *v.* Smith, et al., 3 Wash. C. C. R. 73.

[f] U. S. *v.* Bladen, 1 Peters' C. C. R. 213.

[g] Ibid.

[h] U. S. *v.* Hemmer, 4 Mason, 155.

[i] U. S. *v.* Bladen, 1 Pet. C. C. R. 213; U. S. *v.* Savage, 5 Mason, 460.

[j] Ibid. "The offence of confining the master," says Mr. Curtis, (Rights and Duties of Merchant Seamen, 124,) is not limited to mere personal restraint by seizing him and

CHAPTER IV.

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

A. STATUTES.
UNITED STATES, § 2873.
B. OFFENCE GENERALLY, § 2874.

A.—STATUTES.

UNITED STATES.—(See ante, § 2829.)

B.—OFFENCE GENERALLY.

§ 2874. This is a crime which, though strictly speaking, not an offence upon the high seas, partakes so much of the nature of such, being virtually a maltreatment of the crew out of the jurisdiction of any state of this union, and cognizable in the same courts that have jurisdiction over the present class of offences, that it may not be out of place to consider it here. It will be seen that the statute does not leave it to judicial construction to include any inferior officer within its scope, but specially provides for such a contingency, and it has been held that it applies equally to officers or seamen in American ships, who are or are not citizens, or who

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preventing the free movements of his body, nor to imprisonment in any specific place. It is equally a confinement within the act, to prevent him from free movement about the ship, by force or intimidation, as by limiting him to walking on a particular part of the deck, by terror of bodily injury, or by present force. If he is surrounded and prevented from moving where he pleases, according to his rights and duties as a master, under the threats of force, or if he is restrained from going to any part of the ship by an avowed determination of the crew, or any part of them, to resist him and to employ adequate force to prevent it, these fall within the meaning of confinement. So, too, if the master is prevented from performing the duties of his station by such mutinous conduct of his crew, as would reasonably intimidate a firm man, it is a confinement, and if he is compelled to go armed about the ship from a reasonable fear for his own safety, although not actually molested, it is a confinement. So, too, seizing the person of the master, though but for a minute or two; and seizing him, though only temporarily and for the purpose of inflicting upon him personal chastisement, are within the meaning of the act. But the restraint whether moral or physical, must be an illegal restraint.

"If the master is about to do an illegal act, and especially a felony, a seaman may lawfully confine or restrain him. So a seaman may confine the master in justifiable self-defence. If the master assault him without cause, he may restrain the master so long and with so much force as are necessary for this purpose. And if he is suddenly seized by the master, and without any intention of restraining him of his liberty, from the mere impulse of nature he seizes hold of the master to prevent any injury, for an instant only, and as soon as he may he withdraws the restraint, so that the act may fairly be deemed involuntary, it might not perhaps be deemed an offence within the act, even though the seizing by the master be strictly justifiable; for the will must cooperate with the deed. But if the seizing by the master be justifiable, and he does not exceed the chastisement which he is by law entitled to inflict, then the seaman cannot restrain him, but is bound to submit; and if he does hold the master in personal confinement or restraint, it is an offence within the statute."

are foreigners, provided they are not subjects of a state which by treaty prohibits the employment in its vessels, public or private, of white citizens of the United States.[a] The act refers to such persons as the master "carried out" with him, and the "home" is the home port of the ship for the voyage.

§ 2875. Not every sufficient cause to *discharge* a seaman in a foreign port, is a "justifiable cause" in the sense of this act.[b] It must be such a cause as renders the forcing him on shore necessary to prevent the jeopardizing the safety of the officers or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline; and the *onus probandi* is on the master to prove such a cause. If a seaman, on being injured by a flogging and incapacitated to do duty, refuses to do any more work, this is not a justifiable cause; if, on the contrary, he is able, and his refusal is from obstinacy and malice in order to revenge himself, and to destroy the ship's discipline and incite others of the crew to disobedience, it is cause. But the law will presume "malice" on the master's part, from the fact, until the contrary is shown; "maliciously" meaning all acts wilfully or wantonly done against what any one of reasonable capacity must know to be his duty.[c]

§ 2876. If it is alleged, as a justifiable cause, that the man was dangerous, it must be shown that a man of ordinary firmness would have been affected by his conduct.[d] The policy of the law is against the discharge of seamen even in foreign ports,[e] unless for legal cause, such as continued misconduct, or some aggravated outbreak or offence;[f] and it sets its face much more strongly against an enforced and compulsory setting ashore of the man against his will and without his consent. Striking the master would perhaps be a justifiable cause, if unfollowed by contrition and repentance.[g]

§ 2877. There are three separate offences under this statute:—

I. Maliciously and without justifiable cause, forcing an officer or mariner ashore in a foreign port.

II. Maliciously and without justifiable cause, leaving any officer or mariner behind in a foreign port.

III. Maliciously and without justifiable cause, refusing to bring home again all the officers and mariners of the ship who are in a condition to return and willing so to do.

§ 2878. The words "in a condition to return and willing to return," apply only to the third class; they are not requisite to make out the offence in the second or first.[h] But it does not follow that because a seaman is left behind, it is necessarily an offence within this act. An unauthorized absence of the man for forty-eight hours, has been declared by our statutes,

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[a] Story, J., in U. S. *v.* Coffin, 1 Sum. 394.
[b] Ibid. 396.
[c] Ibid. 399, and see cases there cited.
[d] The Nimrod, Ware, 9.
[e] Hutchinson *v.* Coombs, Ware, 65.
[f] Smith *v.* Treat, Davies, 266.
[g] Buck. *v.* Lane, 12 Serg. & Rawle, 266.
[h] U. S. *v.* Netcher, 1 Story, 307.

to amount to desertion, and judicial construction has applied the rule to cases where his returning within that time was prevented by the sailing of the ship.[1] The words "maliciously and without probable cause" must always qualify and interpret the master's conduct.

§ 2879. It would seem that a leaving behind or refusing to bring home, or forcing ashore a slave owned in this country, would be within the compass of this act.[j]

CHAPTER V.

ENGAGING IN THE SLAVE TRADE.

A. STATUTES.
UNITED STATES.
Seizing negroes on foreign shores, § 2879(*a*).
Detaining negroes in ships, &c., § 2879(*b*).
Serving on board home slaver, § 2880.
Serving on board foreign slaver, § 2881.
Vessel having on board negroes for the purpose of being sold as slaves, § 2882.
B. OFFENCE GENERALLY, § 2883.

A.—STATUTES.

UNITED STATES.

§ 2879 (*a*). *Seizing negroes on foreign shores.*—If any citizen of the United States, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any vessel owned in whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such vessel, and on any foreign shore seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board any such vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction thereof before the circuit court of the United States for the district wherein he may be brought or found, shall suffer death.—(Act of May 15, 1820, sect. 4.)

§ 2879 (*b*). *Detaining negro on ship with intent to enslave him.*—If any citizen of the United States, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any vessel, owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine, or detain, or aid and abet in forcibly confining or detaining on board such vessel any negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall, on board any such vessel, offer or attempt to sell as a slave, any negro or mulatto, not held to service as aforesaid, or shall, on the high seas, or any where on tide water, transfer

[1] Coffin *v.* Jenkins, 3 Story, 108.
[j] Emerson *v.* Howard, 1 Mason, 45.

or deliver over to any other vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land or deliver on shore from on board any such vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto as a slave, such citizen or person, shall be adjudged a pirate, and on conviction thereof, before the circuit court of the United States, for the district wherein he shall be brought or found, shall suffer death.—(Ibid. sect. 5.)

§ 2880. *Serving on board home slaver.*—It shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board any vessel of the United States, employed or made use of in the transportation or carrying of slaves from one foreign country or place to another; and any such citizen, or other person, voluntarily serving as aforesaid, shall be liable to be indicted therefor, and on conviction thereof, shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding two years.—(Act of May 10, 1800, sect. 2.)

§ 2881. *Serving on board foreign slaver.*—If any citizen of the United States shall voluntarily serve on board of any foreign ship or vessel which shall hereafter be employed in the slave trade, he shall, on conviction thereof, be liable to, and suffer the like forfeitures, pains, disabilities and penalties, as he would have incurred had such ship or vessel been owned or employed, in whole or in part, by any person or persons residing within the United States.—(Act of May 10, 1800, sect. 3.)

§ 2882. *Vessel having on board negroes for the purpose of being sold as slaves.*—If any ship or vessel shall be found, from and after the first day of January, 1808, in any river, port, bay, or harbor, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coasts thereof, having on board any negro, mulatto, or person of color, for the purpose of selling them as slaves, or with intent to land the same, in any port or place within the jurisdiction of the United States, contrary to the prohibition of this act, * * * * the captain, master or commander of every such ship or vessel so found and seized as aforesaid, shall be deemed guilty of a high misdemeanor, and shall be liable to be prosecuted before any court of the United States, having jurisdiction thereof; and being thereof convicted, shall be fined not exceeding ten thousand dollars, and be imprisoned not less than two years, and not more than four years.—(Act of March 2, 1807, sect. 7.)

(*See, also, Act of April* 20, 1818.)

B.—Offence generally.

§ 2883. In addition to the statutes already quoted, there are others not here reprinted, as they are so incorporate with other subjects as to make it impossible to give one without all. The act of May 15, 1820, sect. 4, however, as will be seen above, makes the forcible abduction of negroes from a foreign country, piracy; and various other enactments punish, in various manners and degrees, all persons directly or indirectly concerned in this illegal pursuit.[a]

§ 2884. Under the act of 1820, as referred to above, it has been held that a person having no interest or power over the negroes, so as to

[a] See ante, § 2822.

impress upon them the future character of slaves, and only employed in the transportation of them for hire, from port to port, is not guilty.[b]

§ 2885. Upon an indictment under the slave act of the 20th of April, 1818, against the owner of a slave-ship, the declarations of the master, being a part of the *res gestæ* connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner, in the conduct of the guilty enterprise, are admissible in evidence against the owner.[c]

§ 2886. Upon an indictment against the owner, charging him with fitting out the ship, with intent to employ her in the illegal voyage, evidence is admissible that he commanded, authorized, and superintended the fitment, through the instrumentality of his agents, without being personally present.[d] In such an indictment, it is not necessary to specify the particulars of the fitting out; it is sufficient to allege the offence in the words of the statute.[e] Nor is it necessary that there should be any principal offender to whom the defendant might be aiding and abetting. These terms in the statute do not refer to the relation of principal and accessory in cases of felony; both the actor and he who aids and abets the act are considered as principals.[f] It is necessary that the indictment should aver that the vessel was built, fitted out, &c., or caused to sail, or be sent away, within the jurisdiction of the United States.[g] An averment that the ship was fitted out, &c., "with intent that the said vessel should be employed" in the slave trade, is fatally defective, the words of the statute being "with intent to employ" the vessel in the slave trade, and exclusively referring to the intent of the party causing the act.[h]

§ 2887. If, under the act of 20th of April, 1818, ch. 86, sects. 2 and 3, the offence of causing a vessel to sail from a port of the United States, with an intent to engage in the slave trade, be alleged in the indictment to be on a day now last past, and on divers days and times before and since that day, the allegation is sufficient: for the words, now last past, mean last past before the caption of the indictment, and the words on divers days and times may be rejected as surplusage, if the offence be but a single offence.[i]

§ 2888. It is not necessary, in an indictment under the act of 20th of April, 1818, ch. 16, sects. 2 and 3, for the offence of causing a vessel to sail from a port in the United States, with an intent to engage in the slave trade, to allege that the negroes, &c., were to be transported to the United States or their territories; or that they were free and not bound to service; or that the defendant was a citizen or resident within the United States, or that the offence was committed on board of an American vessel. It is sufficient if the indictment follows, in this respect, the language of the statute, and is as certain.[j]

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[b] U. S. *v.* Battiste, 2 Sumner, 240.
[c] U. S. *v.* Goodwin, 12 Wheaton, 460.
[d] Ibid.
[e] Ibid.
[f] Ibid.
[g] Ibid.
[h] Ibid.
[i] U. S. *v.* Lacosta, 2 Mason, 129.
[j] Ibid.

§ 2889. The offence of sailing from a port, with intent to engage in the slave trade, is not committed, unless the vessel sails out of the port, under the act of 20th April, 1818, ch. 86, sects. 2 and 3.[k]

One of the phrases in the statute used being "persons of color," it is sufficient in the indictment, to use the same words, without more definite specifications of the meaning of the words.[l]

2890. The act of 28th of February, 1803, forbidding any master or captain of a ship or vessel to import, or bring into any port of the United States, any negro, mulatto, or other person of color, under certain penalties, where the admission or importation of such persons is prohibited by the laws of such state, does not apply to colored seamen engaged in navigating such ship or vessel.[m]

It is sufficient in the indictment for such offence, to allege that the defendant, "as master for some other person, the name whereof being to the jurors as yet unknown," did cause the vessel to sail, &c.[n]

§ 2891. The offence under the 7th section of the Act of 2d of March, 1807," is not that of importing or bringing into the United States persons of color, with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the colored persons found on board, any further than to impose a duty upon the officers of armed vessels who make the capture, to keep them safely, to be delivered to the overseer of the poor, or the governor of the state, or persons appointed by the respective states to receive the same.[o]

§ 2892. The right of visitation and search does not exist in time of peace. A vessel engaged in the slave trade, even if prohibited by the laws of the country to which it belongs, cannot, for that cause alone, be seized on the high seas and brought in for adjudication in time of peace, in the courts of another country. But if the laws of that other country be violated, or the proceeding be authorized by treaty, the act of capture is not in that case unlawful.[p]

§ 2893. Certain persons who were slaves in Louisiana, were, by their owners, taken to France as servants, and, after some time, by their own consent, sent back to New Orleans; some of them under declarations from their owners that they should be free; and one of them, after his arrival, was held as a slave. The ships in which these persons were passengers, were, after their arrival in New Orleans, libelled for alleged breaches of the Act of Congress of April 20, 1818, prohibiting the importation of slaves into the United States: it was held that the provisions of the Act of Congress do not apply to such cases. The object of the law, it was said, was to put an end to the slave trade, and to prevent the introduction

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[k] U. S. *v.* Lacosta, 2 Mason, 129. [l] Ibid. [m] Brig Wilson, 1 Brackenb. R. 384.
[n] U. S. *v.* Lacosta, 2 Mason, 129. [o] U. S. *v.* Preston, 3 Peters, 65.
[p] The Antelope, 10 Wheaton, 66; La Jeune Eugenie, 2 Mason, 409.

of slaves from foreign countries. The language of the statute cannot properly be applied to persons of color who were domiciled in the United States, and who are brought back to the United States, to their place of residence, after their temporary absence.[q]

§ 2894. A libel of information, under the 9th section of the slave trade act of March 2d, 1807, c. 77, alleging that the vessel sailed from the ports of New York and Perth Amboy, without the captain's having delivered the manifests required by law, to the collector or surveyor of New York and Perth Amboy, is defective; the act requiring the manifest to be delivered to the collector or a surveyor of a single port.[r] Under the same section, the libel must charge the vessel to be of the burden of forty tons or more.

§ 2895. In general, it is sufficient to charge the offence in the words directing the forfeiture; but if the words are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning.[s]

§ 2896. The prohibitions in the slave trade acts of the 10th of May, 1800, c. 205, and of the 20th of April, 1818, extend as well to the carrying of slaves on freight, as to cases where the persons transported are the property of citizens of the United States; and to the carrying of them from one port to another of the same foreign empire, as well as from one foreign country to another.[t] Under the 4th section of the act of 10th of May, 1800, c. 205, the owner of the slaves transported contrary to the provisions of that act, cannot claim the same in a court of the United States, although they may be held in servitude according to the laws of his own country. But if, at the time of the capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who had made a seizure for the same offence, the owner of the slaves may claim; the section only applying to persons interested in the enterprise or voyage in which the ship was employed at the time of such capture.[u]

§ 2897. An act of Congress declared that no person shall build, fit, equip, load, or otherwise prepare any ship or vessel, &c., within any port of the United States, or shall cause any ship or vessel to sail from any port of the United States, for the purpose of carrying on any trade or traffic in slaves, to any foreign country; and it declared that, "if any ship or vessel shall be so fitted out as aforesaid, or shall be caused to sail as aforesaid, such ship or vessel, &c., shall be forfeited to the United States." The second section inflicted a penalty of $2000 on any person who shall build, fit out, &c., &c., any such ship or vessel, knowing or intending that the same shall be so employed. It was held, 1st. That the forfeiture of the vessel is not incurred by the building of the vessel for the illegal purpose aforesaid: 2d.

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[q] U. S. *v.* The Garonne, 11 Peters, 73.
[r] The Mary Anne, 9 Wheaton, 380.
[s] Ibid.
[t] The Merino, 9 Wheaton, 391.
[u] Ibid.

An information against the vessel, which charges "that she was built, fitted, equipped, loaded or otherwise prepared, &c., or caused to sail, &c.," is bad for the uncertainty, as to which of the several offences is charged: and on such information, a sentence of forfeiture ought not to be pronounced.[v]

§ 2898. There are various circumstances which will be received to show that a master of a vessel is guilty of participating in the offence of engaging in the slave trade, however artfully he may contrive to present clean hands and to evade the responsibility of his conduct. Thus, though a freighting voyage of an American vessel, owned and commanded by citizens of this country, from United States to Rio Janeiro, with orders to the consignee to sell her at a limited price, or to let her for freight, is so far, *prima facie* legal; and though she be chartered by the consignee for a certain time at a reasonable rate, to a Brazilian, with articles to carry no illegal goods, or persons not free, and she proceeds on a voyage to the coast of Africa, laden with rum, cottons, gunpowder, iron bars, brass rings, &c., (such goods as are in demand there, in exchanging for the usual products of that country,) the owner of the cargo going with it; yet, nevertheless, this may all be shown to be colorable and false. It may be shown that the full intent and purpose of the voyage was not to exchange this cargo for gold dust, palm oil, or any other leading articles of traffic, but for slaves, to be embarked for the Brazils in other vessels; and if the master stands by and sees this exchange and embarkation made, and knowingly has brought the cargo's owner and others interested in the slave trade thither, these are fair circumstances for a jury to infer his own guilt.[w]

§ 2899. On an indictment charging the master with having received on board his vessel, at a certain place called Lorenzo Marquez, within flow of the tide, on the eastern coast of Africa, a certain negro, &c., with intent to make him a slave, the court ruled that anything done by the master or charterers during the voyage, and near the time when the negro was taken on board, might be shown to prove his knowledge and intent, but nothing of a separate and independent character, done at a different place and on a different voyage, and so distant in time as not to bear on this transaction, where the prisoner would not be likely to come prepared to meet it or rebut it at the trial.[x] Nor can it be shown what became of slaves put on board another vessel, sailing from that part of the coast, whilst the prisoner and his vessel were there, to the Brazils, unless some connection in interest and business be first shown. The letters and instructions of the owner and consignees to the master, written before the reception of the alleged slave on board, are part of the *res gestæ*, and good evidence,[y] and so are notarial letters of manumission of the two negroes taken on board; and any testi-

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[y] U. S. *v.* Libby, 1 W. & M. 225.
[v] Brig Caroline, 1 Brockenb. R. 593.
[w] U. S. *v.* Libby, 1 Mood. & Min. 221.
[x] Ibid. 225; see People *v.* Hopson, 1 Denio, 574.

mony, pro or con, of the master's belief in their authenticity, when he so received them. If the master received on board his ship in Africa a negro, not supposing him to be free, and transports him to Brazil, his guilt would be according to whether he was merely carrying him for another, or an actual participator in the design himself. A passenger in such vessel, however, is not one of the crew or ship's company, within the scope of the statute. In short, to convict one capitally under the act of 1820, both *intent* and *actual conduct*, tending to make some one a slave, must be shown; and if a principal be not liable under our laws, another cannot be charged with aiding and abetting him, unless he do it in such a manner as to involve himself as a principal: nor has any act of Congress yet made punishable the transportation of any kind of goods to the coast of Africa, irrespective of the intent with which they are carried.[z]

§ 2900. In conclusion it should be observed that the illegality of the slave trade arises from the federal legislation upon the subject, and not from its supposed violation of the law of nations. Although it is now prohibited by the laws of civilized nations generally, still it may be, and doubtless is, lawfully carried on by the subjects of those states who have not prohibited it by municipal acts and treaties. It is not piracy unless made so by the treaties or statutes of the nation to which the party belongs. It is true that it was at one time held in one of the U. S. circuit courts, and maintained very learnedly, that this traffic was a violation of the law of nations,[a] but this was overruled in the Supreme Court,[b] and that case, with the decisions of Lord Stowell,[c] and Bailey, J., and Best, J.,[d] in England, must be considered as for the present settling the question.[e]

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[z] U. S. *v.* Libby, 1 W. & M. 240.
[a] La Jeune Eugenie, 2 Mason, 90.
[b] The Antelope, 10 Wheaton, 66, per Marshall, C. J.
[c] Le Louis, 2 Dodson's R. 210. [d] Madrazo *v.* Willis, 3 B. & Ald. 353.
[e] For forms of indictment, see Wh. Prec., as follows:—
(1082) 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.
(1083) Same, but leaving out allegation that offence was after the act, and averring defendant caused the vessel to sail.
(1084) Preparing the vessel, &c.
(1085) Aiding and abetting in preparing, &c.
(1086) 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.
(1087) Second count, the vessel being foreign.
(1088) Third count. Same stated more specially.
(1089) Another form for the same.
(1090) Fitting out slaver, &c.
(1091) Forcibly confining and detaining negroes taken from the coasts of Africa, with intention of making slaves of them, and for aiding and abetting, under act of 15th May, 1820, s. 5.
(1092) Against a part of defendants as principals and the others as accessories.
(1093) Taking on board and receiving from the coast of Africa, negroes, &c., under the act of 20th April, 1818, s. 4.
(1094) Forcibly bringing and carrying away negroes from the coast of Africa, for the purpose of making slaves of them, under act of 15th May, 1820, s. 4.

CHAPTER VI.

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

A. STATUTES.
UNITED STATES.
Maliciously attacking vessel with intent, &c., § 2901.
Plundering wrecked vessel or obstructing escape of passengers, showing false lights or extinguishing lights, &c., § 2902.
B. OFFENCE GENERALLY, § 2903.

A.—STATUTES.

UNITED STATES.

§ 2901.—*Maliciously attacking vessel with intent, &c.*—Ante, § 2825.

§ 2902.—*Plundering wrecked vessel, or obstructing escape of passengers, showing false lights, or extinguishing lights, &c.*—Ante, § 2828.

B.—OFFENCE GENERALLY.

THE statutes above referred to provide for the following offences, which are to be ranked under separate heads.

§ 2903. I. Maliciously and with force or by surprise, attacking a vessel belonging in whole or in part to the United States, or any citizen or citizens thereof, with intent to plunder or despoil the same, or any of the owners, of any moneys, goods or merchandise, is made a felony, punishable by a fine not exceeding $5000, and imprisonment at hard labor not longer than ten years.

§ 2904. II. 1. Plundering, stealing or destroying any money or goods from or belonging to any wrecked or distressed vessel, boat or raft, either on the high seas or on a reef or shoal,—

2. Wilfully obstructing the escape of any one endeavoring to save his life from such wreck or boat or raft,—

3. Extinguishing true or showing false lights, with intent to bring any ship or raft or boat into danger and distress,—

§ 2905. Each of these crimes is punishable with a fine of not more than $5000, and imprisonment at hard labor not more than ten years.

§ 2906. Owing, perhaps, to its close assimilation to piracy, the former class of offences is hardly known in our courts: the latter, however, is unfortunately of occasional occurrence on the seaboard of most maritime nations, where, under the name of "wrecking," abominable outrages are said to have been perpetrated. Whatever may be the degree of guilt or innocence on our own shores, we find no cases on the subject among our reports.

CHAPTER VII.

DESTROYING A VESSEL WITH INTENT TO DEFRAUD THE UNDERWRITERS.

A. STATUTES.
UNITED STATES.
Casting away vessel generally, § 2907.
Same with intent to defraud underwriters, § 2908.
Conspiring to do the same, § 2909.
MASSACHUSETTS.
Casting away vessel with intent to defraud owner or insurer, § 2910
Lading the same with same intent, § 2911.
Getting up fraudulent invoices, &c., with same intent, § 2912.
Making false papers with same intent, § 2913.
NEW YORK, ante, § 1637.
VIRGINIA, ante, § 1657.
B. OFFENCE GENERALLY, § 2914.

A.—STATUTES.

UNITED STATES.

§ 2907. *Casting away vessel, generally*, ante § 2821.

§ 2908. *Same, with intent to defraud underwriters*, ante § 2822.

§ 2909. *Conspiring to do same.*—That if any person or persons shall, on the high seas or within the United States, wilfully and corruptly conspire, combine and confederate with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or to procure the same to be done with intent to injure any person or body politic, that hath underwritten, or shall thereafterwards underwrite, any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person or body politic, that hath lent or advanced, or thereafter shall lend or advance, any money on such vessel, on bottomry or respondentia, or shall, within the United States, build or fit out, or aid in building or fitting out, any ship or vessel, with intent that the same shall be cast away, burned or destroyed, for the purpose or with the design aforesaid, every person so offending shall, on conviction thereof, be deemed guilty of felony, and shall be punished by fine not exceeding ten thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years.—(Act of March 3, 1825, sect. 23.)[a]

MASSACHUSETTS.

§ 2910. *Casting away vessel with intent to defraud owner or insurer.*—If any person shall wilfully cast away, burn, sink, or otherwise destroy any ship or vessel, within the body of any county, with intent to injure or defraud any owner of such vessel, or the owner of any property laden on board the same, or any insurer of such vessel or property, or of any part thereof, he shall be punished by imprisonment in the state prison for life, or for any term of years.—(Ch. 126, sect. 35.)

§ 2911. *Lading the same, with same intent.*—If any person shall lade, equip, or fit out, or assist in laying, equipping, or fitting out any ship or vessel, with intent that the same shall be wilfully cast away, burnt, sunk, or otherwise destroyed, to

[a] Ante, § 1625.

injure or defraud any owner or insurer of such vessel, or of any property laden on board the same, he shall be punished by imprisonment in the state prison not more than twenty years, or by fine not exceeding five thousand dollars, and imprisonment in the county jail, not more than three years.—(Ibid. sect. 36.)

§ 2912. *Getting up fraudulent invoices, &c., with same intent.*—If the owner of any ship or vessel, or of any property laden or pretended to be laden on board the same, or if any other person, concerned in the lading or fitting out of any such ship or vessel, shall make out or exhibit, or shall cause to be made out or exhibited, any fraudulent or false invoice, bill of lading, bill of parcels, or other false estimates of any goods or property laden or pretended to be laden on board such vessel, with intent to injure or defraud any insurer of such vessel or property, or of any part thereof, he shall be punished by imprisonment in the state prison not more than ten years, or by fine not exceeding five thousand dollars, and imprisonment in the county jail not more than two years.—(Ibid. sect. 37.)

§ 2913. *Making false papers with same intent.*—If any master, other officer, or mariner, of any ship or vessel, shall make, or cause to be made, or shall swear to any false affidavit or protest, or if any owner or other person concerned in such vessel, or in the goods or property laden on board the same, shall procure any such false affidavit or protest to be made, or shall exhibit the same, with intent to injure, deceive or defraud any insurer of such ship or vessel, or of the goods or property laden on board the same, he shall be punished by imprisonment in the state prison, not more than ten years, or by fine not exceeding five thousand dollars, and imprisonment in the county jail not more than two years.—(Ibid. sect. 38.)

NEW YORK.—Ante, § 1637, &c.

VIRGINIA.—Ante, § 1657, &c.

B.—OFFENCE GENERALLY.

§ 2914. Under the federal act of 1804, on an indictment for destroying a vessel with intent to prejudice the underwriters, it is sufficient to show the existence of an association actually carrying on the business of insurance, by whose known officers *de facto*, the policy was executed, and to prejudice whom the vessel insured was destroyed; without proving the existence of a legal corporation authorized to insure, or a compliance on the part of such corportion with the terms of its charter, or the validity of the policy of insurance.[aa]

§ 2915. The act applies to our internal as well as to our foreign commerce.[b]

Any combination of two or more persons to destroy the vessel or cargo, consummates the offence under the law, though neither the vessel nor the cargo is insured.[c]

The burning of the vessel is not punishable under the act of congress, but it operates as evidence against the defendants.[d]

§ 2916. The testimony to show the unlawful combination does not end

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[aa] U. S. *v.* Amedy, 11 Wheat. 392; 6 Cond. Rep. 362.
[b] U. S. *v.* Cole et al., 5 M'Lean, C. C. R. 513.
[c] U. S. *v.* Cole et al., 5 M'Lean, C. C. R. 513. [d] Ibid. 514.

at the destruction of the boat. After as well as before that event, the acts of the confederates may be examined to show their guilt.[e]

§ 2917. The law not making it an offence in the owner to destroy his vessel to the prejudice of the underwriters on the cargo, no evidence can be given to establish charges against the defendant for such destruction to the prejudice of the underwriters on the cargo, even if the indictment contain such a charge. Evidence of the value of the property insured may be given, to show inducements to destroy or preserve it.[f]

§ 2918. The legal meaning of the term "destroy," by the act of Congress, is to unfit the vessel for service, beyond the hope of ordinary means. This, as to the extent of the injury, is synonymous with "cast away." Both mean such an act as causes the vessel to perish and to be lost, or to be irrecoverable by ordinary means.[g]

§ 2919. It being necessary that the indictment should state the intent to be to prejudice the underwriters,[i] the prosecutor must show that the insurance is a valid insurance, and if made by an incorporated insurance company, the act of incorporation must be shown, and the contract of insurance must be shown to have been executed.[j]

§ 2920. Under the English statute, where the interest is to prejudice the underwriters, the policy must be proved,[k] and the sailing of the vessel [l]

The intent may be stated in different ways.[m]

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[e] U. S. *v.* Cole et al., 5 M'Lean, C. C. R. 513.
[f] U. S. *v.* Johns, 1 Wash. C. C. R. 363. [g] Ibid. [i] Ibid. [j] Ibid.
[k] R. *v.* Gibson, R. R. 138. [l] Archbold's C. P. 304.
[m] R. *v.* Smith, 4 C. & P. 369; R. *v.* Bowyer, Ib. 559; see also, generally, R. *v.* Neville, 1 Mood. C. C. 458; R. *v.* Phillip, Ib. 263; ante, § 392.

BOOK IX.

TRIALS AND ITS INCIDENTS.

CHAPTER I.

MOTION FOR CONTINUANCE.

§ 2921. While applications for continuance are addressed to the discretion of the court, there are certain leading rules which, though never considered as absolute or imperative, have been recognized as regulating such discretion.[a]

These rules, so far as they relate to criminal cases, may be classed under the following heads:

I. ON APPLICATION OF THE PROSECUTION, § 2922.
II. ON APPLICATION OF THE DEFENDANT, § 2929.
1st. ABSENCE OF MATERIAL WITNESS, § 2930.
(*a*) Testimony must be within process of court, § 2931.
(*b*) There must have been no laches, § 2932.
(*c*) The evidence must be material, § 2934.
(*d*) The opposite party must refuse to admit that the witness would have testified as is alleged, § 2937.
(*e*) The absent witness must, if he had notice, have secreted himself.
2d. INABILITY OF DEFENDANT, OR HIS COUNSEL, TO ATTEND, § 2937.
3d. IMPROPER MEANS TO PREJUDICE THE PUBLIC MIND OR SWERVE THE JURY, § 2940.
4th. INABILITY OF WITNESS TO UNDERSTAND THE OBLIGATION OF AN OATH, § 2941.

I. ON APPLICATION OF THE PROSECUTION.

§ 2922. Provisions exist, as has been noticed, in several of the states,

[a] Com. *v.* Hillard, 1 Mass. 46; State *v.* Zellers, 2 Halstead, 220; U. S. *v.* Gilbert, 2 Sumner, 19; State *v.* Fyles, 3 Brevard, 304; Holt *v.* Com., 2 Virg. Cases, 156; Scogin *v.* Hudspeth, 3 Miss. 123, per Johnson, J.; Price *v.* Jastrobe, Harper, 112, per Nott, J.; Farrand *v.* Bouchell, Harper, 85, S. P.; Cecil *v.* Leebenstone, 2 Dall. 95; Hunter *v.* Fairfax, 3 Dall. 305; Cornelius *v.* Boucher, 1 Breese, 12; Hook *v.* Nanny, 4 H. & M. 157, n.; Ross *v.* Norvelle, 3 Munf. 170; Syme *v.* Montague, 4 H. & M. 180; Jacobs *v.* State, Gilmer, 123; Riggs *v.* Fenton, 3 Mis. 28; Johnson *v.* Strader, 3 Mis. 359; Smith *v.* Com., 2 Virg. Cases, 6; Holt *v.* Com., 2 Virg. Cases, 156; Nixon *v.* Brown,

requiring trials in criminal cases to take place within a specified period from the institution of the prosecution.[b]

§ 2923. In Virginia, it is required, "when any prisoner committed for treason or felony, shall apply to the court the first day of the term by petition or motion, and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term, unless it appear by affidavit that the witness against him cannot be produced in time, the court shall set him at liberty, upon his giving bail in such penalty as they shall think reasonable, to appear before them at a day to be appointed, of the succeeding term. Every person charged with such crime, who shall not be indicted before or at the second term after he shall have been committed, unless the attendance of the witnesses against him appear to have been prevented by himself, shall be discharged from his imprisonment, if he be detained for that cause only; and if not tried at or before the third term after his examination before the justices, he shall be for ever discharged of the crime unless such failure proceed from any continuance, granted on motion of the prisoner, or from the inability of the jury to agree on their verdict."[c]

§ 2924. It has been decided that the word term, when it occurs in this act, means not the prescribed time when the court should be held, but the actual session of the court.[d] When the accused has been tried and convicted, and a new trial awarded to him, although he should not again be tried till after the third term, from his examination, he is not entitled to a discharge.[e]

§ 2925. In Pennsylvania—"If any person shall be committed for treason or felony, and shall not be indicted and tried some time in the next term of Oyer and Terminer, General Jail Delivery, or other court, where the offence is properly cognizable after such commitment, it shall and may be lawful for the judges or justices thereof, and they are hereby required upon the last day of the term, session or court, to set at liberty the said prisoner upon bail, unless it shall appear to them upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment, unless the delay happen on application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment. Provided always, that nothing in this act shall extend to discharge

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3 Blackf. 504; Van Cluricum *v.* Ward, 1 Blackf. 50; Fuller *v.* State, 1 Blackf. 64; Woods *v.* Young, 4 Cranch, 237, S. P.; M'Courey *v.* Doremus, 5 Halst. 245; Reynard *v.* Brecknell, 4 Pick. 302; People *v.* Vermilyea, 7 Cow. 369; Ogden *v.* Payne, 5 Cow. 15; Hooker *v.* Rogers, 6 Cow. 577; Ogden *v.* Gibbons, 2 South, 518; Deans *v.* Scriber, 2 Call, 414; see King of Spain *v.* Oliver, Peters' C. C. 217; M'Key *v.* Marine Insurance Company, 2 Caines, 384; Com. *v.* Millard, 1 Mass. 6; State *v.* Fyles, 1 Const. Rep. 234; 3 Brevard, 304; Green *v.* State, 13 Mis. 382; Golden *v.* State, 19 Ark. 590.

[b] See ante, § 450–2.

[c] R. C. of Va., c. 169, s. 28; see ante, § 450–2.

[d] 2 Va. Cas. 363.

[e] 2 Va. Cas. 162; Davis's Va. Cr. Law, 422.

out of prison any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, and who, by the confederation, ought to be delivered up to the executive power of such state, nor any person guilty of, or charged with a breach or violation of the laws of nations."[f]

§ 2926. The power of discharging a prisoner under this act, it has been held, where he has not been tried at the second term, is strictly confined to the court in which he was indicted, and the Supreme Court will not interfere, if the commitment is unexceptionable on the face of it.[g] A prisoner who stands indicted for aiding and abetting another to commit murder, and who was not tried at the second term, is not entitled to be discharged under the third section of the act, if the principal has absconded, and the proceedings to outlawing against him were commenced without delay, but sufficient time had not elapsed to complete them.[h] A prisoner is not entitled to demand a trial at the second term, if he has a contagious or infectious disease, which may be communicated in the court to the prejudice of those present.[hh]

§ 2927. In South Carolina it is at the discretion of the court to continue a cause on the part of the state.[i]

§ 2928. Where a trial for a capital crime, in Massachusetts, had been continued one term, and the government was not then prepared, the court, on continuing it further, took the prisoner's single recognizance for his appearance at the next term.[j] But where, at the first term after the finding of a capital indictment, it appeared that a material witness on the part of the government, duly put under recognizance to appear, had fraudulently avoided the court, though without any connivance of the prisoner, the indictment was continued, and the prisoner remanded.[k]

II. On application of the defendant.

§ 2929. Continuances, on motion of the defendant, may be granted on three principal grounds :—

1st. On affidavit, setting forth the fact that absence of material witness is absent, that his presence will be procured by the next court, and that due diligence has been used to obtain his attendance.

2d. On affidavit setting forth the inability of the defendant, and in certain extreme cases, of his counsel, to attend the trial.

3d. On affidavit, showing that means had been improperly taken to influence the jury and the public at large, so as to prevent, at the time in question, the chance of an impartial trial.[l]

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[f] Act of Feb. 18th, 1785, sect. 3 ; 2 Smith's Laws, 275 ; Purdon's Dig. 6th ed. 533 ; ante, § 450-2.

[g] Ex parte Walton, 2 Wharton, 501.

[h] Com. v. Sheriff, &c., of Allegheny, 16 S. & R. 304 ; Gibson, C. J., dissenting.

[hh] Ex parte Phillips, 2 Watts, 366.

[i] State v. Patterson, 1 M'Cord, 177.

[j] Com. v. Phillips, 16 Mass. 426.

[k] Com. v. Carter, 11 Pick. 277.

[l] There are one or two other grounds which are sometimes mentioned in the books,

§ 2930. 1st. The general rule is, that a continuance will be granted on an affidavit setting forth the absence of a material witness for the defence, and alleging that his attendance will be procured at the next court, and that due diligence has been used in attempting to procure his attendance.

Where a party is surprised by the unauthorized withdrawal of his witnesses after the trial has commenced, the practice is, to apply for a continuance or postponement of the trial; and should the court unadvisedly refuse the application, such refusal may be made the ground of application for a new trial.[l]

There are, however, the following qualifications to the rule admitting continuances on the ground of absence of witnesses.

§ 2931. (*a*) A continuance will not be granted, on such an affidavit, where the absent testimony is out of the process of the courts.[m] Thus, it was held by Story, J., in a late case, not to be a sufficient ground for a delay of trial, that the party wishes it, in order to procure papers from a foreign country, since the court could not issue process, which will be effectual in procuring such papers.[n]

§ 2932. (*b*) A continuance will not be granted on such an affidavit, when the prisoner has been guilty of laches or delay,[o] or of any connivance.[p]

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but which are seldom recognized by the courts. Thus, if an indictment and a civil action are pending for the same matter, the court will not continue the criminal proceeding till the civil case can be tried, unless the party injured is a witness for the government. (Com. *v.* Elliott, 2 Mass. 372; Com. *v.* Bliss, 1 Mass. 32.)

[l] Colton *v.* State, 4 Texas, 260.

[m] 8 East, 37; 3 Burrows, 1514; 1 Wm. Blackstone, R. 514; Com. *v.* Hilliard, 1 Mass. 6; State *v.* Zellers, 2 Halsted, 220; State *v.* Fyles, 3 Brevard, 304; 1 Const. R. 234.

[n] U. S. *v.* Gilbert, 2 Sumner, 19. The grounds for a refusal to continue in such circumstances, are fully stated in a case in South Carolina. Brevard, J.—"My opinion is, that this motion ought to be rejected. On the argument, the only ground insisted on, was the refusal of the Court of General Sessions, for Newbury district, to postpone the trial, on affidavits which stated the absence of material witnesses for the prisoner, who were beyond the limits of this State. If trials for capital offences should be postponed on affidavits of this sort, very few cases would ever be tried at all, and none at the first court after the arrest of the offender, unless he should be willing. Affidavits of this kind ought very sparingly to be admitted. For, in circuit trials, the prisoners from the time of their commitment may, and ought to, be preparing for their defence. The place where they are to be tried is, in most cases, well known, and they have likewise a reasonable certainty of the time long before the circuit commences. (Foster, C. L. 2.) If the prisoner has had no time or opportunity to prepare for his defence, this will be a good ground for a postponement. (State *v.* Lewis, 1 Bay, 1.) It must be admitted that no crime is so great, no proceedings so instantaneous, but that upon sufficient grounds the trial may be put off; but three things are necessary—1. That the witness is really material, and appears to the court so to be. 2. That the party who appears has been guilty of no neglect. 3. That the witness can be had at the time to which the trial is deferred. (The King *v.* D'Eon, 1 W. Bl. R.) The witnesses are said to be in Tennessee. No compulsory process can issue to obtain their testimony. The presumption is, that they would not attend at another court, or they would have attended at the trial, where the life of the defendant was in jeopardy." (State *v.* Fyles, 3 Brev. 304; see also Mull's Case, 8 Gratt. 695.)

[o] 8 East, 37; Earp *v.* Com., 9 Dana, 302; 3 Burrows, 1514; 1 Blackstone, 514; Bledsoe *v.* Com., 6 Randolph, 673; Com. *v.* Gross, 1 Ashmead, 281; Melstead *v.* Redman, 3 Munf. 219; 1 Dallas, 9; Wallace, 5; Deans *v.* Scriber, 2 Call. 415; King of Spain *v.* Oliver, Peters' C. C. 217; Fiott *v.* Com., 12 Gratt. 564.

[p] Wormley *v.* Com., 10 Gratt. 658.

Thus, in a case in the Court of Errors of Virginia, it was held that where, after one continuance obtained by the prisoner, who was charged with uttering a forged note, he asked for another, the court below was right in compelling him to disclose what the absent witness would prove; and was justified in refusing the continuance, though the witness was shown to be material, due diligence not having been used to procure his attendance.[q] Where a continuance was asked on account of the absence of witnesses, but the evidence of one of them, according to the affidavit, would have been entitled to but little influence, and the others were merely to impeach the principal witness for the prosecution, the case having been continued before, and it not appearing why the witnesses were not attached, nor that they would attend at the next term, it was held that a continuance was properly refused.[r] Where an indictment had been found four months, the court refused a further continuance on the motion of the defendant for the purpose of obtaining a witness from without the state, where it did not appear that he had used any active or stringent means to obtain it.[s]

§ 2933. The affidavit must itself show due diligence in summoning the absent witnesses, or good grounds for expecting their attendance at a future court. Thus, where a prisoner indicted of felony made affidavit that he had four material witnesses who were absent, and resident in another state, without naming them, or stating that he had made any effort to procure their attendance, or that he expected to be able to procure their attendance, and thereupon prayed a continuance, it was held the motion for a continuance was properly overruled.[t]

§ 2934. (*c*) A continuance will not be granted on such an affidavit, where, on the court's requiring such particularity, (which, when the application is made for the second time, it is usual for it to do,)[u] it appears on the face of the defendant's application, that the object for which the absent witness is to be called is not material to the issue.[v] In England, the affidavit must be sworn to at least two days before the intended trial, unless the facts affecting the witness were not known in time, when it may be sworn in court, and from the depositions the judge will decide if the witness is material; but if it is a witness who was not examined before the magistrate, or his deposition has not been returned, what he is expected to prove must be set forth in an affidavit. The affidavit must, in general, be made by the party on whose behalf the postponement is sought; but his absence, age, sickness or other sufficient cause will let in his attorney, or even a third person to swear it. The illness of the absent witness, or of a child of which she is the nursing mother, is best established by the affidavit of the medical attendant, such being deemed sufficient to prevent the estreat of his recognizance. His name and place of abode, his continued absence or actual incapacity to attend at any time during the ses-

[q] Holt *v.* Com., 3 Virginia Cases, 156.
[r] Earp *v.* Com., 9 Dana, 302.
[s] Com. *v.* Hilliard, 1 Mass. 6.
[t] Hurd *v.* Com., 5 Leigh, 715.
[u] Nelson *v.* State, 2 Swan, 482.
[v] People *v.* Thompson, 4 Californ. 238; Dacy *v.* State, 17 Geo. 439.

sion, and the use of every reasonable effort to compel such attendance, must be distinctly specified, and the materiality of his evidence in the case shown.[vv] Nor will these facts suffice to postpone the trial, unless the affidavit is positive in its verification of them Thus, it must state that the absent party is a material witness, without whose evidence the applicant cannot safely proceed to trial, and that he has endeavored, without effect, to serve him a subpœna, specifying the exertions used. It should then state in plain terms that there is reasonable ground for believing that the delay sought for will tend to the furtherance of justice, and that the testimony of the witness may be obtained at the time to which the trial is proposed to be deferred.[w]

§ 2935. There may be cases, it is true, where the court will not in its discretion insist upon the defendant's disclosing, under oath, what the absent witness is expected to prove ; but when such disclosure is required, the continuance will be refused, unless the evidence thus sought to be obtained is material.[x] Where it appeared that two witnesses out of three, on the ground of whose absence a continuance was asked, were merely to impeach the chief witnesses for the prosecution, and that the third was immaterial, a continuance was refused.[y] Where the affidavit stated that A. and B. were material witnesses, that they were summoned but did not attend, that the defendant believed he would be able to prove by the witnesses a good character, and other facts of great importance, but the affidavit did not show where the prisoner's domicil was, or that he had ever lived in the county where the witnesses reside, nor that his character could not be proved by others, it was held that it was insufficient to continue the cause.[z] On account of the absence of witnesses to character a continuance will never be granted.[a]

It appeared on the part of the government, and was not disputed by the accused, that no living person save the prisoner was present at the alleged murder, nor was there claim of an *alibi*. The court required the facts expected to be proved by the absent witnesses to be set forth. It appeared that the witnesses were expected to testify to the defendant's good character before the alleged murder. The government admitted this, and the motion was denied.[aa]

§ 2936. It is in the discretion of the court, even where the materiality of the absent evidence is exposed on affidavit, to refuse a continuance, in their discretion, if it should appear that the defendant's sole object was

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[vv] Moody *v.* People, 20 Ill. 315.

[w] Dick. Q. S., 6th ed. 469; Mull's case, 8 Gratt. 695; See Jim *v.* State, 15 Georg. 535.

[x] Foster, 40; 1 Wheel. C. C. 30; Com. *v.* Fuller, 2 Ib. 323; Holt *v.* Com., 2 Va. Cas. 156; Gibbes *v.* Mitchell, 2 Bay, 351; State *v.* Fyles, 3 Brevard, 304; Earp *v.* Com., 9 Dana, 302; Bledsoe *v.* Com., 6 Randolph, 573; Hurd *v.* Com., 5 Leigh, 715.

[y] Earp *v.* Com., 9 Dana, 302.

[z] Rhea *v.* State, 10 Yerger, 258.

[a] R. *v.* Jones, 8 East, 34, Lawrence, J.; but see contra, State *v.* Nash, 7 Iowa, 347.

[aa] People *v.* Wilson, 3 Parker, C. R. (N. Y.) 199.

delay.[b] Thus where an inferior court, in a capital case, had refused a continuance though the defendant offered affidavits setting forth the fact of the materiality of absent witnesses, and of due diligence in procuring them, it was held by the Virginia Court of Errors to be no error, the court below believing the application to be simply an artifice to obtain delay.[c]

Refusal by the court to continue a capital trial because of a witness's absence, on the ground of want of diligence on the part of the defendant, is, whether erroneous or not, no ground for a new trial, if the witness was brought in and testified before the end of the trial.[cc]

§ 2937. (*d*) A continuance, it is said in South Carolina and Mississippi, may be refused, if the adverse party will admit that such witness would testify as is supposed by the party moving for a continuance.[d] In New York, however, it is said that it is not sufficient that the opposite party should admit that the witness would have testified to the specific facts, there must be an admission that those facts are absolutely true.[e] In Kentucky, on the contrary, it has ever been said that contradictory evidence may be introduced by a party who has admitted statements made in an

[b] State *v.* Duncan, 6 Iredell, 98; People *v.* Thompson, 4 Californ. 238. Thus, in a case in Virginia, it appeared by the record that at the last September term of the Superior Court for Montgomery county, the prisoner was indicted for feloniously stealing, taking, and carrying away a negro man-slave, of the goods and chattels of one Michael Peterman, of the value of four hundred dollars. Being thereof arraigned, he pleaded not guilty, and put himself upon the country, and thereupon moved the court for a continuance of the cause, for the reasons set forth in an affidavit filed, and ordered to be made part of the record. In that affidavit the prisoner swore, "that he considers that he cannot now safely go to trial, and assigns the following reasons: that he expects, by the next term of the court, to be enabled to procure the attendance of sundry witnesses from the State of North Carolina, where he resided previous to his arrest, to prove that he is a man of good general character as to honesty, which he cannot prove here, he being a stranger in the country. He also expects to be able to prove at the next term, that the negro which he is charged with stealing, was the property of Jonathan Laws; that he regards this evidence as material, because, from the testimony given against him before the examining court, the attorney for the commonwealth relied principally on evidence which went to show that the affiant was seen travelling in company with the said Laws, who then had the negro in his possession, after the time he was alleged to have been taken from Peterman. The affiant is well satisfied, that he can clearly prove that the said negro, so seen in possession of said Laws, was in fact then the property of said Laws, and had been his property for several years, which fact, if proved, he is advised and believes will be very material to his defence. He also expects to prove that he was in the State of North Carolina at the time the offence is charged to have been committed, which facts he is now unable to prove, because of his recent arrest and confinement in jail." The motion was overruled by the court, and the prisoner put on his trial, convicted, and sentenced to five years' imprisonment in the penitentiary. The writ of error was asked for on the ground that the Superior Court erred in overruling the motion for a continuance. "A motion for a continuance," it was said by Smith, J., in delivering the opinion of the court, "is addressed to the sound discretion of the court; but whether the decision of a Superior Court, on such a motion in a criminal case, is subject to the reversal and correction of this court, is a question which has never yet been decided here; nor is it necessary now to decide it, for, be that as it may, this court, being unanimously of opinion that the affidavit of the prisoner, and the matters therein set forth, were not sufficient to entitle the prisoner to a continuance of the cause, the writ of error must necessarily be refused." (Bledsoe *v.* Com., 6 Randolph, 674.)

[c] Vence *v.* Com., 2 Va. Cases, 162.

[cc] Mitchell *v.* State, 22 Geo. 211.

[d] Farrand *v.* Bouchell, Harper, 83; Browning *v.* State, 33 Miss. (4 George) 48.

[e] People *v.* Vermilyea, 7 Cowen, 369; Prill *v.* Lord, 14 Johnson, 341; but see ante, § 2935.

affidavit for continuance.[f] In Tennessee where a prisoner makes an affidavit for a continuance, the state cannot force him into a trial, by admitting the truth of what the alleged absent witness would depose to,[g] though where such an admission has once been made, however, it constitutes an admission not merely that the absent witness would have sworn to certain alleged facts, but also that the facts alleged are absolutely true.[h]

§ 2938. (*e*) A continuance will not be granted on such an affidavit, where it appears that the absent witness had notice of the time of trial, unless it appear that he had secreted himself, or had been spirited away by the opposite party.[i]

§ 2939. 2d. On affidavit setting forth the inability of the defendant, and in certain extreme cases, (*e. g.* sickness,[j]) of his counsel, to attend the trial.[k] Death of counsel, occurring so suddenly to prevent the engagement of others, is generally good ground;[l] but absence of counsel is rarely received as in itself adequate.[m]

§ 2940. 3d. On affidvait, showing that means had been improperly taken to influence the jury and the public at large, so as to prevent, at that time, an impartial trial.[n] In a late case it was held that where the public excitement was such as to intimidate and swerve the jury, the motion would be granted.[o] But the fact of ordinary newspaper paragraphs existing on the subject is not enough.[p] Where the excitement is the result of the defendant's own action, the application will be refused.[q] An affidavit of one indicted for a capital offence, stating that he believed he could not obtain an impartial trial because a subscription for his arrest was had in the district, was held, in South Carolina, not a sufficient cause for change of venue.[r] It is not a good ground for a new trial, after conviction, that at the time of trial there was a great excitement in the public mind against the accused.[s]

4th. INABILITY OF WITNESS TO UNDERSTAND THE OBLIGATION OF AN OATH.

§ 2941, A continuance, also, will sometimes be granted where a witness, whose evidence is material to the case, has no sense of the obligation of an oath; in such a case the trial will be adjourned until the witness is instructed in the principles of moral duty.[t]

§ 2942. In South Carolina, a person indicted for a misdemeanor is

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[f] Olds *v.* Com., 3 Marsh. 467.
[g] Goodman *v.* State, 1 Meigs, 195.
[h] Ibid.
[i] Barnes, 442.
[j] People *v.* Logan, 4 California, 188.
[k] Say's Rep. 63.
[l] Hunter *v.* Fairfax, 3 Dallas, 305.
[m] M'Kay *v.* Marine Insurance Co., 2 Caines, 384; Hammond *v.* Haws, Wallace 1; but see Rhode Island *v.* Massachusetts, 11 Peters, 226.
[n] 1 Burrows, 510.
[o] Com. *v.* Dunham, Thach. C. C. 516.
[p] Com. *v.* Carson, Mayor's Court of Philadelphia, June, 1823, per Reed, Recorder 1 Wheel. C. C. 488.
[q] U. S. *v.* Porter and Wilson, 1 Baldwin, 78.
[r] State *v.* Williams, 2 M'Cord, 383.
[s] Com. *v.* Flannagan, 7 Watts, 418.
[t] 1 Leach's cases, 430; ante, § 753-5.

entitled to an imparlance until the next term after the indictment is found,[u] except in the case of an indictment for a forcible entry.[v]

§ 2943. If, at the conclusion of a trial, the court is convinced, after hearing all of the evidence, that the continuance should have been granted, it should allow a new trial; and if it refuses a new trial, the party excepting should embody all the evidence in his bill of exceptions, that the court above may see the bearing of the whole case, and thus judge of the weight of the application.[w]

CHAPTER II.

CHALLENGES.

§ 2944. When the jury is called, either the prosecution or the defence, aside from the operation of local statutes, is at liberty to challenge either the whole panel, or any individual of the panel.[a] The subject will be considered in the following order:

I. OF THE SEVERAL KINDS OF CHALLENGES, § 2945.
1st. To THE ARRAY, § 2947.
(a) Principal challenge to the array, § 2948.
(b) Challenges to the array for favor, § 2953.
2d. To THE POLLS, 2954.
(a) Peremptory, § 2955.
(1) By government, § 2956.
(2) By defendant, § 2958.
(b) Principal, § 2975.
(1) Preadjudication of case, § 2976.
(2) Relationship, interest, infamy, &c., § 3016.
(3) Irreligion, § 3019.
(4) Conscientious scruples, § 3020.
(5) Secret associations, § 3021.
(c) Challenges to the polls for favor, § 3022.
II. MODE AND TIME OF TAKING THE CHALLENGE, § 3026.
III. HOW CHALLENGES ARE TO BE TRIED, § 3036.

I. OF THE SEVERAL KINDS OF CHALLENGES.

§ 2945. The practice among the civilians extends the right of challenges *for cause*,—no peremptory challenges being allowed,—to the judges as well as to the juror; and the great inclination of authority is that the same causes which disqualify the one, disqualify the other.[b] Where the judge, like a chancellor, sits to try both facts and law, as is the case with the civilians, there is peculiar reason for the application to him of a jealous test;

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[u] State *v.* Fraser, 2 Bay, 96.
[v] State *v.* Dayley, 2 N. & M. 121.
[w] M'Daniel *v.* State, 8 S. & M. 401; post, § 3080–9, 3225.
[a] Burns, J., Jurors, viii.
[b] Mittermaier Deutsch. Str. I, s. 30; Hopfner nebur Auklage Process, p. 257; Wildvogel de Recusat. Jud. Ejusque usu et Abusu, Granz Defens. Reor. p. 381; Scuffert von dem Rechte de Peinl. Angeklagten Seiner Richter Ausguschliessen.

and the cases where he may be challenged are placed in two classes,—(1.) Where he is disqualified by circumstances beyond his control, *e. g.*, relationship or previous connexion with the subject-matter. (2.) Where he is disqualified by misconduct, *e. g.*, partiality, or prejudice.[c] But by the common law of England and America, where the judge is a stationary officer, subject to impeachment, and where the jury is unimpeachable, and from its character is peculiarly susceptible to those influences which produce incompetency, it would be as absurd as impracticable to treat each as subject to the same rule. A juryman, again, when challenged, may be readily replaced; but as a judge could not sit to try his own competency, not only would every challenge involve an appeal, but it would be necessary to establish a reserved court to sit subsequently in case a disqualification were found to exist. Under our present system, therefore, there can be no such thing as the challenge of a judge, the remedy, in case of criminal partiality, being found in impeachment. If the general consent of the high professional authorities concerned in the trial of Judge Chase and Judge Peck, however, be entitled to weight, it would seem that as a judge is obliged by law to try such cases as are brought before him, without reference to his own relations to the offender or the offence, he is only impeachable for such overt acts of misconduct as constitute a misdemeanor in office. In this light the judiciary are with us clothed with powers and discretion far more absolute than those under either the civil or the modern continental law; and perhaps this may tend to give additional weight to those moral sanctions which require a judge on the bench, whatever may have been his individual relations, to religiously divest himself of those prejudices, personal, social, or political, which would be a cause of disqualification to a juror.

§ 2946. In our own practice the two principal kinds of challenge are, first, to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel*, or little square *panes* of parchment on which the jurors' names are written; or to the *polls*, by which is meant the several particular persons or *heads* in the array.

§ 2947. 1st. *To the array.*—Challenge to the array is based on the partiality or default of the sheriff, coroner, or other officer that made the return, and must be made in writing.[d] This may be considered under two heads.

§ 2948.(*a*) *Principal challenge to the array*, which, if it be made good, is cause for exemption, without resort to triers. Principal challenges to the array are such as these: if the sheriff be the actual prosecutor or the party aggrieved;[e] if he be of actual affinity to either of the parties, and the relationship be existing at the time of the return;[f] if he return any individual at the request of the prosecutor or the defendant,[g] or any person

[c] Ibid.; Bentham on Judicial Organization, ch. 16; Jousse, traite I. p. 555.
[d] People *v.* Doe, 1 Mann, (Mich.) 451. [e] 1 Leach, 101; Williams, J., Juries, v.
[f] Co. Lit. 156 a; Williams, J., Juries, v.; Burns, J., Jurors, iv. 1; Dick. Sess. 183, 184.
[g] Co. Lit. 156 a; Bac. Abr. Juries, E. 1; Burns, J., Jurors, iv. 1; Williams, J., Juries, v.; Dick. Sess. 184.

whom he believes to be more favorable to one side than to the other;[h] if an action of battery be depending between the sheriff and the defendant, or if the latter have an action of debt against the former;[i] in each of these cases the array will be quashed on the presumption of partiality in making up the return.

§ 2949. Under the provisions of 3d and 4th Will. 4, c. 91, it is the duty of the recorder of Dublin, annually to revise the list of jurors of the county of that city, and to cause a general list of jurors to be made out, and delivered over to the clerk of the peace of the said city for the purposes of the ensuing year. In 1844, upon a trial at the bar of the Court of Queen's Bench of Ireland, the defendant challenged the array of the panel on the following grounds: viz., that there had been a fraudulent omission by some person or persons unknown, in the general list of jurors for that year, of the names of sixty persons, who, on the revision of the lists, had been adjudged by the Recorder to be qualified to act as special jurors; that from the said list the juror's book had been made out and framed, and that from the said book the special jurors' list had been made up, the said names being omitted in the said book and list respectively; and that from the said special jury list the panel had been returned; that the said names had been omitted fraudulently, and not only without the privity of the defendant, or of any person on his behalf, but to his wrong and damage, and contrary to his will and desire; and that such list had been so made up with the intent of prejudicing the defendant on the said trial; and that the plaintiff had due notice of the premises before the panel was arrayed. A general demurrer to the challenge was put in by the plaintiff, which, after argument, was allowed by the court, and the trial having proceeded, judgment was given against the defendant, who sued out a writ of error in Parliament thereon. The fifteen judges being consulted, held unanimously that there was no error; but Lord Denman, C. J., together with Lord Cottenham and Lord Campbell in the House of Lords, inclined to the opinion that the challenge should have been allowed.[j]

§ 2950. The same course will be taken if the sheriff, or his bailiff who makes the return, is under the distress of the party indicting or indicted, or has any pecuniary interest in the event, or is counsel, attorney, servant, gossip, or arbitrator in the same cause.[k] In New York, since the statute authorizing the clerk to array the jury, a challenge to the array lies for partiality or default in the clerk in the same manner as it formerly lay against the sheriff.[l]

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[h] Co. Lit. 156 a; Bac. Abr. Juries, E. 1.

[i] Co. Lit. 156 a; Bac. Abr. Juries, E. 1; Burns, J., Jurors, iv. 1; Williams, J., Juries, v.; Dick. Sess. 184.

[j] R. *v.* O'Connell, 11 Cl. & Finn. 15; 9 Jurist, 30.

[k] Co. Lit. 156 a; Munshower *v.* Patton, 10 Serg. & Raw. 334; 4 Burr. 185, 186; Bac. Abr. Juries, E. 1; Burns, J., Jurors, iv. 1; Williams, J., Juries, v.; Dick. Sess. 184; Vannaker *v.* Beemer, 1 Southard, 364.

[l] Pringle *v.* Huse, 1 Cowen, 435, 436, n. 1; Gardner *v.* Turner, 9 Johns. R. 261. By the New York Revised Statutes, challenges to the array are much abridged: "It shall not be a cause of a challenge to any panel or array of jurors, in any cause, that the

§ 2951. A challenge to the array will not be allowed, on the ground that all persons of a particular fraternity have been excluded from the jury, if those who are returned possess the requisite qualifications.[m]

In New York it is no ground for challenging the array, that the deputy clerk, in the clerk's absence, drew the jury and certified the panel.[mm]

§ 2952. In Pennsylvania, under the acts of Assembly relating to the summoning of jurors, it was held no cause of challenge to the array, that the sheriff was not present the whole time during which the selection of jurors was made; or, that the sheriff and commissioners took up between two and three weeks in making the selection and putting the names of the jurors into the wheels, or that it did not appear that the sheriff and commissioners wrote the names of the jurors selected by them, and put the same into the wheels, this duty having been performed by a clerk in their presence and by their order; or, that the pieces of paper on which the names were written, were not safely kept between the time of writing and putting them into the wheel, the same having been put into a box where they were kept until the selection was completed, when they were put into the wheels; or that the names which were remaining in the wheels at the end of the year were taken out before the names selected for the new year were put in.[n]

The person challenging the array must be strictly prepared to prove the cause,[o] and if he omit to challenge he cannot take advantage of the alleged defect afterwards.[p]

§ 2953.(*b*) *Challenges to the array for favor*, being not a principal challenge, are left to the discretion of the triers.[q] Challenges of this class are based on the supposed partiality of the sheriff, when such partiality is not sufficiently distinct to make it the subject of a principal challenge. Thus, when the defendant is the sheriff's tenant, or where there is affinity but no relationship between the sheriff and one of the parties, or where they are united in the same office,[r] in these cases there may be a challenge for favor.

2d. To the polls.

§ 2954. Challenges to the polls are threefold.

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clerk of the county who drew them was a party, or interested in such cause, or was counsel or attorney for, or related to either party therein." (2 New York Rev. St. 420, s. 56.)

"It shall not be a good cause of challenge to the panel or array of jurors, in any cause, that they were summoned by the sheriff who was a party, or interested in such cause, or related to either party therein, unless it be alleged in such challenge, and be satisfactorily shown, that some of the jurors drawn by the clerk were not summoned, and that such omission was intentional" (Ibid. sec. 57.)

[m] People *v.* Jewett, 3 Wend. 314.

[mm] People *v.* Fuller, 2 Parker, C. R. (N. Y.) 16.

[n] Com. *v.* Lippard, 6 Serg. & R. 395.

[o] R. *v.* Savage, R. & M. C. C. 51.

[p] R. *v.* Sutton, 8 B. & C. 417; 2 M. & R. 406.

[q] 1 Inst. 155; Burn's Justice, Jurors, viii.

[r] Dyer, 367, a.; Bac. Abr. Jur. E. 1; Co. Lit. 156, a.; 1 Cowen, 436, n. 1.

§ 2955.(*a*) *Peremptory*, where the challenge is absolute, no cause being shown.

§ 2956.(1) *By Government.*—At common law, the government has no peremptory challenges,[s] but, unlike the defendant, it is not required to show cause until after the panel is exhausted, having the power of setting aside individual jurors till that period, when, if the jury box be not then filled, the set aside jurors will be severally called, and unless adequate cause is shown against them, will be chosen.[t] Such is still the practice in the federal

[s] R. *v* Frost, 9 C. & P. 136; Henries *v.* People, 1 Harris, C. C. 579; People *v.* Atchinson, 7 How. Prac. Rep. 241.

[t] R. v. Parry, 7 C. & P. 836; 3 Harg. St. Tr. 519; 4 Id. 740; 2 Hale, 271; Bac. Abr. Juries, E. 10; 2 Hawk. c. 43, s. 3. Mr. Townsend (1 Mod. St. Tr. 5) thus spiritedly sketches the attempt of Frost's counsel to break down this rule in the celebrated trial of which he was the subject:

"To prove their determination to fight l'outrance, Sir F. Pollock, as if leading a forlorn hope, again objected to a peremptory challenge on the part of the crown. With a startling temerity he expressed his conviction that the court would not be surprised at his objection.

"'I am aware that for a long series of years it has been considered to be the practice, and therefore to some extent the law, that the crown might postpone the cause to be assigned until the panel is gone through. With the utmost deference to your Lordships, I conceive that this practice crept in at a time when there was a deference paid to the crown upon points of this description, which the law and the principles of the constitution did not warrant.' This attack on established authority was valorously followed up by Mr. Kelly, who took a supplementary objection that the challenge was not till after the book had been put into the hands of the juror, which was too late. This technical point, inter apices juris, what was the moment of beginning to administer an oath, was then formally discussed, and the fact left to the officer of the court, to say whether he had authorized the party to take the book, or had directed him in any manner to put his hand upon it. As Mr. Bellamy could not recollect, the court would not interfere, but intimated that the moment the oath is delivered by the officer, or begun to be delivered by the officer, it is too late for either party to challenge. The principal objection was repelled with some severity, as its hardihood deserved.

"'As to the former objection, which is a question of law, we really are called upon, after a construction has been put upon this Act of Parliament, from the very period when it was passed in the 33d of Edw. I. down to the present time, to put a construction different from that which prevailed at the time the statute was enacted, and different from that which all our predecessors have put. Where would be the certainty of the law of England? What safety would there be for prisoners, as well as for the public execution of justice, if judges, acting according to their own discretion, neglecting those rules of interpretation which wise men before them have laid down, and which have been sanctioned by time, were to do that for the first time which we are now called upon to do, namely, to put a construction different from that which has been put by all who have gone before us?'"

"On the trial of O'Coigley and others, for high treason, before Mr. Justice Buller, at Maidstone, in 1798," says Mr. Townsend (1 Mod. State Trials, 99, n.), "the leading counsel for the prisoner, Mr. Plumer, Mr. Dallas, and Mr. Gurney, declined to interpose, when the crown were exercising their peremptory right of challenge to different jurymen. At length the junior counsel, Mr. W. Scott, jumped up: 'I must be chained down to the ground, my lords, before I can sit here, engaged as I am for the life of one of the gentlemen at the bar, and submit to these challenges of the crown without cause. The crown has now challenged eleven jurors without cause; a greater number, I believe, than was ever known before.' (In Ireland it is usual to challenge fifty at least.)

"'If I had not been restrained by a reason too mighty for me to oppose, I should have resisted these challenges in the beginning.' He was then permitted to argue the point, which he did with great spirit, but at too great length, when Mr. J. Buller interposed, with the not very encouraging remark,—'In every case you have quoted you cannot help seeing a decision against you.' The judgment of the court was of course most prompt and decided. 'The true construction of the statute is in favor of the right to challenge, and there is no case, no period, in which a different determination has been made. It appears to me one of the clearest points that can be.'"

courts, and in such of the states as have not in this respect superseded the common law by statutes.[u] The right may be exercised by the prosecutor

[u] U. S. *v.* Wilson, 1 Baldwin, 81; State *v.* Arthur, 2 Devereux, 217; State *v.* Craton, 6 Iredell, 164; State *v.* Stalmaker, 2 Brevard, 1; Robert's Dig. 328; Jewell *v.* Com., 10 Harris, 94; Wormeley *v.* Com., 10 Grattan, 658; Com. *v.* Jolliffe, 7 Watts, 585. The opinion of Gibson, C. J., in the latter case, fully exhibits the reason of the distinction. "At no time since 33 Ed. I. could the crown or the commonwealth challenge peremptorily. By that statute it was ordained, that if they who sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the said challenge shall be inquired of according to the custom of the court. And this enactment, which stood in force till it was supplied by the act of 1813, had been so construed, as not to require the attorney general to show cause of challenge before the panel exhausted. The act of 1813 simply ordained, 'that in any case of felony, the commonwealth shall not challenge without cause,' a provision repealed in the act of 1834, now in force. The legislature doubtless supposed that the state had a right of peremptory challenge by the English statute; indeed the practice under it might seem to imply it, or its indulgence was sparingly claimed, and seldom, if ever, in a case where the panel afterwards happened to be exhausted, so that there was no occasion to look narrowly into the foundation of it; and hence it came to be supposed that the public privilege, whether absolute or qualified, had been taken away. Both the bench and the bar incautiously acted on that supposition in the Com. *v.* Lesher, 17 Serg. & R. 155. It is true the question there was not whether the commonwealth should presently assign a cause of challenge, but whether the cause voluntarily assigned were sufficient; yet had it been supposed that the juror could be set aside without it, the difficulty would have been disposed of without engrafting a new cause of challenge on the original stock. The shift we were put to in that case to prevent the trial being made a mockery of justice by the supposed disturbance of the existing system, would justify any construction, however strained, to keep it on the old foundation. The particular mischief was obviated, but, what could obviate the infinite variety of mischiefs that would perpetually rush in hereafter? The juror may be notoriously bound to the prisoner by the most absolute ties of feeling; he may even be notoriously confederate with him in guilt; and yet there may be no specific proof of it to ground a challenge for favor. Except to add the prisoner himself to the panel, I know no more effectual way to screen guilt from punishment, than to give the prisoner his choice of the panel. Total impunity was not the end proposed by the legislature, nor ought it, perhaps, to be desired by the philanthropist. It is not easy to discover a conclusive reason why the punishment of the felon ought to move our tenderest sympathies; or why the laws ought to be defectively constructed on purpose that he might elude them. To rob the executioner of his victim when the laws are sanguinary, might be an achievement to boast of, but we were told at the mitigation of our penal code, that the certainty of conviction to be expected from mildness of punishment, would more than compensate, in its effects, the want of that severity which was thought to deter by its terrors. It may be doubted, therefore, whether the prevalent spirit of acquittal which impels judges and jurors to lay hold on the most improbable circumstances, or where these are wanting, to assume the prisoner's innocence by an effort of faith, which acts upon an imaginary distinction betwixt natural and technical disbelief of evidence competent in point of law, and not only credible in point of fact, but entirely satisfactory to the natural understanding; which, like charity, 'beareth all things, believeth all things, hopeth all things, endureth all things:' it may be doubted, I say, whether this spirit hath not already been carried too far. If it be further indulged, a shorter and certainly a cheaper way of obtaining its end, would be to have no prosecutions at all; but it is one which would scarce be found to answer in the state of the times. Why then should the prisoner have more than serves to give him a fair trial? and his twenty peremptory challenges certainly gives him that: and having secured to him all he had a right to require, it must have occurred to the legislature, that the commonwealth must have a fair trial too. Did we believe that an unfair advantage was intended, we might be bound to favor that construction which would give him the benefit of the adventitious prepossessions, but as we could believe it only on compulsion, we are at liberty to carry out what we may suppose to have been the legislative design. The act of 1834, like that of 1813, is a repetition of the English statute, and there is no reason why it should not have the like interpretation. Nothing is open to it but the time, and there is not a word, circumstance, or reason in either to raise a difference as to that. It was well remarked by the late President Roberts, in his Digest, p. 329, that the attorney general, who is usually unassisted by a private prosecutor in capital cases

at any period before the jury is elected, and it was held no error where the commonwealth from excessive caution, set aside a juror who had been before ineffectually challenged by the prisoner.[v]

§ 2957. The practice, however, of permitting the prosecutor to defer showing cause of challenge until the panel be gone through, it was said in a late case in North Carolina, must be exercised under the supervision of the court, who will restrain it, if applied to an unreasonable number;[w] and in Georgia, since the adoption of the penal code, it is rejected altogether.[x]

In Pennsylvania, by the Revised Acts of 1860:

The commonwealth shall have the right, in all cases, to challenge, peremptorily, four persons, and every peremptory challenge beyond the number allowed by law in any of the said cases, shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.[xx]

The statutes regulating challenges are noticed under the next head.[y]

§ 2958.(2) *By defendant.*—Peremptory challenges by the defendant are taken without assigning any reason, and when made must necessarily be allowed. In cases of felony, the prisoner was permitted, at common law, peremptorily to challenge thirty-five, or one under the number of three full juries.[yy] But by 22 Hen. VIII. c. 14, s. 7, made perpetual by 32 Hen. VIII. c. 3, no person assigned for petit treason, high treason, murder or felony, can be admitted peremptorily to challenge more than twenty of the jurors; and by 33 Hen. VIII. c. 23, s. 3, the same restriction is extended to cases of high treason. As far, however, as these statutes respect either high or petit treason, it is agreed that they were repealed by the 1 & 2 Ph. and M. c. 10, which, by enacting that all trials for treason shall be carried on as at common law, has revived the original number as far as it respects those offence.[z] At the present day, therefore, in cases of high and petit treason, the prisoner has thirty-five peremptory challenges; and in murders and all other felonies, twenty.[a]

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and whose business it is not to hunt up witnesses, might be unprepared with instant proofs, and yet be perfectly prepared at the close of the panel. It is to be remembered too, that what is claimed by the commonwealth is not a prerogative but an indulgence, which can deprive the prisoner of no advantage which it is the policy of the law to allow him. And it is an indulgence which cannot be turned into purposes of oppression, as an excessive use of it would defeat itself, by hastening the close of its duration. As there is nothing in the words of the act to deprive the commonwealth of it, and as it is one which is indispensable to criminal justice, we are of opinion that the motion be disallowed."

[v] Wormeley *v.* Com., 10 Grattan, 658.

[w] State *v.* Benton, 2 Dev. & Bat. 196; though see State *v.* Craton, 6 Iredell, 164.

[x] Sealy *v.* State, 1 Kelly, 213; Reynolds *v.* State, Ibid. 222.

[xx] See post, § 2964. [y] See post, § 2959, &c.

[yy] Co. Lit. 156; Bro. Abr. Challenge, 70, 75, 217; 2 Hale, 268; Hawk. b. 2, c. 43, sect. 7; Com. Dig. Challenge, C. 1; Bac. Abr. E. 9; 4 Bla. Com. 354; 2 Woodes. 498; Burns, J., Jurors, iv.: Williams, J., Juries, v.; Dick. Sess. 185.

[z] Co. Lit. 156; Bro. Abr. Challenge, 217; 3 Inst. 227; Fost, 106, 7; 2 Hale, 269; Hawk. b. 2, c. 43, sect. 8; Bac. Abr. Juries, E. 9; Burn's J., Jurors, iv.; Williams, J., Juries, v.; Dick Sess. 185.

[a] 4 Mason, 159; Fost. 106, 7; 4 Bla. Com. 354; 2 Hawk. c. 43, sect. 8; 1 Ch. C. 535.

The act of Congress, passed on the 20th July, 1840,[b] confers upon the courts of the United States the power to make all necessary rules and regulations for conforming the empanneling of juries to the laws and usages in force in the states.[c] This power includes that of regulating the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason or other crimes, of which the punishment is declared to be death.[d] The act of 1790 recognizes the right of peremptory challenge in those cases, and therefore it cannot be taken away.[e]

Under the act of Congress, July 20, 1825, (5 Sts. at Large, 394,) the courts of the United States have the power to adopt the statutes of the several states respecting the empanneling, &c., of jurors, the right of challenge, &c., except in respect to treason, and other crimes specified in § 30, act of 1790, (1 Sts. at Large, 119,) and where these statutes have been adopted, the right of peremptory challenge, either by the prisoner or the government, must depend on them.[ee]

§ 2959. In Massachusetts "every person indicted for any offence, shall, when the jury is empanneled for his trial, be entitled to the same challenges that are by law allowed to defendants in civil cases."[f] "The attorney general, and any other officer prosecuting an indictment, shall be entitled to the same challenges on behalf of the commonwealth, that are by law allowed to parties in civil cases."[g] "Any person who is put on trial for an offence punishable with death, shall be allowed to challenge peremptorily, twenty of the persons returned as jurors, and no more."[h]

§ 2960. In New York, "every person arraigned and put on trial for any offence punishable with death, or with imprisonment in a state prison the years, or any longer time, shall be entitled peremptorily to challenge twenty of the persons drawn as jurors, and no more."[i]

§ 2961. "Every such person, and every person indicted for any offence, shall be entitled to the same challenges as are allowed in civil cases, either to the array of jurors, or to individual jurors."[j]

§ 2962. "The attorney general, or district attorney, prosecuting for the people of this state, shall be entitled to the same challenges in behalf of this state, either to the array or to individual jurors, as are allowed to parties in civil cases, and the same proceedings shall be had thereon as in civil actions."[k]

Under this statute the people are entitled to two peremptory challenges, in a criminal prosecution.[kk]

§ 2963. In Pennsylvania:

On the trial of any indictment for treason or misprision of treason, murder, man-

[b] 5 Stats. at Large, 394.
[c] U. S. *v.* Shackleford, 18 Howard, 555.
[d] Ibid.
[e] Ibid.
[ee] U. S. *v.* Shackleford, 18 How. U. S. 588.
[f] R. S. c. 137, sect. 3.
[g] R. S. c. 137, sect. 4.
[h] Ibid. sect. 5.
[i] 2 N. Y. R. S. 734, sect. 9.
[j] Ibid. sect. 10.
[k] Ibid. sect. 11.
[kk] People *v.* Carriff, 2 Parker, C. R. (N. Y.) 663.

slaughter, concealing the death of bastard child, rape, robbery, burglary, sodomy, malicious maiming and arson, the accused shall be at liberty to challenge, peremptorily, twenty of the jurors, and on the trial of all other indictments the accused shall be at liberty to challenge, peremptorily, four of the jurors.—(Rev. Acts, Bill II., sect. 37.)

§ 2964. *How challenges are to be conducted.*—All challenges in criminal proceedings shall be conducted as follows, to wit.: The commonwealth shall challenge one person, and then the defendant shall challenge one person, and so alternately, until all the challenges shall be made; but if the commonwealth shall refuse to make any challenge, the defendant shall, nevertheless, have the right to challenge the full number allowed him by law.—(Ibid. sect. 38.)

§ 2965. *How to be determined.*—When a challenge for a cause assigned shall be made in any criminal proceeding, the truth of such cause shall be inquired of and determined by the court.—(Ibid. sect. 39.)

§ 2966. *Persons jointly indicted, and joint challenges.*—In all cases in which two or more persons are jointly indicted for any offence, it shall be in the discretion of the court to try them jointly or severally, except that in cases of felonious homicide, the parties charged shall have the right to demand separate trials; and in all cases of joint trials, the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried, and no more.—(Ibid. sect. 40.)

§ 2967. *How tales awarded and juries summoned.*—All courts of criminal jurisdiction of this commonwealth shall be and are hereby authorized and required, when occasion shall render the same necessary, to order a *tales de circumstandibus*, either for the grand or petit jury, and all talesmen shall be liable to the same challenges, fines and penalties as the principal jurors: *Provided*, That nothing herein contained shall repeal or alter the provisions of an act passed the twentieth day of April, one thousand eight hundred and fifty-eight, entitled "An Act establishing a mode of drawing and selecting jurors in and for the city and county of Philadelphia."[1]—(Ibid. sect. 41.)

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[1] "Sections 37, 38, 39 and 40. These sections are intended to supply the one hundred and fifty-second, one hnndred and fifty-third, one hundred and fifty-fourth, one hundred and fifty-fifth and one hundred and fifty-sixth sections of the Act of the 14th April, 1834, entitled 'An Act relating to the organization of courts of justice.' Pamphlet Laws, 341 Brightly's Digest, 373; Title, Juries, Nos. 69, 70, 71, 72 and 73. The changes therein, in reference to challenges, are, that by the thirty-seventh section of this act the number of challenges allowed the accused in treason is twenty; whereas by the one hundred and fifty-second section of the act of 1834, thirty-five challenges are allowed, and that by the one hundred and fifty-fourth section of the act of 1834, the Commonwealth is interdicted from challenging, without cause, in any case of felony; whereas by the thirty-eighth section of the present act, the Commonwealth is only interdicted from challenging peremptorily in the cases enumerated in the thirty-seventh section, to wit: Treason, misprision of treason, murder manslaughter, concealing the death of a bastard child, rape, robbery, burglary, sodomy, malicious maiming, and arson, and in all other felonies and misdemeanors, is allowed the same number of challenges as the defendant, to wit: Four. The object of thus extending to the Commonwealth the right of challenging, in the minor felonies, the same number of jurors as the defendant, arises from the fact, that by the present code a large number of offences, which were misdemeanors at common law, are now made felonies. Hence, the excluding of the Commonwealth from the right of challenge in any felony, is almost totally to deprive her of the right of challenge. In the practical administration of criminal justice, the right of the Commonwealth to challenge four jurors peremptorily, is of the deepest importance. It is not an uncommon thing to find in a panel of jurors, one or more persons pledged to the defendant by per-

§ 2968. On the preliminary trial of a prisoner's insanity, before the trial of the indictment against him, he has not the privilege of peremptory challenges, but may challenge for cause.[r]

§ 2969. In Ohio, on a trial of an indictment for murder in the first degree, the prosecuting attorney has the right to the exercise of two *peremptory* challenges in impanneling the jury.[rr]

§ 2970. Where a statute gives the right of peremptory challenges to a prisoner put on trial "for an offence punishable with death, or imprisonment in a state prison ten years or any longer time," a person indicted for burglary in the second degree, which is punishable "by imprisonment in a state prison for a term not more than ten years, nor less than five years," is entitled to peremptory challenges.[s]

§ 2971. If, in the trial of a criminal case in Tennessee, a juror becomes sick, and is discharged, upon the summoning of a juror to fill his place, the defendant is entitled to as many challenges of persons not before summoned in that cause, as if no juror had been selected.[t]

§ 2972. The more general opinion is that the prisoner's right to a peremptory challenge is waived when the juror is passed over to the court or

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sonal or social sympathies, or influenced in his favor by worse motives. The right to peremptorily challenge four jurors, is the security of the public against such contingencies. The fortieth section of the present act assigns to the court the authority of determining upon the truth and sufficiency of challenges for cause."

"Section 41. This section is new, and is introduced to settle a question in criminal practice, which has produced difficulty. At common law, upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on trial, and thus, in effect, the prisoners in such a case possess the power of peremptorily challenge to the aggregate of the numbers to which they are respectively entitled. The embarrassments from defect of jurors, resulting from the exercise of this right by numerous defendants jointly indicted, led the courts, at a very early period, to determine that they had the power, against the will of the prisoners, to sever the panel, and try them severally, if they insisted upon their right of several challenges. This settled the question that prisoners, jointly indicted, could, against their wishes, be tried separately. But whether prisoners, jointly indicted, could demand a *separate* trial, presented another question. Some insisting that they possess such a right; others contending that such severance is a matter of sound discretion, to be exercised by the court, with that due regard and tenderness to prisoners, which characterizes our criminal jurisprudence. And this latter we regard as the better opinion. In the section under consideration this doctrine has been adopted, except as to cases of joint indictments for felonious homicide, in which it is proposed to give the accused the positive right to demand separate trials. In cases of joint trials, it is also proposed to limit the number of the challenges, of all the prisoners, to the number each would be entitled to if separately tried, and no more. As prisoners jointly indicted for felonious homicide have, by this section, the right to sever in their trials, persons so circumstanced will not be effected by this latter provision, in cases of joint trial, as their being so tried is a matter resting entirely in their own choice.

Section 42. This section is a summary of the one hundred and forty-fourth, one hundred and forty-fifth, one hundred and forty-sixth, one hundred and forty-seventh and one hundred and forty-eighth sections of the act of the 14th of April, 1834, entitled "An Act relating to the organization of courts of justice." Pamphlet Laws, 341. Brightly's Digest, 473; Title, Juries, No. 61, 62, 63, 64 and 65; which sections have been left unrepealed, as they apply equally to civil as well as criminal proceedings." (Revisors' Note.)

[r] Freeman *v.* People, 4 Denio, 9.

[rr] Fonts *v.* The State, 8 Ohio State R. (N. S.) 98.

[s] Dull *v.* People, 4 Denio, 91.

[t] Granger *v.* State, 5 Yerg. 160.

the prosecution;[u] though this has been doubted by a court of great respectability.[v] It is clear that the right ceases, when the panel is complete and accepted.[w]

§ 2973. Peremptory challenges are not allowable on the trial of any collateral issue,[x] nor at common law in trial for a misdemeanor.[y]

§ 2974. A prisoner who, in case of felony has challenged twenty jurors peremptorily, cannot withdraw one of those challenges to challenge another juror, instead of one that he had previously challenged;[z] nor can he avail himself in error of an exception to the competency of a juror whom he peremptorily challenged, after having first taken exceptions to such juror's competency.[a]

The right of peremptory challenge is a right, not to select, but to reject.[b]

§ 2975. (*b*) *Principal.*—Principal challenge to the polls, is where a cause is shown, which, if found true, stands sufficient of itself, without leaving anything to be tried by the triers.[c]

Causes of principal challenge to the polls are such as these:

§ 2976. (1) *Preadjudication of case.*—Where the juror has prejudged the issue. In England it has been considered to be a good cause for challenge, on the part of the prisoner, that the juror has declared his opinion beforehand that the party is guilty, or will be hanged;[d] but it is said that expressions used by a juryman previous to the trial, are not a cause of challenge, unless they can be referred to something of personal ill-will towards the party challenging.[e]

§ 2977. In this country, as will presently be seen, the great preponderance of authority is that the holding by a juror of any opinions which may disqualify him from rendering a verdict in accordance with the laws of the land, is a disqualification.[f] Mere opinions thrown out as a jest, however, or to avoid being empannelled, will not *per se* so operate.[g] And so of a general bias and prejudice against crime.[h]

§ 2978. *United States Courts.*—"The court has considered," declared Marshall, C, J., in Burr's trial, "those who have deliberately formed and delivered an opinion on the guilt of the prisoner, as not being in a state of

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[u] Com *v.* Rogers, 8 Met. 500; U. S. *v.* Hanway, U. S. Circuit Ct. Phil. 1852; State *v.* Potter, 18 Conn. 166; see post § 3027.

[v] Wyatt *v.* State, 8 Blackf. 507; Hendrick *v.* Com. 5 Leigh, 708.

[w] State *v.* Cameron, 2 Chandl. (Wisc.) 172; see post, § 3026, 3032.

[x] Fost. 42; Burn's Justice, Jurors, viii.

[y] Reading's case, 7 Howell's State Trials, 265; Oate's case, 10 Howell's State Trials, 1079; 4 Bl. Com. 353, note by Mr. Christian.

[z] R. *v.* Parry, 7 C. & P. 836.

[a] Stewart *v.* State, 8 Eng. (13 Ark.) 720; post, § 3029.

[b] U. S. *v.* Marchant, 4 Mason, 160; 12 Wheaton, 480; State *v.* Wise, 7 Richards, 412; State *v.* Smith, 2 Iredell, 402; see, however, People *v.* Bodine, 1 Denio, 281.

[c] Burn's Justice, Jurors, viii. [d] 2 Hawk. c. 43, sect. 28.

[e] R. *v.* Edmonds, 4 B & Ald. 492; 2 Hawk. c. 43, sect. 28.

[f] See cases cited infra; see, also, Pierce *v.* State, 13 N. H. 536; People *v.* Reyes, 5 Cal. 347.

[g] John. *v.* State, 16 Georgia, 200. [h] Williams *v.* State, 3 Kelly, 453.

mind to weigh the testimony, and therefore as being disqualified to sit as jurors in the case."[i] The question was accordingly sanctioned by the court, "Have you formed and expressed an opinion about the guilt of Colonel Burr?"[j]

§ 2979. When there were separate trials on a joint indictment, it was held by Baldwin, J., and Hopkinson, J., good cause of challenge on the second trial, that the juror said, that if the same evidence was to be adduced as on the former trial, the prisoner is guilty.[k]

§ 2980. So, also, on the trial of Hanway, in 1852, for treason,[l] Judge Grier and Judge Kane held that a juror who had formed an opinion that the "riots" in question either did or did not amount to treason, was incompetent; and in the last mentioned case it was held that a juror was incompetent who stated, on being challenged, that he had read the newspaper accounts of the facts at the time, and come to his own conclusions—*had made up his mind*, that the offence was treason, though he had not expressed that opinion,—nor apparently formed nor expressed an opinion that the defendant was or was not engaged in the offence. It was held at the same time that it did not constitute incompetency for a juror to say that he has formed a conditional, but not an absolute opinion on the law of treason: *e. g.*, who says he can't understand how treason can be committed against the United States if such and such facts do not constitute it: if he says that, on being instructed by the court, that the opinion is erroneous, such opinion will cease to influence him as a juror. It was said, also, that one who, without forming or expressing any opinion as to the matter to be tried, had "formed an opinion that the laws had been outraged," is competent; and so of one who had "certainly expressed an unfavorable opinion towards the course of these gentlemen,"—that is a party of persons with whom the prisoner agreed in opinion; the person summoned being sensible of no such bias as would affect his action as a juror; having neither formed nor expressed any opinion as to the guilt or innocence of the prisoner, or of the other persons charged to have participated with him in the offence; not presuming to be a judge whether the offence was treason; knowing none of these gentlemen individually" and meaning to express nothing more than an opinion against the transaction, and that the persons engaged in it ought to be punished.[m]

§ 2981. Still more recently, (in 1854,) Taney, C. J., laid down the following test in a criminal trial in Baltimore:

"If the juror has formed an opinion that the prisoners are guilty and entertains that opinion now, without waiting to hear the testimony, then he is incompetent.[n] But if, from reading the newspapers or hearing reports, he has impressions on his mind unfavorable to the prisoners, but has

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[i] Marshall, C. J., 1 Burr's Trial, 416; see, also, U. S. *v.* Woods, 4 Cranch, C. C. 484.

[j] Marshall, C. J., 1 Burr's Trial, 367.

[k] U. S. *v.* Wilson, 1 Bald. 78.

[l] 2 Wall. Jr. 143.

[m] 2 Wall. Jr. 143.

[n] See post, § 3221.

no opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, then he is competent."

§ 2982. In Maine, in a late criminal trial, thirty-six jurors were called. To each one the oath was administered, to make true answers to such questions as should be asked by the court or by their order. The questions which the prisoner's counsel put to the most of them were, in substance, whether they had formed or expressed any opinion as to the innocence or guilt of the prisoners, and whether they were conscious of any bias or prejudice against them.

§ 2983. The inquiries then made by the counsel for the state were, in substance, in most of the cases, whether the juror had any conscientious scruples which would prevent him from returning a verdict against the prisoners, if the proof should show them to be guilty; and whether he was related to either of the prisoners.

§ 2984. It was permitted to both parties to ask, in various forms of language, whether the juror was conscious of any such bias or preference as to prevent his acting with impartiality, and whether he had heard, read or conversed upon the subject; together with such connected questions as should elicit the views and feelings of the juror upon the subject-matter.

§ 2985. Of the thirty-six, who were thus examined upon the *voir dire*, there appeared to be twenty-five who had not formed such an opinion of the innocence or guilt of the prisoners, and who did not entertain such conscientious scruples as to disqualify them to try the case. Of these, thirteen were challenged peremptorily, and the other twelve were sworn as jurors. Three of the twenty-five were opposed to the law inflicting capital punishment in any case; but, believing it to be the duty of each citizen to acquiesce in the existing laws of the land, they said they should have no conscientious scruples in returning a verdict of guilty, if such should be the proof. The remaining eleven were set aside by the court, four of them having formed opinions as to the guilt of the prisoners; six of them being conscientiously scrupulous of returning a verdict of guilty, in any case where the death penalty might be inflicted; the other merely stating, without offering the ground of his objection, that he could not return a verdict of guilty in any case where the punishment might be death.[o]

§ 2986. In New Hampshire, where jurors have heard the prisoner tried upon another indictment, before another jury, and found guilty, and answered upon inquiry that they had formed an opinion of his guilt upon the second indictment, which was pending at the same time, from the evidence which they had heard on the other trial, they were held to be incompetent.[p]

§ 2987. In Massachusetts, a juror having said upon the *voir dire*, that he had formed an opinion from what he had heard, but that he did not know how much he might be influenced by it, was allowed to be challenged for

[o] State *v.* Jewell, 3 Redding, 583.
[p] State *v.* Webster, 13 N. H. 491.

cause.[q] A juror, however, it is said, cannot be asked whether he considers

[q] Com. v. Knapp, 9 Pick. 496. The practice in Massachusetts is exhibited with great accuracy in Mr. Bemis' Report of the Webster Case, p. 8. "Mr. Sohier, for the defence, moved that the statute question, in regard to certain disqualifications of the jurors, be put to them before the prisoner should be called upon to exercise his right of challenge.

"By the Chief Justice. The usual course is to be pursued. We have uniformly held, since the adoption of the revised statutes, that, on motion of counsel on either side, the court would put the usual interrogatories to the jurors, to ascertain if they had formed or expressed any opinion; and also, whether they had conscientious scruples, or such opinions on the subject of capital punishment as to preclude them from finding a defendant guilty. If the prisoner intends to challenge peremptorily, he must exercise that right before the jurors are interrogated. (Com. v. Rodgers, 7 Met. 500.)

"Mr. Wilde then addressed the juror and prisoner: 'Prisoner, look upon the juror; juror, look upon the prisoner.'

"The first juror being challenged peremptorily by the prisoner, on the second being called and passed to the examination upon his statute qualifications, the Chief Justice quoted and read the provisions of the 95th chapter, 27th section, of the revised statutes, which are as follows: 'The court shall, on motion of either party, in any suit, examine on oath any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection.' Accompanying the reading, the judge added the explanation, for the benefit of all the panel who had been summoned, that the material inquiries contemplated by the statute, as applicable to a case like the present, were, whether the juror had formed or expressed an opinion, or was sensible of any bias or prejudice in regard to it. In reference to the word 'prejudice,' a pre-judgment of the case, and not necessarily an enmity or ill-will against either party. The statute intended to exclude any person who had made up his mind or formed a judgment in advance, no matter in favor of which side. Still the opinion or judgment must be something more than a vague impression, formed from casual conversations with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the question, as would be likely to bias or prevent a candid judgment, upon a full hearing of the testimony. If one had formed what in some sense might be called an opinion, but which yet fell short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror.

"He then referred to the indictment to inform the jurors what the nature and character of the charge against the prisoner was, which they were empannelled to try. They were also informed that the law looked to the forming and to the expression of an opinion as distinct acts, each of such a character as would be likely to influence his future judgment, incline him to maintain such opinion, and thus affect his impartiality.

"The question was then proposed in this form:—Have you expressed, or have you formed any opinion on the subject-matter now to be tried; or are you sensible of any bias or prejudice therein?

"The second juror having answered that he had both formed and expressed an opinion in the sense explained by the court, he was set aside, and the clerk proceeded to call the third; he, having been passed by the prisoner, and answered the statute question proposed to the former juror in the negative, was then interrogated by the chief justice (upon the motion of the attorney-general) whether he had any such opinion as would preclude him from finding any defendant guilty of an offence punishable with death.

"The Chief Justice, in reference to this inquiry, quoted, and commented on the 6th section of the 137th chapter of the revised statutes. 'No person, whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death, shall be compelled or allowed to serve as a juror, on the trial of any indictment for such an offence.'

"The third juror, Mr. Thomas Barrett, having answered this inquiry in the negative, the court directed that he be sworn in chief; whereupon the clerk administered to him the following oath, prescribed by the 137th chapter, 7th section, of the revised statutes: 'You shall well and truly try, and a true deliverance make, between the commonwealth and the prisoner at the bar, whom you shall have in charge, according to your evidence; so help you God.'

the facts set forth in the indictment constitute a proper subject for punishment.[r]

A person indicted is not entitled to have the jury asked, before they are impanelled, whether they have formed or expressed an opinion as to the credibility of a witness, whose testimony is to be relied on in support of this indictment, and who testified, and whose credibility was in question, in another case before them. Nor can the defendant be allowed to prove on the trial of this indictment, that the jury have declared that they would believe this witness.[rr]

The judge presiding at a criminal trial may exclude from the panel jurors who state, in answer to his questions, that they have formed and hold such an opinion of the unconstitutionality of the statute on which the prosecution is founded, that if persisted in they cannot convict the defendant, whatever the evidence may be.[s]

§ 2988. In Connecticut, while the jury were being empannelled for the trial of an indictment for murder, A. was called as a talesman, and being inquired of whether he had formed any opinion as to the prisoner's guilt, said that soon after the prisoner's arrest, he read certain newspaper accounts of what purported to be his confessions, and upon reading them he was of opinion that, if those accounts were true, a horrid murder had been committed, but he had formed no opinion as to the truth or falsity of them; and remarked to his family, while reading the accounts, that the case in the trial would probably turn out to be a very different affair. He added that he had not any settled opinion on the subject, and felt that he could render an impartial verdict. It was held that he was not disqualified by bias to sit as a juror in the cause.[ss]

§ 2989. In New York it has been laid down generally, that the law attaches the disqualification to the fact of forming and expressing an opinion,

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"Mr. Benjamin H. Green (the ninth juror of the panel as finally made up) stated, in reply to the inquiry in regard to his opinions upon finding a verdict in a case punishable with death, that he was opposed to capital punishment, but that he did not think that his opinions would interfere with his doing his duty as a juror; that as a legislator he should be in favor of altering the law, though he believed he could execute it as a juror, as it was.

"The Chief Justice, after conferring with the other judges, intimated to him that the state of his opinion was a matter which he must decide for himself; that, as he had stated it, the court did not consider him disqualified. Mr. Green, after some hesitation, took the oath.

"After the other jurors had been sworn, and when the name of Mr. Green was called to take his seat upon the panel, he stated to the court that he thought it inconsistent for him to serve as a juror, holding the opinions he did, and should prefer being let off. The Chief Justice remarked, that it was a question to decide, whether his opinions would prevent his giving an unbiassed verdict. Mr. Green replied, that he thought he could give an unbiassed judgment; yet he had a sympathy for the prisoner and his family, and feared that his opinions in relation to capital punishment might influence others of the jury. The court, upon conference, ruled that his case did not come within the statute, and he was not excused."

[r] Com. *v.* Burrell, 16 Pick. 153. The shaping and propounding of the interrogatories are certainly within the discretion of the court. (Com. *v.* M'Gee, 6 Cushing, 177.)

[rr] Commonwealth *v.* Porter, 4 Gray (Mass.), 423.

[s] Com. *v.* Austin, 7 Gray (Mass.), 51.

[ss] State *v.* Potter, 18 Conn. 166.

and does not look beyond to examine the occasion or weigh the evidence on which that opinion was founded.[t] "There is no distinction," it was said, "as to the grounds of the opinion formed by the juror of the guilt of the accused; whether it be founded on being an eye-witness, or on hearing the testimony of those who were present at the transaction, or whether it is based on rumors, reports, and newspaper publications; in either case it is a good cause of challenge."[u] "If a juror," it was declared in another case, "have expressed an opinion against the party, though from his knowledge of the cause and not from any favor or ill-will, yet this is a principal cause for challenge."[v] So a challenge to a juror for a principal cause was sustained where the juror had said that he believed the defendant was guilty, although he testified that he had no fixed opinion upon the subject of the defendant's guilt; that he only entertained impressions derived from history and common reports, meaning thereby printed statements in papers, and reports in conversation; that he had never heard witnesses to the transaction testify nor say anything on the subject in question; if the evidence supported the circumstances he had heard, he had a fixed belief respecting the guilt of the defendant; if these circumstances should be done away by evidence, he should not consider him guilty.[w] The mere forming of an

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[t] People *v.* Marvin, 4 Wendell, 229; People *v.* Bodine, 1 Denio, 281; Blake *v.* Millspaugh, 1 Johnson, 316; Pringle *v.* Hnse, 1 Cowen, 432.

[u] People *v.* Mather, 4 Wendell, 22. [v] Ex parte Vermilyea, 6 Cowen, 555.

[w] People *v.* Mather, 4 Wendell, 22; People *v.* Bodine, 1 Denio, 281. In a very recent case in New York, Beardsley, J., considered the learning on this head with great fulness and ability. "Several persons," he said, "drawn as jurors, were, in the first place, challenged for principal cause by the counsel for the prisoner; but the court held that these challenges were not sustained by the evidence adduced in their support. Challenges for favor were then interposed; but the jurors were found by the triers to be indifferent. Various exceptions were taken by the prisoner's counsel to points made and decided in disposing of these challenges; and, although the several jurors thus challenged were ultimately excluded by the peremptory challenges of the prisoner, it is now urged that these exceptions are still open to examination and review in this court. I think otherwise. The prisoner had the power and the right to use his peremptory challenges, and the court cannot judicially know for what cause or with what design he resorted to them. (The People *v.* Bodine, 1 Denio, 310.) He was free to use, or not use them, as he thought proper; but having resorted to them, they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions, growing out of the various challenges for cause, would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually, and as I think effectually, blotted out all such errors, if any, as had previously occurred in regard to them.

"But the case of the juror Beach stands on other grounds. He was first challenged, as is said, for principal cause, which, after evidence had been given, was overruled by the court. He was then challenged for favor, but the triers found him to be indifferent. No peremptory challenge was made, and he served as one of the jury. As to this juror, every exception taken by the prisoner's counsel is now here for examination and review.

"When a juror is challenged for principal cause, or for favor, the ground of the challenge should be distinctly stated; for without this the challenge is incomplete, and may be wholly disregarded by the court. It is not enough to say, I challenge for principal cause, or for favor, and stop there; the cause of the challenge must be specified. In Mann *v.* Glover, (2 Green's R. 195,) the court say: 'A party cannot make a principal challenge, or a challenge to the favor, by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor; and so determine by what forum it is to be tried; and secondly, whether the facts, if true, are sufficient to sup-

opinion, also, without its expression, is considered a sufficient ground of exclusion.[x] An *impression*, however, does not disqualify.[y] Nor does a hypothetical opinion.[yy]

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port such challenge.' Again, the challenger must 'state why the juror does not stand indifferent; he must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he is not or may not be impartial. In the former case the challenge would be a principal one, triable by the court; in the latter, it would be to the favor, and submitted to triers.'

"These views are sound and appropriate, and their observance would greatly promote order and convenience in the determination of challenges. I am aware that challenges are not unfrequently made in general terms, which merely indicate the supposed character of the challenge, as for principal cause or for favor, but without designating the particular grounds by which, if at all, they must be sustained. In this posture of the question, as far as a question can be said to have been made, the parties proceed to the examination of witnesses before the court or triers as the case may be. No issue has been joined, and no matter of fact alleged by either party. What is to be tried? It can hardly be determined in such a state of things whether the question is one of fact or of law, and the proceeding is obviously inconvenient and irregular.

"Challenges for principal cause may become part and parcel of the record, and should therefore be made in due form. They may be demurred to, and unless some cause, sufficient of itself to raise the legal presumption of unindifference is alleged, the challenge must of course be overruled. But the opposite party is not bound to demur; he may take issue on the facts stated as ground for the challenge, or may counterplead new matter in avoidance. Thus an issue of fact may be joined, which must be decided upon the evidence to be adduced by the respective parties. By pursuing the orderly mode of requiring the challenger to specify the grounds of his challenge, and the opposite party to demur, take issue, or counterplead, questions of law and fact will be kept distinct, and, as I apprehend, the convenience of the parties, as well as that of the court, will be greatly promoted.

"The case of Mann *v.* Glover has not been referred to as containing any new doctrine, but because it presents a terse summary of the law on this subject. All challenges, except such as may be made peremptorily, are *for cause;* and unless some cause is stated by the challenger, the objection cannot justly be called a challenge, nor should it be regarded as such.

"The bill of exceptions does not show, in terms, what cause of challenge was alleged against the juror Beach; it is only said he was challenged 'for principal cause.' But from the scope and character of the evidence given to maintain the challenge, the inference is plain that it was alleged the juror had formed and expressed an opinion that the prisoner was guilty of the crime for which he stood indicted. This was good cause of principal challenge, as has repeatedly been held by this court. (Ex parte Vermilyea, 6 Cowen, 555; 7 Ibid. 108: The People *v.* Mather, 4 Wend. 229; see also Mann *v.* Glover, supra; The State *v.* Benton, 2 Dev. & B. 196; Irvine *v.* Kean, 14 S. & R. 292; The Com. *v.* Lesher, 17 Ib. 155.)

"We must then understand this cause of challenge to have been alleged, and as evidence was gone into, the fact must have been expressly or virtually denied by the public prosecutor. An issue was thus joined to be tried by the court; and if the fact alleged was found to be true, the juror was necessarily excluded. Every challenge for principal cause, must be for some matter which imports absolute bias or favor, and leaves nothing for the discretion of the court. The truth of the fact alleged, and that alone, is in question. Its sufficiency, as a ground of challenge, is conceded by omitting to demur and taking issue on the fact. It is otherwise, on a challenge for favor. That must be determined by triers, who are to pass upon the question of actual bias or favor. They are final judges upon the matters submitted to them; and from their decision, when properly instructed, the law has provided no appeal.

"The challenge of the juror, Beach, for principal cause, was not, in my opinion, sustained by the evidence, and was correctly overruled. He had only an impression

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[x] People *v.* Rathbun, 21 Wendell, 509; see Armstead *v.* Com., 11 Leigh, 657; Heath *v.* Com., 1 Robinson, 735.

[y] People *v.* Honeyman, 3 Denio, 84.

[yy] People *v.* Fuller, 2 Parker, C. R. 16.

§ 2990. A juror having stated before the triers that he had formed no opinion, and had no impressions as to the guilt of the prisoner, but that it

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that the prisoner was guilty, but nothing which deserved to be called an absolute opinion. He had doubts of the prisoner's guilt, and as far as any opinion had been formed, it was contingent and hypothetical. Such impressions or opinions fall short of what is required to maintain a challenge for principal cause. (People *v.* Bodine, 1 Denio, 281, 306; People *v.* Mather, 4 Wendell, 243, and cases there cited; Mann *v.* Glover, supra; Irvine *v.* Lumbermen's Bank, 2 W. & S. 190, 202.)

"The challenge for principal cause having been overruled, or, in other words, found not to be sustained by the evidence given in its support, this juror was challenged for favor, and the question of his indifference was submitted to triers, on the same evidence which had been given to the court on the trial of the challenge for principal cause. As the bill of exceptions states, the court charged the triers the same as in the case of the juror, Taylor, to which charge, and every part and portion thereof, the counsel for the prisoner exc pted.

"In the case of the juror, Taylor, evidence was given, tending to show that he had decided impressions against the prisoner, and a pretty strong belief of his guilt; and in the case of Beach, the evidence, although less decisive, was of the same character. The court charged the triers, in the case of the juror, Taylor, amongst other things, that the resort to the triers, by the prisoner's counsel, was in the nature of an appeal from the opinion of the court on the facts, and that a hypothetical opinion formed by the juror did not disqualify him. These points were distinctly stated in the charge, and, as it seems to me, are plainly reached by the exceptions as taken. The charge embraced several distinct propositions, amongst which were those I have stated; and although a separate and formal exception was not pointed at each of these positions, as laid down by the court, the exception as taken, was, in my opinion, fully sufficient to apprise the court and the counsel of what was intended. In terms, the exception extended to 'every part and portion' of the charge, which would seem to be sufficient to reach every distinct position of the law which had been laid down by the court. At all events, in a capital case, where it is obvious that the court regarded the exception as stated fully sufficient for the occasion, I do not feel at liberty to overlook it as deficient in the requisite degree of certainty.

"Then, as to the legal positions laid down by the court, and which have already been stated, it seems to me they cannot be maintained. I would not be understood to hold that a hypothetical opinion necessarily disqualifies a juror. It clearly does not. If such was its effects it would uphold a challenge for principal cause, which it will not. Still, it is some evidence of bias, and upon which triers, in their discretion, may set a juror aside. (The People *v.* Bodine, supra.) The court should not instruct them, as matter of law, as was done in this case, that such an opinion does not disqualify a juror; for this, in effect, is charging them that he cannot be set aside on that ground.

"If the triers find that bias actually exists in the mind of the juror, although it is proved only by the formation of a hypothetical opinion, they may, and ought to, reject him. Some minds are so constituted that such an opinion would exert a controlling influence in the jury-box, while with others its influence would be neither seen nor felt. All this is to be considered and passed upon by the triers. No rule can be laid down which will enable them, in every case, to determine with unerring certainty that the juror is or is not indifferent between the parties. It is not a question to be solved by a rule of law, but by the common sense of the triers; and if this has fair play, the difficulty will rarely be found very great. The triers must find that the juror stands impartial and indifferent, or they should reject him. It is the province of the court to say what evidence is admissible on the question of indifference; but its strength and influence, in establishing the allegation of favor or bias, are for the triers alone to determine. The court erred in instructing these triers that the juror could not be found unindifferent on evidence that he had formed a hypothetical opinion of the guilt of the prisoner. The instruction should have been, that this was evidence to be considered by the triers; and if it convinced them that actual bias existed, the juror ought to be excluded, but if his mind was, notwithstanding, found to be impartial and unbiassed, the objection should be disregarded.

"I know of no sense in which a resort of triers, by a challenge for favor, can be rightly regarded as an appeal from the decision of the court on a challenge for principal cause. The latter species of challenge is allowed on some ground, from which the law infers partiality or bias; and where the fact is put in issue, the court has only to find whether it is true or not. If true, the law adjudges indifference, and the juror is necessarily excluded. The court is not to pass upon the question of actual bias, but

had been and still was his impression, that the general character of the prisoner was bad,—the question was then put to the juror whether he would disregard what he had heard and read, and render his verdict according to evidence. It was held, that the question, though inartificially put, substantially called for the consciousness of the juror as to his ability to try the cause impartially, and therefore that it was properly allowed.[z]

§ 2991. In New Jersey, Chief Justice Hornblower, in 1846, on the trial of a party charged with a capital offence, said:—"It has been supposed that an opinion of guilt, founded upon newspaper reports, or other information or personal knowledge, disqualifies a man from being a juror. But this is not so. It has been solemnly declared by our own Supreme Court, in Mann *v.* Glover,[a] that a hypothetical opinion founded on the supposition that the facts detailed are true, is no cause of challenge. And I have no hesitation in saying, that a bystander who sees the commission of a homicide, or any other breach of the peace, is a perfectly competent juror, as much so as a witness to a bond or other contract between private parties would be on a trial concerning such bond or contract. It is a common occurrence, both in civil and criminal causes, to see jurors on the panel called as witnesses to prove some material facts in their knowledge relating to the matter in question.

§ 2992. "A declaration of opinion to disqualify a juror, therefore, must be such as implies malice or ill-will against the prisoner; thereby showing that the person challenged does not stand indifferent between the state and him. This is the uniform language of the books and cases which are of authority under our constitution, as well as of the English courts up to the present time.

§ 2993. "As to the mode of proving a challenge, the law of evidence is the same as in other cases. Proof may be made by records, papers, or witnesses, either to support the challenge, or to disprove it. The juror

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simply to ascertain the truth of the alleged cause of challenge; for if that is true, it follows that the jury is unindifferent.

"But on a challenge for favor, no such isolated question is presented to the triers. They are first to inquire whether the alleged cause or ground of challenge is true in fact. But this is not all; for supposing its truth to be established, they must then pass upon the effect it has produced on the mind of the juror, and find whether the consequence has been actual bias or favor. The triers must come to this conclusion, before they can exclude a juror on a challenge for favor. But as no such question is to be decided by the court, on a challenge for principal cause, the charge in this case, that the resort to the triers was an appeal from the decision of the court, was erroneous.

"Besides, the tendency of such a charge must be to prejudice the prisoner on the question to be decided by the triers; for it virtually places them in the position of persons sitting in the judgment on what had immediately before been determined by the court. It should never be lost sight of, that triers are to ascertain the real state of the mind of the juror, to determine whether he is truly impartial and indifferent between the parties, without favor or bias as to either; and that all the evidence given is only allowable as material to enable the triers to come to this result. On this part of the case, my opinion is, that there was error in the instructions to triers, and for which the judgment should be reversed, and a new trial ordered." (Freeman *v.* People, 4 Denio, 31; Beardsley, J.)

[z] Lohman *v.* People, 1 Comstock, 379. [a] 2 Green, 195.

himself may be examined as to his statutory qualifications, or to any other matter not going to his honor or discredit.

§ 2994. "But it has been repeatedly decided, that it does go to his discredit to ask him if he has formed or expressed an opinion on the matter in issue, or that the prisoner is guilty. For, as this is no ground of challenge unless expressed in such a manner as to evince malice or ill-will to the prisoner, it would be great injustice to the juror, and a legal impropriety which the court should not tolerate, to compel him, by his own testimony to convict himself of what the law deems disreputable conduct.[b]

§ 2995. "I know that this practice has been suffered, on former occasions, by my brethren on the bench, as well as by myself, but it was an unauthorized departure from the rules of the common law, and yielded to under the pressure of high judicial examples in other states.

"It is a practice productive of delay, vexation and expense; and if continued, would involve us in the same embarrassments in the administration of justice, that have occurred in some of our neighboring states.

§ 2996. "If the course which I shall deem it my duty to pursue on this subject shall, in the result of this trial, be supposed to have prejudiced the rights of this prisoner, an opportunity will be afforded of referring the question to the adjudication of the Supreme Court. For myself, I am desirous of leaving my testimony on record of what I believe to be the law of New Jersey in relation to this matter; and of doing what in me lies to bring back our criminal practice in this particular, to the safe and tried rules of the common law."[c] As the defendant was acquitted, this opinion was never reviewed by the Supreme Court.

§ 2997. In Pennsylvania, on the trial of a civil issue, it was held that a juror was incompetent who had heard all the evidence on a former trial, and had made up and expressed his opinion on the facts then given in evidence, but who said that his mind was always open to conviction on another state of facts.[d]

§ 2998. In Delaware the test adopted by Marshall, C. J., in Burr's case, appears to have been received.[e]

§ 2999. In Virginia, it is said, that upon a question, whether one called as a juror in a case of felony, and challenged for cause, stands indifferent or not, the general rule is, that one who has formed a decided opinion that the prisoner is guilty or innocent, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, or conversation with witnesses, or common report, is not an indifferent juror; and that it is immaterial whether such opinion has been expressed or not. If the person called as a juror, it was urged, has been so inconsiderate and unjust as, upon insufficient or no evidence, to have prejudged the prisoner's

[b] 4 B. & A. 471; S. P. State *v.* Fox, 1 Dutch. (N. J.) 566.
[c] State *v.* Spencer, 1 Zabriskie, 196; State *v.* Fox, 1 Dutch. (N. J.) 566.
[d] Irvine *v.* Kean, 14 Serg. & R. 292; see People *v.* Mather, 4 Wendell, 22, ut supra.
[e] State *v.* Benwell, 2 Harrington, 529.

cause, much more is he unfit to be trusted with it as a juror. Thus, where a person called as a juror stated that "he had a conversation with the prosecutor shortly after the alleged offence committed, and heard from him a general statement of the facts, though he did not know whether that statement mentioned all the facts; on that statement he had *formed and expressed a decided opinion* that the prisoner was guilty; he knew the prosecutor, and had entire confidence in his veracity; he had forgotten some of the circumstances by him related: and the opinion he had formed was not such but that it would yield to evidence; he would try the prisoner's cause by the evidence alone, and had no doubt he could give him a fair trial; he had no prejudice against him:" upon a challenge for cause, it was held, this person was not indifferent, and the challenge should have been sustained.[f] But where a person being called as a juror in a case of felony, said, on *voir dire*, "that he had expressed an opinion on the circumstances as he had heard them narrated in the country; but he had not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties; and he did not think the opinion so formed would have any influence on his mind, in trying the case; it was held, he was an indifferent juror, and the challenge for the cause rightly disallowed.[g] Where a juror, examined as to his indifferency on his *voir dire*, declared "he had heard reports concerning the case in the country, and a statement of the circumstances from one of the witnesses, and had formed a hypothetical opinion, but he believed it would not influence his mind as a juror; he believed the account he had heard of the case at the time he heard it, (and he did not now express any doubt of its truth;) if the evidence at the trial should correspond with the account he had heard, his former opinion would remain, but if it should be different, he felt satisfied he should be able to decide the cause, without being influenced by what he had before heard, and without prejudice," and it did not appear that the witness had ever before expressed the opinion he had so formed; it was held, that such preconceived hypothetical opinion did not constitute good cause of challenge to the juror. To constitute good cause of challenge to a juror, on the ground of preconceived opinion of the cause formed by him, it was said, it must appear that such preconceived one was a decided one, and not hypothetical.[h] So where a juror was examined on his *voir dire*, and said he had heard part of the evidence on a former investigation, and formed some opinion thereon, yet the opinion so formed would nowise incline his mind, as a juror, for or against the prisoner, but that he could pass upon the case, on the whole evidence, as impartially as if he had never heard of it; it was held, that such person was a good and impartial juror.[i] A person is not rendered incompetent as a juror in a criminal case, it was repeated by the

[f] Armstead *v.* Com., 11 Leigh, 657; see Heath *v.* Com., 1 Robinson, 735.
[g] Brown *v.* Com., 11 Leigh, 769.
[h] Osander *v.* Com., 3 Leigh, 780; see also Sprowl *v.* Com., 2 Virg. Cas. 375; Heath *v.* Com., 1 Robinson, 735; Pollard *v.* Com., 5 Randolph, 659.
[i] Hendrick v. Com., 5 Leigh, 708.

same court on a later occasion, by the formation of a legal opinion upon facts previously presented to his mind, as he would be by the formation of previous conviction in respect to the existence of facts themselves.[j] On the trial of an indictment, in which the prisoner was charged in some counts with the embezzlement of a check, and in others with the embezzlement of notes and dollars to the same amount, a juror on his *voir dire* declared that he had formed and frequently expressed, a decided opinion of the prisoner's guilt, but that he did not know that such opinion applied particularly to the charge laid in the indictment; (there being other indictments for the larceny of the checks and money;) that his opinion was a general one, that the prisoner was guilty of embezzling checks of the bank, and that it related as much to one check as another: it was held, that such juror ought to be excluded.[k] Hasty expressions of a juror, who swears that he has formed no opinion of the guilt of the prisoner, and feels no prejudice against her, do not render him incompetent.[l] And in the same state when a venireman when called stated "that he had not heard any of the evidence, nor had he heard any report of it from those who had heard it; but from the rumor of the neighborhood had formed an opinion which was at the time he spoke existing in his mind, and which he would stick to unless the evidence should turn out to be different from what rumor reported it to be. That he had no prejudice nor partiality for or against the prisoner, and believed he could give him a fair and impartial trial according to the evidence that should be given in." It was held that he was a competent juror, and a challenge of him for cause by the prisoner, was ruled to be properly overruled.[m]

§ 3000. It is not enough to disqualify a juror, according to the view of Leigh, J., "that if the facts and circumstances proved on the trial should be the same with those which the jurors had heard, then they had a decided opinion."[n] An opinion founded on mere rumor, ought *prima facie* to be regarded as a mere hypothetical opinion, forming no ground for challenge, unless it appear that the opinion formed is a decided one, likely to influence the juror in this decision.[o]

§ 3001. A talesman, when examined on his voir dire, said that he had heard a great deal said about the case, but that he had not heard or read the evidence given at the examinations before the mayor or Hustings Court; and that he had formed no opinion on the subject. He then stated that since the prisoner had been in jail, his wife and family had moved to the lot adjoining his residence, and had lived there; that they were often at his house, and that there was great intimacy between the families, and on that account he would rather not sit in the case, that his mind might be influenced; and in answer to a question from the court, he said he was

[j] Heath *v.* Com., 1 Robinson, 735; see Com. *v.* Russell, 16 Pick. 158.
[k] Lithgow *v.* Com., 2 Virg. Cas. 297. [l] Hailstook's case, 2 Grat. 564.
[m] Clore's case, 8 Grattan, 606; see also Wormeley *v.* Com., 10 Grattan, 658.
[n] Epes's case, 5 Grat., 674.
[o] Armistead's case, 11 Leigh, 657; Epes's case, 5 Grat. 681; see Wormeley *v.* Com., 10 Grattan, 658.

unwilling to trust himself under the circumstances. He thought he could give the prisoner a fair trial on the evidence, that he had no prejudice for or against the prisoner, there was no connection by blood or marriage between them, and that he had never spoke to the prisoner's wife or family on the subject of the trial. It was held that he was a competent juror, and that it was error to set him aside.[p]

Where one of the grand jury which found the indictment, is one of the jury which is to try the prisoner for felony, the prisoner, if he is guilty of no laches in making the discovery, may object to the juror at any time before the evidence is introduced; and, it seems also, the Court may discharge him at any time before the verdict is rendered. And the propriety of examining the juror, or taking his statements, on his *voir dire*, is, to say the least, doubtful.[pp]

§ 3002. In North Carolina, the rule is, that an opinion fully made up and expressed against either party, on the subject-matter of the issue to be tried, is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is, founded on the supposition that facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but may be urged by way of challenge to the favor, which is to be allowed or disallowed, as the triers may find the fact of favor or indifferency.[q] In the same state, on a challenge for cause, the juror stated "that he had formed and expressed an opinion adverse to the prisoner, upon rumors which he had heard; but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner." The court found the juror indifferent, and the Supreme Court refused to reverse the decision.[r]

In Ohio, the act of March 3, 1860, provides,

That upon the trial of any person charged with an offence made criminal by any law of this state, if a juror summoned in such case and under examination touching his competency to serve as such juror therein, shall state that he has formed an opinion, or has formed and expressed an opinion as to the guilt or innocence of the accused, and shall be objected to for that reason, the court shall thereupon proceed to examine such juror as to the grounds of such opinion, and if it shall appear to have been founded upon reading newspaper statements or reports, or upon rumor or hearsay, and not upon conversation with witnesses of the transaction, or hearing them testify, and the juror shall say that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror will render such impartial verdict, may, in its discretion, admit such juror as competent to serve in such case.

SECTION 2. This act shall take effect and be in force upon its passage.[rr]

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[p] Montague *v.* Com., 10 Grattan, 767, 768.

[pp] Dilworth *v.* Com., 12 Gratt. (Va.) 689.

[q] State *v.* Benton, 2 Dev. & Bat. 196.

[r] State *v.* Ellington, 7 Iredell, 61.

[rr] See also the following:—

Principal causes for which a petit juror may be challenged. If there shall be empanneled, for the trial of any cause, any petit juror who shall have been convicted of

Shortly before the passage of this statute, it was held that a juror challenged for cause, who states upon his *voir dire* that he has formed an opinion as to the commission of the crime and as to the guilt or innocence of the prisoner, and further states, that he does not think that the opinion thus formed will influence his verdict, should be set aside as an unsuitable juror.[s]

§ 3003. In a capital case, it is said, in Alabama, it is not ground of peremptory challenge of a juror, that he has formed upon common report and expressed an opinion of the guilt of the prisoner, if the juror believes that such opinion would have no influence in the formation of his verdict, should the evidence on the trial be different from the report of the facts.[ss] Under the statute of Alabama of 1831, which provides that if a juror, in a capital case, has formed and expressed an opinion founded upon rumor, he shall be sworn in chief, it must appear that such opinion was founded upon mere rumor. Where it appears that the opinion was formed upon facts well authenticated by persons in whom the juror had confidence, it is good ground for challenge for cause [t]

§ 3004. In Mississippi the rule is, that while it is not necessary, to exclude a juror, that he should have formed and expressed his opinion against the accused with malice or ill-will, a mere hypothetical opinion, from rumor only, and subject to be changed by the testimony, does not disqualify.[tt] If a juror, however, has formed a fixed opinion, he ought to be excluded, though he may never have expressed that opinion.[u] When the juror said that he had formed and expressed an opinion from rumor only, but that his mind was free to act upon the testimony, he was held competent.[v] A juror being examined on his *voir dire*, was asked, "Have you formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar?" Answer. "I have." Question. Have you formed or expressed that opinion from common report, or from the witnesses, or either of

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any crime, which by law renders him disqualified to serve on a jury; or who has been arbitrator on either side relating to the same controversy; or who has an interest in the cause; or who has an action depending between him and either party; or who has formerly been a juror in the same cause; or who is either party, employer, employee, counselor, agent, steward, or attorney, or who is subpœnaed in the cause as a witness; or who is akin to either party; or any person who shall have served once already on a jury as a talesman in the trial of any cause in the same court during the term, he may be challenged for such causes, in either of which cases the same shall be considered as a principal challenge, and the validity thereof be tried by the court; and any petit juror who shall be returned upon the trial of any of the causes hereinbefore specified, against whom no principal cause of challenge can be alleged, may, nevertheless, be challenged on suspicion of prejudice against, or partiality for either party, or for want of a competent knowledge of the English language, or any other cause that may render him at the time an unsuitable juror; and the validity of such challenge shall be determined by the court; and each party may peremptorily challenge two jurors. *Act of Feb'y 25th*, 1859, *Sect.* 1.

[s] Fouts *v.* State, 7 Ohio (N. S.) 471. [ss] State *v.* Williams, 3 Stewart, 454.

[t] Quesenbury *v.* State, 3 Stew. & Port. 308.

[tt] Ogle *v.* State, 33 Missis. 383.

[u] State *v.* Johnson, 1 Walk. 392; State *v.* Hoover, Ib. 318.

[v] King *v.* State, 5 Howard's Miss. R. 730.

them ?" Answer. "Common report only; I have never heard any of the witnesses say anything on the subject." Question. "Will anything you have heard or said respecting the prisoner, have any influence on your mind as a juror, in the determination of this cause ?" Answer. "It will not. I feel free to decide the case according to the evidence which may be produced on the trial." Such an individual was held a competent juror.[w] While it seems that a person who had formed or expressed an opinion as to the guilt or innocence of the prisoner, from mere rumor, is not absolutely disqualified as a juror, yet if he have formed or expressed the opinion from what he has heard one say some of the witnesses had told him, he is disqualified, though he himself had not heard any of the witnesses say anything on the subject, and though he stated that his opinions were not such as would influence his verdict, but that he would be governed by the evidence.[x] The formation of an opinion by one who had heard all the testimony, is a disqualification; while one who has formed a hypothetical opinion from rumor, and who at the same time declares he could render an impartial verdict, will be a competent juror: between these extremes, the qualification or disqualification must depend on the circumstances of each case; absolute freedom from preconceived opinion should be required where it can be had; yet where, from the notoriety of the transaction, or other cause, that cannot be obtained, as near an approximation to it as possible should be had.[y]

Where a juror, being asked if he had formed an opinion as to the guilt or innocence of the prisoner, answered that he had, and, after being challenged for cause by the prisoner, said, in answer to questions by the court, that his opinion was formed from rumor, and that his mind was as free to act upon the testimony as if he had heard nothing about the case, it was held, that it was error for the court to require the prisoner either to accept the juror or to challenge peremptorily.[yy]

In Tennessee, it has been declared that loose impressions and conversations of a juror, as to the prisoner's guilt or innocence, founded upon rumor, would not, if disclosed by him or others to the court, on the selection of the jury, have the effect to set him aside as incompetent; nor, if disclosed after verdict, be a cause of new trial.[z]

A juror said, on the morning of the trial, "I have formed my opinion as to that case: I believe he ought to be hung." Again: "Damn him, he ought to be hung." It was held, on error, that he should have been rejected as incompetent.[a]

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[w] State *v.* Johnson, 1 Walker. 392.
[x] Nelins *v.* States, 13 Smedes & Marshall, 500.
[y] Sam *v.* State, 13 Smedes & Marshall, 189.
[yy] Cotton *v.* State, 31 Miss. (2 George,) 504.
[z] Howerton *v.* State, Meigs, 262; Alfred *v.* State, 2 Swan, 581; Major *v.* State, 4 Sneed, (Tenn. 597;) but see M'Gowan *v.* State, 9 Yerger, 184.
[a] Brakefield *v.* State, 1 Sneed, (Tenn.) 215.

A juror, on his examination by the Court, stated that "shortly after the killing, and while he was looking at the body of the deceased, he inquired of the bystanders how the killing occurred; being told that it was done without provocation, he said that the prisoner ought to be hung." But he also stated, that he had no opinion now. The court held him competent. The prisoner excepted. It was held, that without some explanation of his change of mind, the juror was incompetent, and a new trial was ordered.[aa]

§ 3005. In Indiana, where a juror testified "that he had formed and expressed an opinion as to the defendant's guilt from report, but that he had heard no witness, that he knew of, speak of the transaction; that he lived eighteen miles from the neighborhood of the defendant, and had never been in the defendant's neighborhood since the transaction complained of;" the court held that when the juror answers that he has formed or expressed an opinion of the defendant's guilt, there are other inquiries to be made before he can be set aside; that the nature and cause of the opinion must be inquired into; and that if it appear from the answers of the juror, or from any other testimony, that he has formed or expressed an opinion of the defendant's guilt out of ill-will to the prisoner, or that he has such a fixed opinion of the defendant's guilt as would probably prevent him from giving an impartial verdict, the challenge ought to be sustained.[b] If, however, it was said, the opinion be merely of that light and transient character so commonly formed when we hear any reports of the commission of an offence, such an opinion merely as would probably be changed by the relation of the next person met with, it is not a sufficient cause of challenge.[bb]

Certain jurors, included in the *venire* at a trial for murder, on examination by the court, stated that they had heard considerable talk about the case, and had read the newspaper accounts of it; that they were rather inclined to think, if what they had read was correct, the prisoner was guilty; that they had never talked with any of the witnesses, nor formed nor expressed an opinion; that they had no ill-will against the prisoner, and could give him a fair trial according to the law and evidence. They were held competent to try the issue.[c]

§ 3006. In Illinois the courts have united in the opinion that a juror is disqualified if he has expressed a decided opinion upon the merits of the case.[cc] If, without any qualification whatever, a juror says the defendant is guilty, or the like, or that the plaintiff ought to recover in the action, or that the verdict ought to be against the plaintiff, he would be disqualified, as not standing impartial between the parties.[d] If, on the contrary, he says he has no prejudice or bias of any kind, for or against either party, that he has heard rumors in relation to the case, but has no

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[aa] Norfleet *v.* State, 4 Sneed, (Tenn.) 340.
[b] M'Gregg *v.* State, 4 Blackf. 106.
[bb] Ibid.
[c] Rice *v.* State, 7 Ind. 332.
[cc] Gates *v.* People, 18 Illinois, 433.
[d] Smith *v.* Eames, 3 Scam. 78; Gardner *v.* People, &c., Id. 88; Sellers *v.* People, &c., Id. 414.

personal knowledge of the facts, and from the rumors has formed and expressed an opinion in a particular way, if they are true, without expressing any belief in their truth, he would not be disqualified.[e] Thus, where a juror stated that he had formed and expressed an opinion, from report, as to the guilt or innocence of the prisoner; that he had heard none of the witnesses, nor any other person who professed to know the facts, detail them; and he had no reason to believe or disbelieve the reports more than any other reports that float through the neighborhood; and that he had expressed his opinion in this way, "if the reports are true, my opinion is so and so," without stating what it was: it was held that he was a competent juror.[f] But where a juror, two or three weeks previous to the trial, expressed the opinion that the prisoner would and ought to be hanged, and subsequently went to the jail, and told the prisoner that he ought not to be hung, and if he were on the jury he should not be hung, but subsequently, when sworn on the trial, touching his competency as a juror, stated that he had formed and expressed an opinion, and the prisoner supposing that his opinion was in his favor, according to his statement at the jail, or that he was impartial, according to his oath in court, consented that he should serve on the jury, it was held that the juror was incompetent.[g] It was intimated by the same court, that if an opinion is formed, but not expressed, it is not good cause for a challenge.[h]

In the same state a juror was held incompetent who declared that no amount of circumstantial evidence would induce him to convict a defendant.[i] And the same ruling was had with another who declared that he would not convict, even if convinced of the prisoner's guilt.[j]

In Arkansas, if a juror in a criminal case state upon his *voir dire*, that he has formed an opinion as to the guilt or innocence of the prisoner from rumor, he should be required to state, also, that the opinion was not such as to bias or prejudice his mind, in order to render him competent; and if he states that he has conversed with persons about the case, and formed his opinions from such conversations, he should be required to state further, that such persons did not profess to have a personal knowledge of the matters stated by them; but it is not necessary that he should know or be able to state whether such persons were witnesses in the case.[jj]

§ 3007. In Georgia, it is said, that while a juror who states that he has formed and expressed an opinion in a particular case, upon the guilt or innocence of the prisoner, is not competent to sit in such case;[k] and that while the opinion which disqualifies depends upon the nature and strength of the opinion, and not upon its source or origin,[l] for it may be founded on

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[e] Smith *v.* Eames, 3 Scam. 78; and see to same effect Baxter *v.* People, 3 Gilman, 386.
[f] Gardner *v.* People, &c., Id. 88.
[g] Sellers *v.* People, 3 Scam. 415.
[h] Noble *v.* People, Breese, 30.
[i] Gates *v.* People, 14 Ill. 433.
[j] Ibid.
[jj] Meyer *v.* The State, 19 Ark. 156.
[k] Reynolds *v.* State, 1 Kelly, 222; Anderson *v.* State, 14 Georgia, 709.
[l] Boon *v.* State, 1 Kelly, 631,

hearsay;[m] yet the mere formation of an opinion by a juror, from rumor, without having expressed that opinion, or expressed it otherwise than jocularly,[n] is not good cause of challenge.[nn] The opinion must be settled and abiding.[o]

One formed from mere report will not exclude.[oo] The words, "if that is so, the prisoner deserves to be hung," used before a trial by a juror, in reply to a statement by a third person, does not show a fixed opinion of guilt, that would be sufficient ground for a new trial.[p] It is a sufficient disqualification of a juror, on a trial for murder, that he was heard to say, before the trial, "that from what he knew, he would stretch the prisoner."[pp]

§ 3008. In Iowa, an opinion as to the guilt or innocence of the prisoner, formed from rumor, is sufficient to exclude a juror.[q]

In Wisconsin, a juror, on his examination, stated that he had an opinion on the question of the defendant's guilt or innocence, if what he had heard was true; that he had heard the story talked about, but had not read the report of the examination before the coroner, or heard the story from witnesses, or those who had heard the testimony, and that his opinion would not prevent his hearing testimony impartially. It was held, that that this was cause for a challenge to the favor, but not for principal cause.[qq]

§ 3009. Having formed and expressed an opinion from report does not disqualify a person to sit as a juror in California, if he declares he can sit on the jury without bias, that evidence can change his opinion, and that he will be governed by the evidence. Under the criminal code of that state, a challenge for implied bias, can be taken only where the juror has formed and expressed an unqualified opinion or belief that the prisoner is guilty of the offence charged.[r] It is not material that the juror did not state whether his opinion was for or against the prisoner. The courts would not permit the juror to be questioned on that point.[rr]

§ 3010. It will be observed that some conflict exists as to the degree of bias necessary to exclude a juror, it having been held in New York,[s] Iowa,[t] and perhaps in Massachusetts,[u] that the formation of an opinion based entirely on the assumption that a particular state of facts, as given by rumor, is correct, is adequate for that purpose; while it is said in Connecticut,[v]

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[m] Boon *v.* State, 1 Kelly, 618; Ray *v.* State, 15 Georgia, 223; Jim *v.* State, 15 Georgia, 535.

[n] John *v.* State, 16 Georgia, 200.

[nn] Hudgins, *v.* State, 2 Kelly, 173; Baker *v.* State, 15 Georgia, 498; Griffin *v.* State, Ibid. 476; see Anderson *v.* State, 14 Georgia, 709.

[o] Wright *v.* State, 18 Geo. 383.

[oo] Thompson *v.* State, 24 Ga. 297.

[p] Mercer *v.* State, 17 Geo. 146.

[pp] Monroe *v.* State of Georgia, 5 Geo. 85; see as to practice in this State in reference to triers, Willis *v.* State, 12 Georg. 444; Copenhagen *v.* State, 14 Georg. 22.

[q] Wau-kon-chau-neck-kaw *v.* United States, 1 Morris, 332.

[qq] Schæffler *v.* State, 3 Wis. 823.

[r] People *v.* Macauley, 1 Cal. 378.

[rr] People *v.* Williams, 6 Cal. 206.

[s] People *v.* Mather, 4 Wend. 22; People *v.* Rathbun, 21 Wend. 509.

[t] 1 Morris, 332.

[u] Com. *v.* Knapp, 9 Pick. 496.

[v] State *v.* Potter, 18 Conn. 166.

Virginia,[w] North Carolina,[x] Georgia,[y] Alabama,[z] Mississippi,[a] Tennessee,[b] Indiana,[c] and Illinois,[d] that the formation of a hypothetical opinion, dependent on the existence of facts, concerning the truth of which the juror had come to the conclusion, is not sufficient cause for principal challenge, provided he believes that such hypothetical opinion left no bias on his mind, and that on the production of new facts he will be entirely open to conviction. In Illinois,[e] and perhaps in Vermont,[f] it is held that an opinion which has been formed, but not expressed, is not a good cause for challenge, but the contrary doctrine may undoubtedly be held to be firmly established.[g] It is clear, also, that a juror is not to be asked whether he thinks the act set forth in the indictment ought not to be punishable by law.[h]

§ 3010. A juror is bound to answer, under oath, any question asked him with regard to his competency as a juror, providing such questions do not tend to degrade him, or make him infamous.[i] It seems he will not be excused from stating whether he has any prejudice against a religious sect, on the ground that the answer would tend to disgrace him.[j]

§ 3011. As it is the duty of the court to empannel, for the trial of each case, a competent and impartial jury, the court may propound to the jurors returned, other interrogatories than those which they are required to put by statute.[k]

§ 3012. A challenge of a juror because of his having formed and expressed an opinion on the question to be tried, can be made only by that party against whom it was so formed and expressed. It seems that the other cannot interpose.[l]

§ 3013. If the juror answers that he has not formed or expressed an opinion on the merits, the examination is not closed, but either party may proceed to ask him such questions as may further test his competency, and

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[w] Spence *v.* Com. Virg. Cases, 375; Brown *v.* Com., 11 Leigh, 769; Pollard *v.* Com., 5 Randolph, 659; Heath *v.* Com., 1 Robinson, 735.

[x] State *v.* Benton, 2 Dev. & Bat. 196; State *v.* Ellington, 7 Iredell, 61.

[y] Hudgin's *v.* State, 1 Kelly, 193; John *v.* State, 16 Georgia, 200.

[z] State *v.* Williams, 3 Stewart, 454.

[a] State *v.* Johnson, 1 Walker, 392; State *v.* King, 5 Howard's Miss. R. 730.

[b] Hewertown *v.* State, Meiggs, 262.

[c] M'Gregg *v.* State, 4 Blackf. 106.

[d] Smith *v.* Eames, 3 Scam. 78; Gardner *v.* People, Id. 88; Sellers *v.* People, Id. 414; Baker *v.* People, 3 Gilman, 268.

[e] Noble *v.* People, Breese, 392.

[f] Boardman *v.* Wood, 3 Vermont, 570.

[g] State *v.* Johnson, 1 Walker, 391; State *v.* Hewer, Ibid. 318; Armstead *v.* Com., 11 Leigh, 657; Heath *v.* Com., 1 Robinson, 735; People *v.* Rathbun, 21 Wend, 509; 1 Burr's Trial, 416.

[h] Com. *v.* Burrell, 16 Pick. 153.

[i] 7 Dana Abridgment, 334; Edwards' Juryman's Guide, 85; State *v.* Benton, 2 Dev. & Bat. 196; 1 Salkeld, 153; 6 City Hall Recorder, 71; 7 Cranch, 297; 2 Wheeler's C. C. 367; 2 Rawle, 49; 3 Martin's La. R. 619; 17 Serg & Raw. 155; 1 Cowen, 432; 1 Blackf. Ind. R. 319; State *v.* Bonwell, 2 Harrington, 529; and see Co. L. 158; 3 Bac. Ab. 267; *per contra*, State *v.* Baldwin, 3 Brevard, 309; Const. R. 289.

[j] People *v.* Christie, 2 Parker, C. R. (N. Y.) 579.

[k] Pierce *v.* State. 13 N. H. 536; Com. *v.* M'Gee, 6 Cushing, 177; post, § 3035; see post, § 3026, &c., as to manner of putting questions.

[l] State *v.* Benton, 2 Dev. & Bat. 196.

in case of sufficient reason appearing on the *voir dire* to form cause for principal challenge, he may be challenged for favor, and the question of his bias, as will be seen more fully hereafter, submitted to triers.[m] Thus, where a juror in a capital case was called, and, on being sworn, deposed that "he had formed no opinion or come to any conclusion upon the case of the prisoner, what he heard was rumor, and he does not know all the circumstances;" upon which the counsel for the prisoner was proceeding to interrogate the juror further, for the purpose of showing more completely the state of his information, and opinion of the case, and having asked the juror whether he had conversed much about the case, the court arrested him, saying that no further questions should be put, that the juror was competent; the overruling of the question was held error by the Court of Errors, and a new trial was ordered.[n]

§ 3014. The following questions, in the several cases in which they occur, were adopted as determining the competency of the juror:—

"Have you formed and expressed an opinion about the guilt of Col. Burr?" *Marshall, C. J., Burr's Trial.*[o]

"Have you formed and delivered an opinion on the subject-matter of this indictment?" *Chase, J., in U. S.* v. *Callender.*[p]

"Have you heard anything of this case, so as to make up your mind?" "Do you feel any bias or prejudice, for or against the prisoner at the bar?" *Parker, J., Selfridge's Trial.*[q]

"Have you formed and expressed an opinion of the guilt or innocence of the prisoner?" *Marshall, C. J., in U. S.* v. *Hare, &c.*[r]

"Have you formed and expressed an opinion as to the general guilt or innocence of all concerned in the commission of the offence?" (viz., the burning of the convent in Charlestown, Mass.)

Supreme Court of Mass., on trial of the Charlestown rioters.[s]

"Have you made up your minds as to which of the two parties was in the wrong in the Kensington riots?"

Rogers, J., Supreme Court of Pennsylvania, April 29, 1845, *in Com.* v. *Sherry, one of the Kensington rioters, MSS.*

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[m] People *v.* Bodine, 1 Denio, 281; Heath *v.* Com., 1 Robinson, 735; post § 3221, 3036, &c.

[n] Heath *v.* Com., 1 Robinson, 735.

[o] 1 Burr's Trial, 367.

[p] Callender's Trial, Pamphlet, 19-21.

[q] Pamphlet, p. 9.

[r] U. S. Circuit Court for Baltimore, May T. 1818, Pamphlet.

[s] Com. *v.* Burrell, 16 Pick. 153.

1. "Have you, at any time, formed or expressed an opinion, or even entertained an impression which may influence your conduct as a juror?"

2. "Have you any bias or prejudice on your mind, for or against the prisoner." *Ogden, J., on a homicide trial.*[t]

1. "Have you expressed or formed any opinion relative to the matter now to be tried?"

2. "Are you sensible of any prejudice or bias therein?"

3. "Had you formed an opinion that the law of the United States, known as the Fugitive Slave Law of 1850, is unconstitutional—so that you cannot convict a person indicted under it for that reason, if the facts alleged in the indictment are proved, and the court held the statute to be constitutional?"

4. "Do you hold any opinion upon the subject of the Fugitive Slave Law, so called, which would induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment and constituting the offence are proved against him, and the court direct you that the law is constitutional?"

Curtis, J., in U. S. v. *Morris, charged with attempting to rescue a fugitive slave, Boston,* 1851, *and approved by Grier J., and Kane, J., in Phila.,* 1852, *U. S.* v. *Hanway.*[u]

§ 3015. In the trial of Dorr, the following questions, asked by the attorney general, were rejected by the court:—

"Did you vote for the Dorr constitution?"

"Do you believe the defendant to have been governor of Rhode Island?"[v]

§ 3016. (2) *Relationship, interest, infamy, &c.*—There are other causes of challenge, which, though less common in this country than that which has been just noticed, have been frequently acted on. Thus, a principal challenge will be allowed if the juror be within the age of twenty-one;[w] if a female;[x] if he be of blood or kindred to either party,[y] within the ninth degree;[z] if he be connected by affinity or alliance with either party,[a] though if the relationship be remote, as where the juror's sister was the wife of the nephew of one of the parties, the rule is otherwise;[b] if he be godfather to the child of the plaintiff or defendant, or they to his child;[c] if

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[t] People *v.* Johnston, 2 Wheel. C C. 367.

[u] U. S. *v.* Hanway, 139, 2 Wal. Jr. 129.

[v] 7 Boston Law Reporter, 347.

[w] 1 Inst. 157.

[x] Burn's Justice, tit. Jurors, viii. p. 965.

[y] 1 Inst. 157.

[z] State *v.* Perry, 1 Busbee, 330; Jaques *v.* Com., 10 Grattan, 690.

[a] Bank *v.* Hart, 3 Day, 491; Hinckman *v.* Clark, Coxe, 446; Stevenson *v.* Stiles, 2 Penn. Rep. 740.

[b] Rank *v.* Shewey, 4 Watts, 218. If, during the trial of a case of felony, it is discovered that the prisoner has a relation on the jury, this is no ground for discharging the jury, and the case must proceed. (R. *v.* Wardle, 1 C. & M. 647.)

[c] 1 Inst. 157.

he gave a verdict before in the same cause, or upon the title or matter, though between other persons,[d] though it is not so when the verdict is against the same party for another cause of action;[e] if he was indictor of the plaintiff or defendant in the same cause;[f] if he were one of the grand jury who found the particular bill;[g] if he be counsel, servant, or of fee of either party,[h] though it is no cause of challenge that he is brother of one of the counsel of the opposite party,[i] or that he is a client of the prisoner, who is a member of the bar;[j] if he has been convicted of an infamous crime;[k] if he has been summoned as a witness for either of the parties;[l] if he be bail for the defendant;[m] and if, on an indictment for riot, he be an inhabitant of the town where the riot occurred, and had taken an active part in the matter which led to it.[n]

§ 3017. On an indictment of a slave for murder, it is good cause of challenge of a juror on the part of the government, that he is nearly related to the owner of the slave.[o]

§ 3018. Notwithstanding the enumerated causes of challenge in the penal code of Alabama, the court may, in its discretion, reject such as are unfit or improper persons to sit upon the jury, and may excuse those from serving, who from reasons personal to themselves, ought to be exempt from serving on the jury. So, also, the court may reject any juror who admits himself open to any of the enumerated challenges for cause, without putting him upon the prisoner.[p]

§ 3019. (3) *Irreligion.*—Where a juror said when on a jury in another cause in the said term, "that he was a Tom Paine man, and would as lief swear on a spelling book as on a bible," it was held a good ground for challenge.[q]

§ 3020. (4) *Conscientious Scruples.*—Where a juror, on being called in a capital case, declared, "that he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict;" it was held by the Supreme Court of Pennsylvania, a principal cause of challenging by the prosecution, Gibson C. J., dissenting.[r] The same opinion was adopted in New York,[s] even though the juror did not belong to a religious denomination scrupulous on the subject, which seemed to

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[d] 1 Inst. 157.
[e] U. S. *v.* Shackleford, 3 Cranch C. C. 178.
[f] Lamb. 544; and see R. *v.* Edmonds, 4 B. & Ald. 471.
[g] 2 Rev. Stat. N. Y. 734, sec. 8; Rev. Stat. Mass., ch. 137, sec. 2; Barlow *v.* State, Blackford, 115; Rogers *v.* Lamb, 3 Blackford, 155.
[h] 1 Inst. 157.
[i] Pipher *v.* Lodge, 16 S. & R. 214.
[j] R. *v.* Leach, 9 C. & P. 499.
[k] 1 Inst. 158.
[l] Com. *v.* Joliffe, 7 Watts, 85.
[m] 1 Wheeler's C. C. 391.
[n] R. *v.* Swain, 2 M. & Rob. 112.
[o] State *v.* Anthony, 7 Iredell, 234.
[p] State *v.* Marshall, 8 Ala. 302, post, § 3035.
[q] Com. *v.* M'Fadden, 11 Harris, 12.
[r] Com. *v.* Lesher, 17 Serg. & R. 155.
[s] People *v.* Damon, 13 Wendell, 351; but see 2 Wheeler's C. C. 48.

have been the qualification of the revised statute;[t] in Virginia;[u] in Maine;[v] in Indiana;[w] in Ohio;[x] in Massachusetts;[y] in Georgia;[z] in Alabama;[a] in Louisiana;[b] in Mississippi;[c] in California;[d] and in the United States Circuit Court for the Eastern District of Pennsylvania, by Baldwin, J.[e] But when, notwithstanding such scruples, the juror thought he could do justice as between the state and the accused, he was held competent.[f] It is said, in Massachusetts, that a juror is not to be asked whether he thinks the crime set forth in the indictment ought not to receive a punishment different from that which the law prescribes.[g]

In Arkansas, jurors may not be rejected because they are opposed to capital punishment, unless they go further, and bring themselves under the disqualifications prescribed by the statute.[h]

In Alabama, the exemption is extended to scruples as to penitentiary punishment.[i]

On the trial of an indictment for murder, a juror was challenged by the government on the ground that he was opposed to capital punishment. The juror being sworn, said he was opposed to capital punishment, but if, acting as a juror, the evidence of guilt was clear, he should find the accused guilty. The court ordered him to take his seat as a competent juror. After other jurors had been called, but before any evidence had been submitted, the same juror stated that he had misunderstood the question, and given a wrong answer, and that he could not, under any circumstances, find a person guilty of murder. The challenge was repeated, and the juror set aside.[j]

In Illinois, it was ruled that a juror was incompetent who declared that no amount of circumstantial evidence would induce him to find a verdict of guilty.[k] And so in Pennsylvania, of a juror who declared in a prior case, that he would acquit any one the judge wanted him to convict.[l]

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[t] 2 Rev. Stat. 734, sec. 12.
[u] Clore's case, 8 Gratt. 606.
[v] State *v.* Jewell, 3 Redding, 583.
[w] Jones *v.* State, 2 Blackf. 475; Gross *v.* State, 2 Carter, Ind. 329.
[x] State *v.* Town, Wright's R. 75; Martin *v.* State, 16 Ohio, 364; Driskill *v.* State, 7 Ind. 338.
[y] Rev. Stat. c. 137, sec. 6.
[z] Williams *v.* State, 3 Kelly, 453.
[a] Stolls *v.* State, 28 Alab. 25.
[b] State *v.* Nolan, 13 La. Ann. 276.
[c] Lewis *v.* State, 9 S. & M. 115; Williams *v.* State, 33 Miss. (3 George) 389.
[d] People *v.* Tanner, 2 Cal. 257. By the laws of California the crime of grand larceny is punishable by imprisonment in the State prison or death, at the discretion of the jury; and by the same laws a man is declared incompetent to sit as a juror on the trial for a crime "punishable with death," who entertains such conscientious opinions as would prevent his finding the defendant guilty. On the trial of an indictment for grand larceny, one summoned as a juror was asked, by the counsel for the State, whether he had any conscientious scruples against the infliction of capital punishment? He replied, that he would hang a man for murder, but not for stealing. The court below decided that he was incompetent. And this court confirmed the decision of the court below; People *v.* Farmer, 2 Cal. 257.
[e] U. S. *v.* Wilson, 1 Baldwin, 78.
[f] Williams *v.* State, 33 Miss. (3 Georg.) 389; People *v.* Stewart, 7 Cal. 140.
[g] Com. *v.* Russell, 16 Pick. 153.
[h] Dig. § 158, c. 2; Atkins *v.* State, 16 Ark. 568.
[i] Stolls *v.* State, 28 Alab. 25.
[j] People *v.* Wilson, 3 Parker, C. R. (N. Y.) 199.
[k] Gates *v.* People, 14 Ill. 433.
[l] Com. *v.* M'Fadden, 11 Harris, 12.

The prosecuting officer may inquire of a person presented as a juror in the trial of a case for counterfeiting, whether he has taken an oath to acquit all persons of counterfeiting, but the person may refuse to answer.[m]

§ 3021. (5) *Secret associations*—In New York it was held to be no cause of challenging to a juror, that he is a freemason, where one of the party to a suit is a freemason, and the other is not.[n] In the obligation, it was observed, assumed by a royal arch mason, and said to be in these words: "I promise and swear that I will aid and assist a companion royal arch mason when engaged in any difficulty, and espouse his cause as far as to extricate him from the same, if in my power, whether he be right or wrong," there is a discrepancy in the relation given of it by masons; while some say that such is the form of the oath, others deny it; but all concur in stating that the obligation is always accompanied with an explanation as to its meaning, which is, that if a royal arch mason sees a brother mason engaged in a quarrel with another person, it is his duty to take his brother mason by the arm, and extricate him, without inquiring into the merits of the controversy. On such an interpretation, the oath taken by a master mason, or a royal arch mason, on his admission, it was ruled, does not disqualify him from serving as a juror, in an action between a mason and a person not a mason.[o]

In Massachusetts, the members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for that purpose, are incompetent to sit as jurors on the trial of an indictment for violating that law.[p] But members of an association to prosecute offences against certain laws, who have each, by subscribing a certain sum to the funds of the association rendered themselves liable to pay, to the extent of their subscriptions their proportion of expenses incurred in such prosecutions, are not incompetent to sit as jurors on the trial of such a prosecution, commenced by the agent of the association, and carried on at its expense, if it does not appear but that they have paid their subscriptions before this prosecution was commenced.[q]

A juror being challenged for bias, was examined before triers, and the following questions were propounded: 1st. Are you a member of a secret and mysterious order known as, and called, Know-Nothings, which has imposed on you an oath or obligation, beside which an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded? 2d. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which any prejudice exists in your mind against Catholic foreigners? 3d. Do you belong to any secret political society, known as, and called by the people at large in the United States, Know-Nothings; and if so, are you bound

[m] Fletcher *v.* State, 6 Humph. 249.
[n] People *v.* Horton, 13 Wendell, 9.
[o] Ibid.
[p] Com. *v.* Eagen, 4 Gray, (Mass.) 18.
[q] Com. *v.* O'Neil, 6 Gray, (Mass.) 343.

by an oath, or other obligation, not to give a prisoner of foreign birth, in a court of justice, a fair and impartial trial? 4th. Have you at any time taken an oath or other obligation, of such a character that it has caused a prejudice in your mind against foreigners? 5th. Are you under any obligation not to extend the same rights, privileges, protection and support to men of foreign birth, as to native-born American citizens? 6th. Have you any prejudice whatever against foreigners? It was held, in California, that the court erred in refusing to allow the questions to be asked.[r]

§ 3022. (*c*) *Challenge to the polls for favor.*—Challenges to the polls for favor, take place when though the juror is not so evidently partial as to amount to a principal challenge, yet there are reasonable grounds to suspect that he will act under some undue influence or prejudice.[s] The cause of such challenge are manifestly numerous, and dependent on a variety of circumstances; for the question to be tried is, whether the juryman is altogether indifferent as he stands unsworn,[k] because he may be, even unconsciously to himself, swayed to one side, and indulge his own feelings when he considers himself influenced entirely by the weight of evidence,[l] as for instance, where the party and juryman are fellow-servants, where the latter has been entertained in the former's house, or where he has been appointed arbitrator by both the parties, to terminate their differences.[m]

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[r] People *v.* Reyes, 5 Cal. 247.

[s] Co. Lit. 157, b.; Bac. Abr. Juries, E. 5; Williams, J., Juries, v.; Dick Sess. 188; Freeman *v.* People, 4 Denio, 39. "Challenges to the favor," as was observed by the late Judge Gaston of North Carolina, "are where the matters shown do not, *per se*, demonstrate unindifference, and therefore warrant it as a judgment of the law, but only excite a suspicion thereof, and leave it as a matter of *fact*, to be found or not found, by the triers, upon the evidence." "And," he adds, "it seemeth to us that an opinion fully made up and expressed, against either of the parties, on the subject-matter of the cause to be tried, whether in civil or criminal cases, is a good cause of principal challenge; but that an opinion imperfectly formed, or an opinion merely hypothetical, that is to say, founded on the supposition that facts are as they have been represented or assumed to be, do not constitute a cause of principal challenge, although they may be urged by way of challenge *to the favor*, which is to be allowed or disallowed as the triers may find the fact of favor or indifferency." (State *v.* Benton. 2 Dev. & B. 212, 213.) So, in pursuance of the same distinction, it was said by Beardsley, J., in a late case: "A fixed and absolute opinion may be necessary to sustain a challenge for *principal* cause, but not so where the challenge is *for favor*. In the first species of challenge the result is a conclusion of law upon ascertained facts, but in the latter, the conclusion is a matter of fact to be found by the triers. No certain rule can be laid down for their guidance. They are sworn to try whether the juror challenged stands indifferent, Gra. Pr. 307; 1 Trials, per Pais, 205; 1 Salk. 152, pl. 1; Bac. Abr. Juries, E. 12, notes;) and this must be determined upon their conscience and discretion, in view of the facts and circumstances in evidence before them. It is competent to prove that the juror challenged, and the opposite party are in habits of great intimacy; that they are members of the same society, partners in business or the like. The feelings of the juror may also be shown, and that whether they amount to positive partiality or ill will, or not, as his views and opinions also may be, whether mature, absolute, or hypothetical. Indeed any and every fact or circumstance from which bias, partiality, or prejudice may justly be inferred, although very weak in degree, is admissible on this issue, and the inquiry should by no means be restricted to the isolated question of a fixed and absolute opinion as to the guilt or innocence of the prisoner." (People *v.* Bodine, 1 Denio, 281.)

[k] People *v.* Horton, 13 Wendell, 8.

[l] Ibid.

[m] Co. Lit. 157; Bac. Abr. Juries, E. 5; Burn, J., Jurors, iv. 1; Williams, J., Juries, v.

§ 3023. The right to challenge a juror "*propter affectum*" is not taken away by the statute of Georgia of 1843, prescribing the oath to be administered to jurors in criminal cases, but only prescribes the manner of doing it.[n]

§ 3024. Generally speaking, the same circumstances will operate as a ground of objection to the favor of a single juryman as may be urged on a challenge to the array, for the partiality of the returning officer. So, when the juror has purged himself of such bias as would form ground for principal challenge, he may be challenged for favor, and may be asked such further questions on his *voir dire* as may show his partiality: his competency being a point to be determined by the triers.[o]

§ 3025. Persons to be affected by the finding of jurors may object to their fitness, but have nothing to do with the question, whether the juror is privileged from acting as such. Whether a person is exempt on account of his age, comes under the latter class of questions.[p]

The court may excuse a juror for deafness, without the prisoner's consent.[q]

II. Mode and time of taking the challenge.

§ 3026. The challenge of a juror, either by the prosecution or the defence, must be before the oath is commenced, down to which period the right exists.[r] The moment the oath is begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if he take the book without authority, neither party wishing to challenge is prejudiced thereby.[v] The juror, however, must be sworn on the *voir dire*, and challenged before he can be interrogated.[w]

A juror may be challenged for favor, after overruling a challenge for principal cause.[x]

The mere passing of a juror over to the court, or the other party, is not an absolute waiver of the right to challenge, if a good cause be shown afterwards.[xx]

§ 3027. After a juror has been sworn in chief, and taken his seat, if it be discovered that he is incompetent to serve, he may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given; and this may be done even in a capital case, and as well for cause

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[n] Robinson *v.* State, 1 Kelly, 563.

[o] People *v.* Bodine, 1 Denio, 281; Com. *v.* Heath, 1 Robinson, 735.

[p] Breeding *v.* State, 11 Texas, 257. [q] Jesse *v.* State, 20 Geo. 156.

[r] Manly *v.* State, 7 Blackford, 593; Morris *v.* State, Ibid. 607; Williams *v.* State, 3 Kelly, 453; People *v.* Kohle, 4 Califor. 198; State *v.* Patrick, 3 Jones' Law, (N. C.) 443; post, § 3221.

[v] Rev. Stat. Mass. c. 95, sect. 29; R. *v.* Frost, 9 C. & P. 137; Com. *v.* Knapp, 10 Pick. 477; McClure *v.* State, 1 Yerger, 206; Bratton *v.* Bryan, 1 Marsh. 212.

[w] King *v.* State, 5 Howard's Miss. R. 730; State *v.* Flower, 1 Walker, 318; Com. *v.* Jones, 1 Leigh, 598; 12 East, 231; ante, § 3011.

[x] Carnel *v.* People, 1 Harris C. C. 273; Freeman *v.* People, 4 Denio, 9.

[xx] McFadden *v.* Com., 23 Penn. State R. (11 Harris), 12.

existing before as after the juror was sworn;[y] though, as a general rule, it is too late, after the jury is empanneled, to inquire into the impartiality of a juror.[z] In Massachusetts, however, it is said a challenge is not too late after a juror has been merely sworn, and not empanneled.[a]

§ 3028. In general, the prisoner has the right of peremptory challenge to a juror after he has made such answers on the *voir dire* as do not authorize a challenge for cause.[b] But the right to a peremptory challenge, it is said in Massachusetts, must be exercised, if at all, before the jurors are interrogated by the court concerning their bias and opinions,[c] and such is the view entertained recently by the U. S. circuit court in Philadelphia.[d]

§ 3029. After peremptory challenge, objections to incompetency cannot be taken on error.[e]

A prisoner on trial for murder, made a peremptory challenge of a juror, and then, having ascertained that there was a connection by marriage between the juror and the deceased, proposed to withdraw it, in order to challenge him for cause. This the court would not permit him to do.[ee]

§ 3030. Where a person, called to serve as a juror, in Virginia, in a criminal case, was elected by the prisoner, but before he was sworn, the prisoner retracted his election, and asked that he might be permitted to challenge him peremptorily, but the court refused to permit such peremptory challenge, and the juror was sworn, and served on the jury; it was held that this was error, the prisoner having an absolute right to challenge any juror peremptorily, at any time before he is sworn.[f]

§ 3031. Where the prisoner does not exhaust all his peremptory challenges, he cannot complain on error that in consequence of an improper decision of the court admitting a biassed juror; he was compelled to challenge such juror absolutely.[g]

§ 3032. But in Connecticut, B. having been called as a talesman, and examined as to his bias, and no reason to except to him appearing, the counsel for the prisoner were informed by the court that they could then challenge B. peremptorily, if they desired to do so. They declined to exercise the right at that time, as the panel was not then full; and B. was directed to take his seat as one of the jurors. After the panel was full, and but six peremptory challenges had been made, the prisoner's counsel claimed the right to challenge B. peremptorily. It was held that in the

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[y] People *v.* Damon, 13 Wendell, 351; Toeel *v.* Com., 11 Leigh, 714; Com. *v.* McFadden, 11 Harris, 12; U. S. *v.* Morris, 1 Curtis C. C. 23. See post, § 3127, etc., as to withdrawal of jurors.

[z] Com. *v.* Knapp, 10 Pick. 477; Ward *v.* State, 1 Humphrey, 253.

[a] Com. *v.* Twombly, 10 Pick. 480.

[b] Com. *v.* Knapp, 9 Pick. 496; 6 T. R. 531; Co. Lit. 158, a.; 4 Bla. Com. 363; 2 Hawk. c. 43, sect. 10; Bac Abr. Juries, E. 11; Hooper *v.* State, 4 Ohio, 350; see People *v.* Bodine, 1 Denio, 281.

[c] Com. *v.* Rogers, 7 Metcalf, 500.

[d] Ante, § 2989, etc.

[e] Stewart *v.* State, 8 Eng. (13 Ark.) 720; see ante, § 2974.

[ee] State *v.* Price, 10 Rich. Law, (S. C.) 351.

[f] Hendrick *v.* Com., 5 Leigh, 708.

[g] People *v.* Knickerbocker, 1 Harris C. C. 302.

absence of any reason for a peremptory challenge then, which did not exist before, when the exercise of the right was declined, it was too late to challenge B. peremptorily.[h]

§ 3033. The right to challenge a juror, as has been observed, is a right to reject, not to select; and therefore neither of two defendants in an indictment on a joint trial has cause to complain of a challenge by the other.[i]

In general, if juror stands indifferent on the *voir dire*, a want of impartiality is not to be shown by other evidence. A cause of challenge, however, which could not be known to the juryman, may thus be shown.[j]

§ 3034. If a juror be challenged on one side, and be found indifferent, he may still be challenged on the other side.[k]

§ 3035. In Massachusetts, the interrogatory of the jurors is solely within the discretion of the court. The parties themselves have no right to propound questions.[l]

In all cases the juror may be cross-examined by the opposite side as to the nature and extent of the alleged bias.[m]

In Virginia it is held that, the court of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve upon the jury, touching any disability created by statute, such as infancy, want of freehold or property qualifications, or in a capital case, conscientious scruples on the subject of capital punishment, and upon

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[h] State *v.* Potter, 18 Conn. 166; see ante, § 2972, etc.

[i] State *v.* Smith, 2 Iredell, 402; U. S. *v.* Marchant, 4 Mason, 160; 12 Wheaton, 480.

[j] Com. *v.* Wade, 17 Pick. 395. When, after a juror has been elected and sworn, and after trial and verdict, the prisoner asks for a new trial on grounds of exception against him, existing before he was elected and sworn, such motion is addressed to the sound discretion of the court; and in the exercise of this discretion, the court ought to consider the whole case, and be satisfied that justice is done. (Dent *v.* Hundred, 2 Salk. 645; Com. *v.* Jones, 1 Leigh, 598; Presbury *v.* Com., 9 Dana, 203; People *v.* Bodine, 1 Denio, 281; U. S. *v.* Fries, 2 Dallas, 515; State *v.* Hopkins, 1 Bay, 373; People *v.* Vermilyea, 7 Cowen, 108.)

[k] Co. Lit. 158, a.; Bac. Abr. Juries, E. 16; 1 Ch. C. L. 545.

[l] Dewey, J. The first questions arising in the present case, are those which relate to the empanneling of the jury for the trial of the defendants upon this indictment. The regular list of jurors having been exhausted by reason of challenges for cause, the sheriff returned certain individuals from the bystanders to complete the panel. As to these persons, the defendants asked the court that the questions prescribed by the Rev. Stats., c. 95, s. 27, might be put, for the purpose of ascertaining whether such jurors had formed or expressed an opinion upon the cause, or had any bias or prejudice therein. After these questions had been put, the counsel for the defendant insisted upon the right to have other questions put to the jurors, for the purpose of furnishing grounds for their exclusion from the panel; and they further insisted that they had the right personally to interrogate the jurors for this purpose. This view of the course of proceeding is, in our opinion, erroneous. The whole matter, relative to the examination of jurors, beyond the provisions of the statute, is one that must be left to the sound judgment and judicial discretion of the presiding judge. This applies not only to the propounding of further questions to the jurors, but also the manner of putting them. The counsel of a party has no right personally to interrogate the jurors, with a view of showing their bias or prejudice by facts drawn up by a cross-examination, or something very like it. The orderly conducting of trials will be better promoted by adhering, as a general rule, to the usual practice of interrogating the jurors, by questions propounded by the court or by their order. (Com. *v.* McGee, 6 Cushing, 177; see, also, Pierce *v.* State, 13 N. H. 536.)

[m] People *v.* Knickerbocker, 1 Harris, 302.

any such disability being thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action, without objection made by either party.[n] And the court, of its own motion, without the suggestion or consent of either party, may excuse or set aside, a juror who, though in all other respects competent, is disabled physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing or other like cause, from properly performing the duties of a juror. But the erroneous exercise of this power is a matter of exception by the prisoner, for which the judgment of the court may be reversed.[o]

III. How challenges are to be tried.

§ 3036. If the array be challenged, it lies in the discretion of the court how it shall be tried; sometimes it is done by two coroners, and sometimes by two of the jury, with this difference, that, if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge be found in favor of partiality, then by any other two assigned thereunto by the court.[p] Upon a challenge to the array, the persons making the challenge must be prepared strictly to prove the cause.[q]

The method of trial in Pennsylvania has been already stated.[qq]

§ 3037. When the array is thus challenged, the opposite party may either plead to it or demur to its sufficiency in law.[r] If he plead, then the triers are sworn and charged to inquire "whether it be an impartial array or a favorable one; if they affirm it, the clerk enters under it "*affirmatur;*" but if they find it to be partial, the words "*calumnia vera,*" are entered on record.[s] The court may either decide the demurrer at once, or adjourn its consideration to a future period.[t] Where the judges, upon hearing the arguments, overrule the challenge, the decision is entered on the original record, and at *nisi prius* appears on the *postea;* but if it is overruled without demurrer on being debated, the objections may afterwards be made the subject of a bill of exceptions.[u] Should the challenge be admitted, and the array be quashed, a new *venire* is awarded the coroners or elisors, in the same manner as if it had been prayed by one of the parties to be so directed, to prevent the delay at an earlier stage of the proceedings.[v]

§ 3038. When any challenge is made to the polls, if it be before any jurors are sworn, the court, at common law, shall choose the triers: if two are sworn, they shall try;[vv] and if they try one indifferent, and he be sworn

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[n] Montague *v.* Com., 10 Grattan, 767.
[o] Montague *v.* Com., 10 Grattan, 767; see ante, § 3018.
[p] 2 Hale, 275.
[q] R. *v.* Savage, R. & M. C. C. 51.
[qq] Ante, § 2965.
[r] See form of Demurrer and Joinder, 10 Wentw. 474–5.
[s] Tr. per Pais, 165; 4 Bla. C. 353, n. 8; Bac. Abr. Juries, E. 12; Williams, J., Juries, v.; Diok. Sess. 190; 1 Ch. C. L. 549.
[t] Style, 464; Tr. per Pais, 199.
[u] Skin. 101; Hut. 24; Bac. Abr. Juries, E. 12; 1 Ch. C. L. 549.
[v] Co. Litt. 158, a.
[vv] McDuffie *v.* State, 17 Geo. 497.

then he and the two triers shall try another; and if another be tried indifferent, and he be sworn, then the two triers cease, and the two that be sworn on the jury shall try the rest. If the plaintiff challenge ten, and the defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the plaintiff, and another by the defendant.[w]

Where on a trial for murder, a juror was challenged for favor, and the first two jurors sworn, having been appointed triers, sworn as such, and hearing the evidence, arguments and charge, could not agree, it was held that the next two, (the third and fourth) should be selected to rehear the matter as triers; and they were so sworn.[ww]

§ 3039. The trier's oath is, "*You shall well and truly try whether A. B.* (the juryman challenged,) *stand indifferent to the parties by this issue; so help you God.*[x] Where the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined on his oath; but in other cases he shall be examined on his oath to inform the triers.[y]

§ 3040. Where the panel is quashed on a challenge of the array, for unindifference of the sheriff, the proper course is for the prosecutors to apply to the court to direct a new jury process to the coroners.[z]

§ 3041. When the facts on which a challenge rest are disputed, the proper course is to submit the question to triers; but if neither of the parties ask for triers to settle the issue of the fact, and submit their evidence whether consisting of the jurors' *voir dire* or of extraneous evidence to the judge, and take his determination thereon, they cannot afterwards object to his competence to decide that issue.[a] The production of evidence to the judge without asking for triers, will be considered as the substitution of him in the place of triers; and his decision will be treated in like manner as would the decision of triers; and, therefore, although the determination of the judge should be against the weight of evidence, a new trial will not be granted for that cause when the defendant is acquitted, in analogy to the principle that if on a main question in a criminal case, the defendant is found not guilty, there cannot be a new trial.[b]

§ 3042. Upon the trial of a challenge for favor, it is erroneous to reject all evidence except such as goes to establish a fixed and absolute opinion touching the guilt or innocence of the prisoner. A fixed opinion of the guilt or innocence of the prisoner, though it may be necessary to sustain a challenge for principal cause, need not be proved where the challenge is for favor. A less decided opinion may be shown and exhibited to the triers, who must determine upon its effect. Thus, when the question is

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[w] Finch. 112; 1 Inst. 158; Co. Litt. 158, a; 2 Hale, 275; Bac. Abr. Juries, E. 12; Burn, J., Jurors, iv. 3; Williams, J., Juries, v.; Dick. Sess. 190; ante, § 3013, etc.

[ww] People *v.* Dewick, 2 Parker, C. R. (N. Y.) 230.

[x] Anon. Salk. 152.

[y] 1 Inst. 158; Anon. 1 Salk. 153.

[z] R. *v.* Dolby, 1 D. & R. 145; 2 B. & C. 104, S. C.

[a] People *v.* Rathbun, 21 Wend. 509; People *v.* Mather, 4 Wend. 229; People *v.* Doe, 1 Mann. (Mich.) 451; Stewart *v.* State, 8 Eng. (13 Ark.) 720.

[b] People *v.* Mather, 4 Wend. 229.

submitted to the triers, a juror challenged for favor, who if examined, may be asked whether he ever thought the prisoner guilty; or what impressions statements which he had heard or read respecting the evidence had made upon his mind; and, on the same reasoning, an opinion imperfectly formed, or one based upon the supposition that facts are as they have been represented, may be proved before the triers upon such a challenge.[bb] The question is to be submitted as a question of fact upon all the evidence, to the conscience and discretion of the triers, whether the juror is indifferent or not, and any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, is admissible evidence.[c]

Though it is not a good ground of challenge to a juror for principal cause, that he has an impression as to the defendant's guilt or innocence,[d] yet, upon a challenge for favor, evidence as to such impression is admissible, and is to be judged of by the triers; but the juror should not be set aside unless the triers find that he has formed a settled opinion. It is not sufficient to justify triers in setting aside a juror, in a criminal case, as not being indifferent, that he has formed an unfavorable opinion of the accused.[e]

Where a challenge for principal cause is overruled by the court, and the juror is then challenged for favor, it is erroneous to instruct the triers that the latter challenge is in the nature of an appeal from the judgment of the court upon the facts.[f]

Where triers of a challenge for favor are sworn to find whether the juror is indifferent "upon the issue joined," the oath is erroneous; they should be sworn to find whether the juror is indifferent as to the issue, and impartial between the parties.[g]

[bb] People *v.* Fuller, 2 Parker C. R. 16.

[c] People *v.* Bodine, 1 Denio, 281. It is said that the court should not instruct the triers how to find. People *v.* McMahon, 2 Parker, C. R. (N. Y.) 663, In Georgia, where a juror is put upon the triers to ascertain his competency, the trial should be conducted in the presence of the court; but it is not error if the triers are allowed to retire with the juror, and question him in private. Epps *v.* State, 19 Geo. 102. In New York, upon a challenge for favor, if the court err in admitting or rejecting the evidence, or instructing the triers upon matters of law, a bill of exceptions lies. The remedy would be the same if the court should overrule such a challenge when properly made. or refuse to appoint triers.—Per Beardsley, J. The fact that a prisoner did not avail himself, as he might, of a peremptory challenge to exclude a juror who was found indifferent upon a challenge for cause, does not prevent him from taking advantage of an error committed on the trial of the challenge for cause, though it appears that his peremptory challenges were not exhausted when the empannelling of the jury was completed. (People *v.* Bodine, 1 Den. 282; see, *per contra*, State *v.* Benton, 2 Dev. & B. 196.)

[d] People *v.* Honeyman, 3 Denio, 121.

[e] People *v.* Lohman, 2 Barb. S. C. 216.

[f] Freeman *v.* People, 4 Denio, 9.

[g] Ibid.

CHAPTER III.

MOTION IN ARREST OF JUDGMENT.

WHEN ALLOWABLE.

§ 3043. At common law, and until 7th Geo. 4, c. 64, sect. 20, 21,[a] and the corresponding statutes in this country,[b] any objection which would have been fatal in demurrer, was (with exceptions to be presently noticed) equally fatal on motion in arrest of judgment.[c] Judgment, however, can only be arrested for matter appearing on the record;[d] though the motion is not confined to the indictment alone, as it obtains if any part of the record is imperfect, repugnant, or vicious.[e] Thus judgment was arrested when it appeared the case had been tried by thirteen jurors[f] and where no issue was averred to have been joined;[g] though as the court possesses the power of amending its own records at any time during the term in which they are entered, it seems that clerical errors, such as the false entering of a plea on an impossible day, may be corrected.[h]

There are, however, several points in which an indictment is cured by verdict, and in which the errors which might have been taken advantage of at a previous stage, are not sufficient cause to arrest judgment. Thus, while duplicity is fatal on motion to quash, or demurrer, the better opinion is, that it will not be ground for arrest;[i] and the same position is undoubtedly good when there has been a misjoinder of counts, but where the defendant has gone to trial without a motion to quash, or on application for election.[j] So the verdict will cure the omission to connect necessary and dependent members of the same sentence by their appropriate copula-

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[a] See ante, § 215, 259, 273, 287, 354-62, 445, &c.

[b] See ante, § 215–28.

[c] Com. v. Morse, 2 Mass. 128, 130; Brown v. Com., 8 Mass. 59, 65; State v. Bangor, 38 Maine, 592; State v. Putnam, 38 Maine, 296, Martin v. State, 28 Alab. 71; Tipper v. Com., 1 Metc. Ky. 6; Com. v. Child, 13 Pick. 198; 4 Bla. Com. 324; Burn, J., Indictment, xi.; Williams, J., Demurrer, 1 Ch. C. L. 442, 663; Francois v. State, 20 Ala. 83. A defective indictment is not cured by a plea of *nolo contendere*. Com. v. Northampton, 2 Mass. 116. Defective description of the offence charged is not one of the points in which an indictment is cured by a verdict, but the same is equally fatal upon a motion in arrest of judgment, as upon demurrer, or a motion to quash. State v. Gove, State v. Cars, 34 N. H. 510.

[d] State v. Allen, Charlton, 518; Com. v. Watts, 4 Leigh, 672; Com. v. Linton, 2 Va. Cases, 476; Horsey v. State, 3 Har. & Johnson, 2; 4 Burr. 2287; 1 Lord Raym. 281; 1 Salk. 77, 315; 1 Sid. 65; Com. Dig. Indict. N.

[e] 1 Ch. C. L. 662; 2 Stra. 901; 2 Taylor, 93; State v. Fort, 1 Car. Law Rep. 510; Whitehurst v. Davis, 2 Hay, 113.

[f] Whitehurst v. Davis, 2 Hay, 113.

[g] State v. Fort, 1 Car. Law Rep. 510.

[h] Com. v. Chauncey, 2 Ashmead, 91.

[i] Com. v. Tuck, 29 Pick. 356; State v. Jackson, 3 Hill S. C. R. 1; see *antea*, § 395.

[j] See *ante*, § 414-26; Com. v. Gillespie, 7 Serg. & R. 476; Ferguson, 29 Eng. Law Eq. Rep. 526. But where two counts set forth the same offence, judgment will be arrested, *ante*, § 426.

tives.[j] The practice also is, not to arrest judgment on the ground of irregularities in the summoning or the procedure of the grand jury;[k] and it is clear that if misnomer of the defendant be not met by plea in abatement, it is too late for further objection after trial.[l]

In Pennsylvania, by the Revised Acts of 1860:—

Cure of defects in jury process by verdict.—No verdict in any criminal court shall be set aside, nor shall any judgment be arrested or reversed, nor sentence delayed, for any defect or error in the precept issued from any court, or in the venire issued for the summoning and returning of jurors, or for any defect or error in drawing, summoning or returning any juror, or panel of jurors, but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue in any case, shall be a waiver of all errors and defects in, or relative or appertaining to the said precept, venire, drawing, summoning or returning of jurors.—(Rev. Acts, 1860, p. 443.)

§ 3044. Where the verdict itself is insensible, judgment will not be entered. A special verdict, finding the defendant guilty of the same facts as those charged in the indictment, but not finding him guilty in the county where the offence was laid, cannot be supported, and the defendant must again be put on his trial.[m] In another case, on an indictment for receiving goods, knowing them to be burglariously stolen, &c., a verdict of guilty of receiving the goods, knowing them to have been stolen, but not burglariously stolen, was held sufficient to sustain a sentence.[n]

It is no ground for arrest of judgment that the defendants were convicted of different degrees of homicide.[o]

If on an indictment for an assault with intent to kill and murder, the jury find the accused guilty of being accessory before the fact of an assault with intent to kill, that offence not being necessarily included in the indictment, judgment will be arrested.[p]

Judgment will not be arrested under the Massachusetts Act on an indictment for larceny of "sundry bank bills, of the aggregate value of $367," merely because the verdict was "guilty of stealing sundry bank bills of the value of $317," and not guilty as to the residue.[q]

After a verdict of guilty on an indictment for murder, judgment will not be arrested because it appears on record that there was, at the time of the trial, another indictment against the defendant for the same offence, pending in the same court.[r]

§ 3045. Where it appears on the face of an indictment that the offence charged is barred by the statute of limitations, and none of the exceptions

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[j] Lutz *v.* Com., 29 Penn. State R. 441.
[k] Com. *v.* Chauncy, 2 Ashmead, 70; see *ante*, § 472–3.
[l] Com. *v.* Beckley, 3 Met. 330; see *ante*, § 259–61.
[m] Com. *v.* Call, 21 Pick. 509; *ante*.
[n] Dyer *v.* Com., 23 Pick. 402, § 395.
[o] Mash *v.* State, 32 Miss. (3 Georg.) 406; *ante*, § 434.
[p] State *v* Scannel, 39 Maine, (4 Heath.) 68.
[q] Com. *v.* Duffy, 11 Cush. (Mass.) 145.
[r] Com. *v.* Murphy, 4 Cush. (Mass.) 472, *ante*, § 547.

in the statute to prevent its operation are alleged therein, judgment will be arrested.[s]

It has been held, however, that on such an indictment the prosecutor can put such exceptions in evidence without their being specially pleaded.[t]

§ 3046. Where it appears from the statement in the face of the indictment, that the grand jury were sworn, it is not competent, on a motion in arrest of judgment, to disprove the recital by testimony *aliunde*.[u]

The passing of sentence upon a prisoner is a sufficient overruling and disposition of a motion in arrest of judgment.[v]

CHAPTER IV.

WRIT OF ERROR.

I. HOW FAR ONE BAD COUNT AFFECTS A GENERAL CONVICTION ON ERROR, § 3047.
II. BILL OF EXCEPTIONS, § 3049.
III. IN WHOSE BEHALF A WRIT OF ERROR LIES, § 3050.

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

§ 3047. The practice both in England and this country, has always been, where there has been a general verdict of guilty on an indictment containing several counts, some bad and some good, to pass judgment on the counts that are good, on the presumption that it was to them that the verdict of the jury attached.[a] On the same reasoning, where one of two

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[s] M'Lane *v.* State of Georgia, 4 Geo. 335; State *v.* Robinson, 9 Foster, 274; U. S. *v.* Watkins, 3 Cranch, C. C. R. 441; but see Com. *v.* Hutchinson, 2 Parsons, 453; State *v.* Bowling, 10 Humph. 52, *ante*, § 445-9.

[t] U. S. *v.* White, 5 Cranch, C. C. R. 73; though the authority of this ruling may be doubted.

[u] Terrell *v.* State, 9 Georgia, 58.

[v] Weaver *v.* Com., 20 Penn. State R. 445.

[a] U. S. *v* Furlong, 5 Wheaton, 164; Miller *v.* State, 5 Howard's Miss. R. 250; Com. *v.* Holmes, 17 Mass. 337; Price *v.* State, 2 Tenn. R. 254; Pole *v.* State, 2 Tr. Com. Rep. 494; State *v.* Davidson, 12 Vermont, 300; Kane *v.* People, 3 Wend. 363; Com. *v.* M'Kisson, 8 Serg. & R. 420; West *v.* State, 2 Zab. 212; Bullock *v.* State, 10 Geo. 47; Roberts *v.* State, 14 Georg. 8; State *v.* Jennings, 18 Mis. (3 Bennett,) 435; Buch *v.* State, 1 Ohio St. R. 15; Baron *v.* State, Parker C. C. 246; People *v.* Stein, Ibid. 202; Isham *v* State, 1 Sneed, 111; Shaw *v.* State, 18 Ala. 547; Baily *v.* State, 4 Ohio (N. S.) 440; Buford *v.* Com., 14 B. Monroe, 24; Com. *v.* Hawkins, 3 Gray, (Mass.) 463; U. S. *v.* Potter, 6 McLean, 186: Isham *v.* State, 1 Sneed, (Tenn.) 112; Manley *v.* State, 7 Md. 132; U. S. *v.* Burn, 5 McLean, 23; State *v.* Burke, 38 Maine, (3 Heath,) 574; Hazen *v.* Com., 23 Penn. S. R. (11 Harris,) 355; Baker *v.* State, 30 Alab. 521; but see State *v.* Montage, 2 M'Cord, 257, where it is said that where there are several counts, prescribing offences to which there are several punishments, a general verdict of guilty is bad. In Virginia it has been said that the rule is not applicable in cases of penitentiary crimes, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict. —(Mowbray *v.* Com., 11 Leigh, 643.) The English practice down to a late period, was to consider one count as sufficient after verdict for all necessary purposes. (Grant *v.* Astley, Dougl. 730; Peake *v.* Oldham, Cowp. 275; R. *v.* Barfield, 2 Burr. 986.)

counts is bad, and the defendant is found guilty, and sentenced generally, the presumption of law is, that the court awarded sentence on the good count; and the sentence is not erroneous, if it is warranted by the law applicable to the offence charged in that count.[b] This practice was lately disturbed in England in a case of great professional interest, as well as of high political importance, where a judgment of the Court of Queen's Bench of Ireland, on an indictment containing some good counts and some bad, was reversed, because the judgment was entered generally on the verdict, instead of severally on the good counts. It will be noticed, however, that, in the opinion of the great majority of the judges, the judgment of the court below was sustained, and that in the House of Lords, the reversal was carried by a bare majority, Lord Denman, C. J., Lord Cottenham, and Lord Campbell voting for reversal, Lord Lyndhurst and Lord Brougham for affirmance. Notwithstanding, however, the opinion of Lord Denman, an opinion which is one of the most masterly specimens of judicial reasoning on record, but which conceded at the outset that the object it had in view was to destroy, by technical refinement, a practice, the correctness of which had never before been disputed, and whose advantage no one could deny, it may still be questioned whether the reversal of the House of Lords, where of the five judges sitting only one had been on the bench of a common law court, is as an abstract question of conflict of authority, to be viewed as outweighing the almost unanimous opinion of the judges of Great Britain and Ireland, or whether it can be considered as shaking the practice, which has obtained with scarcely any qualification in the American courts.[c] Nor does it appear that even in England, it is likely to be

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[b] Josselyn *v.* Com., 6 Metcalf, 236; Jennings *v.* Com., 2 Pick. 356; Bennett *v.* State, 8 Humph. 118; Parker *v.* Com., 8 B. Monr. 30; Hartman *v.* Com., 4 Barr; Stone *v.* State, 1 Spencer, 404; U. S. *v.* Burroughs, 3 M'Lean, 405; State *v.* Miller, 7 Iredell, 275; State *v.* Conolly, 3 Rich. 337; Wash. *v.* State, 14 Sm. & Mars. 126.

[c] R. *v.* O'Connell, 11 Clark & Fin. 15; 9 Jurist, 30. As the reports, in which this case is given at large, are rarely to be met with by the profession in this country, I have thought it better to include in a note a sketch of the whole proceedings.

The indictment contained eleven counts, in each of which it was charged that the defendants, Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Matthew Kay, Charles Gavan Duffy, John Gray and Richard Barrett, the Rev. Peter James Tyrrell and the Rev. Thomas Tierney, unlawfully, maliciously and seditiously did combine, conspire, confederate and agree with each other, and with divers other persons unknown, for the purpose in those counts respectively stated.

The first count charged the conspiracy as a conspiracy to do five different acts, (that is to say, First. To raise and create discontent and disaffection amongst her majesty's subjects, and to excite such subjects to hatred and contempt of the government and constitution of the realm as by law established, and to unlawful and seditious opposition to the said government and constitution.—Second. To stir up jealousies, hatred, and ill will between different classes of her majesty's subjects: and especially to promote amongst her majesty's subjects in Ireland, feelings of ill-will and hostility towards and against her majesty's subjects in the other parts of the United Kingdom, especially in that part of the United Kingdom called England.—Third. To excite discontent and disaffection amongst divers of her majesty's subjects serving in her majesty's army.—Fourth. To cause and procure, and aid and assist in causing and procuring, divers subjects of her majesty *unlawfully*, *maliciously* and *seditiously* to meet and assemble together in large numbers, at various times and at different times, within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at

quietly acquiesced in, if we can judge by the vehement protest against its authority uttered by Lord Brougham in a subsequent case.[d] In this country the only state where it is in any sense followed is in Virginia, and there only in respect to penitentiary offences.[e]

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such assemblies and meetings, changes and alterations in the government, laws and constitution of the realm by law established.—Fifth. To bring into hatred and disrepute the courts of law established in Ireland for the administration of justice, and to diminish the confidence of her majesty's subjects in Ireland in the administration of the law therein, *with the intent* to induce her majesty's subjects to withdraw the adjudication of their differences with, and claims upon each other, from the cognizance of the said courts by law established, and to submit the same to the judgment and determination of other tribunals, to be constituted and contrived for that purpose. [This count set out as overt acts of the above design, numerous meetings, speeches and publications.]

The second count was the same as the first, omitting the overt acts.

The third count was the same as the second, only omitting from the fourth charge the words "unlawfully, maliciously and seditiously."

The fourth count was the same as the third, omitting the charge as to the army.

The fifth count contained the first and second charges set forth in the first count, omitting the overt acts.

The sixth count contained the fourth charge set forth in the first count, omitting the words "unlawfully, maliciously and seditiously," and the overt acts.

The seventh count was the same as the sixth, adding the words, "and especially, by the mean aforesaid, to bring about and accomplish a *dissolution of the legislative union*, now subsisting between Great Britain and Ireland."

The eighth count contained the fifth charge set forth in the first count, omitting the overt acts.

The ninth count contained the fifth charge set fourth in the first count, omitting the intent therein charged, and the overt acts, but adding the following charge: "And to assume and usurp the prerogatives of the crown in the establishment of courts for the administration of law."

The tenth count was the same as the eighth, omitting the intent stated in the fifth charge in the first count.

The eleventh count charged the conspiracy to be "*to cause and procure large numbers of persons to meet and assemble together* in divers places, and at divers times, within Ireland, and by means of unlawful, seditious, and inflammatory speeches and addresses, to be made and delivered at the said several places, on the said several times respectively, and also by means of the publishing, and causing and procuring to be published, to and amongst the subjects of her said majesty, divers unlawful, malicious and seditious writings and compositions, *to intimidate the Lords Spiritual and Temporal, and the Commons* of the Parliament of the United Kingdom of Great Britain and Ireland, and thereby to effect and bring about changes and alterations in the laws and constitution of this realm, as now by law established."

On the 22d November, the defendants respectively pleaded, "that they were not guilty of the premises above laid to their charge, or any of them, or any part thereof:" and on the 16th January, 1844, the trial commenced at bar, before the full court of Queen's Bench—viz., Pennefather, Chief Justice, and Burton, Crampton and Perrin, Justices—and lasted till the 12th February. The jury ultimately returned a verdict to the following effect: All the defendants were found guilty on the whole of the last eight counts of the indictment, viz., the fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh counts. Three of the defendants—Daniel O'Connel, Barrett, and Duffy—were also found guilty on the whole of the third count, and on part of the first and second counts—that is to say, of all the first and second counts, except as to causing meetings to assemble "unlawfully, maliciously and seditiously." Four other of the defendants—John O'Connell, Steele, Ray, and Gray—were also found guilty of a part of the first, second and third counts, viz., of all except as to causing meetings to assemble unlawfully, maliciously and seditiously, and exciting discontent and disaffection in the army.

On motion in arrest of judgment, the Chief Justice, in delivering his judgment, thus expressed himself,—"It was boldly and perseveringly urged, that there was no crime

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[d] Irvine *v.* Douglas, 3 Eng. R. 23; ante, § 415. [e] Clere's case, 3 Grattan, 615.

The rule that a judgment on a verdict of guilty, on an indictment containing several counts, some of which are good and some bad, will be sus-

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charged in the indictment. If there was one in any count, or in any part of a count, that was sufficient." Mr. Justice Burton declared: "We cannot arrest the judgment, if there be any count on which to found the judgment." The other two judges expressly concurred in that doctrine; and the whole court decided, moreover, that all the counts were sufficient in point of law.

Having been called up for judgment, 30th May, 1844, the defendants were respectively sentenced to fine and imprisonment, and to give security to keep the peace, and be of good behavior for seven years; and were at once taken into custody, in execution of the sentence. They immediately sued out writs of error, *coram nobis*, upon which the court formally affirmed its judgments. On the 14th of June, 1844, the defendants sued out of the "High Court of Parliament," writs of error to reverse the judgment of the court below. On the writ of error being sued out, it became necessary to enter the findings of the jury, according to the true and legal effect of such findings, upon the record, which was done accordingly. The eleven counts of the indictment were set out *verbatim;* then the findings of the jury, in accordance with the statement of them given above, and the entry of judgment. "Whereupon, all and singular the premises being seen and fully understood by the Court of our said Lady the Queen, now here it is considered and adjudged by the said Court here, that the said Daniel O'Connell, for his offences aforesaid, do pay a fine to our Sovereign Lady the Queen, of two thousand pounds, and be imprisoned," &c., and "enter into recognizances to keep the peace, and to be of good behavior for seven years," &c. Corresponding entries were made concerning the other defendants respectively.

On the proceedings, generally, the advice of the judges of England was asked by the House of Lords on eleven questions, of which the following turned out to be the chief:

Question I. "Are all, or any, and if any, which, of the counts of the indictment, bad in law—so that, if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered upon them?"

Question 2. "Is there any, and if any, what, defect in the findings of the jury upon the trial of the said indictment, or in the entering of such findings?"

Question 3. "Is there any sufficient ground for *reversing the judgment*, by reason of any defect in the indictment, or of the findings, or entering of the findings of the jury, upon the said indictment?"

Question 11. "In an indictment consisting of counts A, B, C, when the verdict is *guilty of all generally*, and the counts A and B are good, and the count C is bad,—the judgment being, that the defendant, 'for his offences aforesaid,' be fined and imprisoned, which judgment would be sufficient, in point of law, if confined expressly to counts A and B,—can such judgment be reversed on a writ of error? Will it make any difference whether the punishment is discretionary, as above suggested, or a punishment fixed by law?"

On the first question, the judges were unanimously of opinion that two of the counts were bad, or insufficient in law, (see ante, 578, note,) which were the sixth and seventh counts, but that the remaining nine counts were perfectly valid.

On the second question, it was answered, one judge dissenting, "that the findings of the jury in the first four counts were not authorized by law, and are incorrectly entered on the record."

The result was, that, according to the opinion of the judges, there were two bad counts (the 6th and 7th), on which there were good findings by the jury, and four good counts (the 1st, 2d, 3d and 4th), on which there were bad findings The effect of this two-fold error was stated by Mr. Baron Gurney, and adopted by the Lord Chancellor, as follows: "I cannot distinguish between a bad finding on a good count, and a good finding on a bad count. They appear to me to amount to precisely the same thing, namely, that upon which no judgment can be pronounced. The judgment must be taken to have proceeded upon the *concurrence of good counts and good findings*, and upon nothing else."

Seven out of nine of the judges expressed a clear, unhesitating opinion, that the third and eleventh questions should be answered in the negative, viz., that the judgment was in no way invalidated, could be in no way impeached by reason of the defective counts and findings. The two dissenting judges were Baron Parke and Mr. Justice Coltman. The first position of the judges was thus expressed by Chief Justice Tindal: "I conceive it to be the law that, in the case of an indictment, if there be one good count in an indictment upon which the defendants have been declared guilty by proper findings on the record, and a judgment given for the crown, imposing a sentence

tained, is not varied by the circumstance that a demurrer of the defendant to the bad counts was overruled, after which the defendant pleaded not guilty to the whole indictment, it not appearing from the record that the defendant was prejudiced by the introduction of evidence under the bad counts, which was not competent under the good counts.[ee]

It should be observed that a general verdict of guilty on several counts will not authorize separate penalties on separate counts.[f]

Where a verdict only applies to a portion of the counts, leaving others undisposed of, it seems the judgment will be reversed.[g]

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authorized by law to be awarded in respect of the particular offence, that such judgment cannot be reversed by a writ of error, by reason of one or more of the counts in the indictment being bad, in point of law. It was urged at your lordships' bar, that all the instances which have been brought forward in support of the proposition, that one good count will support a general judgment upon an indictment in which there are also bad counts, are cases in which there was a motion in arrest of judgment, not cases where a *writ of error* has been brought. This may be true; for, so far as can be ascertained, there is no single instance in which a writ of error has been ever brought to reverse a judgment upon an indictment, upon this ground of objection. But the very circumstance of the refusal by the court to arrest the judgment, where such arrest has been prayed for on the ground of some defective count appearing on the record, and the assigning by the court, as the reason for such refusal, that there was one good count upon which the judgment might be entered up, affords the strongest argument that they thought the judgment, *when entered up*, was irreversable upon a writ of error. For such answer could not otherwise have been given. It could have had no other effect than to mislead the prosecutor, if the court were sensible at the time that the judgment, when entered up, might afterwards be reversed by a court of error. I interpret the words, 'that the defendant, *for his offences* aforesaid, be fined and imprisoned,' in their plain, literal sense, to mean *such offences as are set out in the counts of the indictment, which are free from objection, and of which the defendant is shown, by proper finding on the record, to have been guilty*—that is, in effect, the offences contained in the fifth and eighth, and all the subsequent counts. And I see no objection to the word offences, in the plural, being used, whether the several counts last mentioned do intend several and distinct offences, or only one offence described in different manners in those counts. For whilst the record remains in that shape, and unreversed, there can be no objection, in point of law, that they should be called 'offences,' as they appear on the record."

The determination of appeal cases in the House of Lords has been, by immemorial usage, committed to those lords who have reached the peerage by professional preferment. Each of the five lords present—Lord Langdale, Master of the Rolls, being absent—delivered an elaborate and extended opinion on the subject; Lord Lyndhurst and Lord Brougham, as has been noticed in the text, for affirmance, and Lord Denman, Lord Cottenham and Lord Campbell for reversal. The result of the opinion of Chief Justice Tindal has been given; and though it was supported with great copiousness of illustration by Lord Lyndhurst and Lord Brougham, its strength can scarcely be said to have been improved. Lord Denman, after commenting with great vigor and boldness on the illiberality of the court below, in disallowing the challenge made by the defendants to the array, proceeded as follows:

"Now, the question is, whether the judgment which has been pronounced, and the sentence which has been passed, can be good under such circumstances." [After reading the eleventh question put to the judges, his lordship proceeded:] "The court have pronounced their sentence upon the defendant, in respect of counts A, B, and C, in respect, that is, 'of his said offence.' The plain sense of these words, according to the approved rules of construction, is supposed to be, that they mean only such offence as shall appear, after legal argument, to be well laid. I cannot think so. It appears to me to be an extremely ingenious term of language to say that you can so confine it. Here are three counts, each laying what is presumed to be an offence; on each the

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[ee] Robbins *v.* State, 8 Ohio State R. (N. S.) 131.

[f] Buch *v.* State, 1 Ohio St. R. 61; see ante, § 414-27.

[g] Baron *v.* People, 1 Parker C. C. 1245.

§ 3048. When an indictment charges in one count the breaking and entering of a building with intent to steal, and in another count, a stealing

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grand jury has made presentment of a true bill. To each of those three counts the plea—'not guilty,' applies; on each issue a trial takes place; upon each there must be evidence given; upon each of those three counts the verdict is taken. The court proceeds to say—'For his said offences, the offences of which he stands convicted, I sentence him to a certain discretionary punishment, to a punishment which I inflict according to my discretion, and according to my views of his demerits, as found guilty upon those his said offences.' We are told that it is necessary to 'presume that the court pronounced their judgment on the good counts only.' In the first place, I feel an unconquerable repugnance to that, because I cannot be ignorant that I should be setting up a presumption in direct contradiction to the notorious facts. If your lordships are to teach the present and future students of the law what the law is upon this subject, from your proceedings in this case, and you say—'We must, by law, presume that the court of Dublin passed this sentence upon the good counts only,' at least those members of the legal profession who go to practise on the other side of the channel, will take in the reports of the court of Queen's Bench in Ireland, and there they will find a solemn decision, the direct contrary of what your lordships have thought proper to assume; because, there, on motion in arrest of judgment, on the ground that these two very counts were bad, the court said—'These counts are perfectly good; they are unexceptionable.' Strange now to call upon your lordships to assume that those counts were not acted upon by that very court, which tells you they are so good that they are determined to act upon them. But not only is it against the notorious fact, and, in my opinion, against the plain meaning of the words, but it is against the common probability of every case. I am deliberately of opinion that the practice of selecting, at the time of the trial, the counts on which judgment may be lawfully awarded, is the right and wholesome practice, producing no inconvenience, and affording a great security for justice. It was the universal practice of necessity, when, in old times, the indictment consisted of a single count; the constant aim of modern legislation has been to simplify criminal charges, nor is any object worthier of attention in framing the code of every civilized country. But it seems to me that, as in the case of damages, I have suggested a short and simple mode of keeping clear of all difficulty, which I am sure no lawyer will contest with me; so with regard to several counts in criminal cases, the objection may be entirely avoided by the court passing a separate judgment upon each count, and saying—'We adjudge that, upon this count, on which the prisoner is found guilty, he ought to suffer so much; that, upon the second count he ought, on being found guilty, to receive such a punishment. Whether the count turns out to be good or not, we shall pronounce no opinion.' And that question would be reserved for the superior court. A court of error would then reverse the judgment only on such counts as could not be supported in law, leaving that to stand which had proceeded on valid charges. Now, it is said that this is a mere technical objection, and that no injustice can arise from it. I must say that I think the greatest injustice may arise from it. It is very different from irrelevant stuff being foisted into a good count. That is highly improper, if it is done by way of prejudice, because a criminal charge ought to be distinct, clear and intelligible in itself and free from all matter of imputation that does not belong to the offence. But still the court would easily throw aside that irrelevant abuse, and pass judgment only for that which goes to make up the offence. Suppose there had been three indictments, and the prisoner had been found guilty on all three, and the court had been permitted by law to pronounce one judgment upon all, in one sentence. I do not see how it would be at all different from what has taken place here. So far from being merely technical, it may involve the greatest injustice, because you may inflict the heaviest punishment for the lightest offence, or, indeed, for that which may turn out to be no subject for punishment at all. To pass a sentence for three offences, where a party is well convicted of only two, cannot be right. And let it be observed, that I do not seek to control a discretion exercised on the proper subjects of that discretion. I merely hold it wrong to punish in a case where no punishment is lawful. The judgment is not severable, and, if partially wrong, must, for that reason, be wholly reversed, on the very same unquestionable principle which must be applied to civil cases. The sentence in the one and the damages in the other stand on the same footing, the moment it is clear that the judgment is general and proceeds on all the counts. Another objection to this mode of giving judgment has been adverted to. It is observed that the party will not be able to defend himself in case of a second charge against him of the facts so imperfectly stated in the bad count. Let me here observe upon what appears to me another striking inconsistency. You are to assume that it

in the same building, on the same day, and the defendant is found guilty generally, the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed on error, because the record does not show whether one offence only, or two, were proved on the trial; and as this must be known by the judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved.[h]

When there is a general verdict of guilty upon several counts relating to the same transaction, the practice is to pass judgment on the count charging the highest grade of offence.[i]

Where a party is subject to two distinct penalties by statute for the same offence, he cannot assign the omission of one of them in the sentence as ground for reversal of judgment.[ii]

II. Bill of exceptions.

§ 3049. The practice concerning bills of exception, so far as it is settled by statute, does not fall within the compass of this work. So far as concerns criminal cases at common law, it has always been held in this country that bills of exceptions do not lie. In England, the same view was generally taken by the older authorities;[j] but now it seems to be the better opinion that they may be tendered in cases of *misdemeanor*.[k] In a case where the defendants were indicted for obtaining money by false pretences, and for a conspiracy to defraud, a bill of exceptions was tendered to the admissibility of certain documents in evidence; it was remarked by Lord Campbell, C. J., that it was the first time he had ever known a bill of exceptions in a criminal case; but after hearing arguments at chambers, his lordship sealed the bill of exceptions, leaving the question whether it would lie to be argued in the court of error.[l] If a challenge, whether to the array or to the polls, be overruled without demurrer, the ruling of the judge may be made the subject of a bill of exceptions.[m] In cases of treason and felony a bill of exceptions has never been allowed.[n] In a case of felony,[o] Sir E. Sugden, Lord Chancellor of Ireland, 1846, refused a writ

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is too difficult for the judge to give his mind to the subject at the moment of trial, and at the same time you are to say that he took care to apportion his judgment strictly to those counts that were good in point of law. And this was urged as a reason for allowing the judgment to be general; and yet, when that general sentence has been passed, however defective it may be proved as to part of its foundation, the court of error must support it on the presumption that the judge did form that opinion and discriminate between the good counts and the bad."

[h] Kite *v.* Com., 2 Metcalf, 581.

[i] Manly *v.* State, 7 Md. 149.

[ii] Dodge *v.* State, 4 Zabr. (N. J.) 455.

[j] Sir Henry Vane's case, 1 Sid. 85; 1 Keble, 384; 1 Lev. 68; Kelynge, 15.

[k] R. *v.* Lord Paget, 1 Leon. 85; R. *v.* Higgins, 1 Vent. 366; R. *v.* Nutt, 1 Barnard, 307; R. *v.* Preston, (Inhab.) Rep. temp. Hald. 251; 2 Str. 1040.

[l] R. *v.* Alleyne, cited Archbold's C. P., 13th edition, 145. For the form of a bill of exceptions, on an information in quo warranto, see 2 Gude's Cr. Prac. 2117.

[m] Bac. Abr., Juries, (E.) 12; Skin. 101; 2 Inst. 427.

[n] St. Tr. f. 938; 2 Hawk, c. 46, sect. 1; Bac. Abr., Bill of Exceptions.

[o] In re. Haynes and Rice, 3 Jones & La Touche, 528.

for a bill of exceptions: saying that, "having regard to the terms of the 13 Edw. I., and of the Irish Act, 28 Geo. III., c. 31, and the authorities, that a bill of exceptions cannot be taken in a case like this, particularly,[p] and having regard to the circumstance that there is no authority in favor of the Statute of Westminster applying to a criminal case like this, he was of opinion, on a review of all the circumstances, that the application should not be granted."[q]

In Pennsylvania, the extent to which the Supreme Court may review errors in certain criminal cases, was limited by the act of November 6, 1856, to the decisions of the court below, on the trial, on points of evidence or law, excepted to by the defendant, and noted and filed of record by the court.[qq]

In that state the Revised Acts of 1860 provide as follows:

§ 3049 (*a*). *Error in homicide.*—Upon the trial of any indictment for murder, or voluntary manslaughter, it shall and may be lawful for the defendant or defendants to except to any decision of the court upon any point of evidence or law, which exception shall be noted by the court, and filed of record as in civil cases, and a writ of error to the supreme court may be taken by the defendant or defendants, after conviction and sentence.

§ 3049 (*b*). If during the trial upon any indictment for murder, or voluntary manslaughter, the court shall be required by the defendant or defendants to give an opinion upon any point submitted and stated in writing, it shall be the duty of the court to answer the same fully, and file the point and answer with the records of the case.

§ 3049 (*c*). No such writ shall be allowed, unless special application be made therefor, and cause shown within thirty days after sentence pronounced; and if the supreme court be sitting in banc in any district, the application shall be made, and cause shown there; if the said court be not sitting, application may be made to, and cause shown before one of the judges of that court, and upon the allowance of such writ, the said court or judge shall fix a time and place for hearing the said case, which time shall not be more than thirty days thereafter; if the said court shall be at that time sitting in banc in any district of the state, the said court or judge, upon the allowance of any such writ, shall make all such proper orders, touching notice to the commonwealth, and paper books, as may be considered necessary.

§ 3049 (*d*). The writ of error shall issue from the prothonotary's office of the proper district, and all orders, decrees and judgments in the case shall also be entered of record there; but the application and final hearing may be made and had before the said supreme court while sitting in any other district.

§ 3049 (*e*). Upon the affirmance of the supreme court of the judgment in any case, the same shall be enforced pursuant to the directions of the judgment so affirmed, and the said court may make any further order requisite for carrying the same into effect; and if the supreme court shall reverse any judgment, they shall remand the record, with their opinion, setting forth the causes of reversal, to the proper court for further proceeding.

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[p] Sir Harry Vane's case, 2 Harg. St. Tr. 450; and R. *v.* O'Donnell, 1 Hud. & Br. 439

[q] Archbold's C. P., 13th ed., 145.

[qq] Fife *v.* Commonwealth, 29 Penn. State R. 429.

III. In whose behalf a writ of error lies.

§ 3050. In New York, before the recent statute, it was said that no writ of error lies for the government after judgment for the defendant, upon a demurrer to the indictment.[r] Such, also, is the law in Illinois,[s] in Virginia,[t] in Massachusetts,[u] and in Georgia.[v] It is otherwise, however, in Maryland,[w] and in Arkansas, by statute.[x]

In New York, at present, the people are not entitled to a writ of error to review the order of the Supreme Court, granting a new trial in a criminal case, where there had been a conviction and *certiorari* with stay of judgment in the court below.[xx] The writ only lies where there has been judgment for the prisoner upon the indictment.[y]

§ 3051. In Pennsylvania a writ of error was sustained when taken by the commonwealth to a judgment for the defendant, on a demurrer to the evidence, and the Supreme Court directed the record to be remitted to the court below, so that the latter might give judgment in accordance with the former's decree. This case, however, it should be observed, was one of fornication and bastardy, which may be treated as *quasi* civil.[yy]

In New York, a statute now exists, authorizing a writ of error for the people in all cases, except acquittals.[z]

No writ of error lies in Pennsylvania, at common law, as a matter of right, and under the old practice the court refused to allow one to correct merely technical errors.[a]

In Massachusetts, error may be brought any time after judgment,[b] and on reversal of judgment for error in substance, the proper judgment may be entered by the Supreme Court.[c]

§ 3052. In England a writ of error may be taken by the crown, and on the reversal of an erroneous judgment for the defendant, on demurrer to the indictment, he may be put on his trial before a jury.[d]

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[r] People *v.* Corning, 2 Comstock, 1, overruling People *v.* Onondaga, 2 Wend. 631; People *v.* Adams, 3 Denio, 190; 1 Comst. 173; and a series of other cases, ante, § 529.

[s] People *v.* Dill, 1 Scammon R. 257.

[t] Com. *v.* Harrison, 2 Va. Cases, 202.

[u] Com. *v.* Cummings, 3 Cushing, 212.

[v] State *v.* Jones, 7 Georgia, 422.

[w] State *v.* Buchanan, 5 H. & J. 317.

[x] State *v.* Graham, 1 Pike, 428.

[xx] People *v.* Nestle, 5 E. D. Smith (Appeals), N. Y. 583.

[y] Ibid.

[yy] Com. *v.* Parr, 5 W. & S. 345.

[z] People *v.* Clark, 3 Selden, 385.

[a] Com. *v.* Martin, 2 Barr, 284.

[b] Sup. Rev. Stat. 227.

[c] Ibid. 649–50.

[d] R. *v.* Houston, 2 Crawf. & Dix, 310.

CHAPTER V.

MOTION FOR NEW TRIAL.

I. IN WHAT NEW TRIALS CONSIST, § 3053.
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3d. To whom, § 3232.
4th. In what form, § 3235.

I. In what new trials consist.

§ 3053. A new trial is a re-examination by jury according to the forms

of the common law, of the facts and legal rights of the parties upon disputed facts, which it is in the discretion of the courts to grant or refuse, but which is claimable as a right when evidence has been improperly received or rejected, or incorrect directions in law have been given.[a] No error, however, which is apparent on the record, and which can be noticed in arrest of judgment, will be ground for a new trial.[b] Thus a new trial will not be granted because a letter was omitted in the prisoner's name, in the title on the back of the bill found by the grand jury.[c]

II. In what cases courts have authority to grant new trials.

1st. After acquittal.

§ 3054. After an acquittal of the defendant, on an indictment for either felony or misdemeanor, there can in general be no new trial, though the result be produced by error of law or misconception of fact.[d]

§ 3055. But in England, in cases of misdemeanors, and in this country in all cases, where the verdict has been obtained by fraud of the defendant or in consequence of irregularity in his proceedings, as by keeping back witnesses for the prosecution, or neglecting to give due notice of trial; and in cases where the object of the proceeding substantially is to try a right, and the verdict would bind the right, as in cases of indictments for non-repair of a highway or a bridge, a new trial may be had after verdict for the defendant if evidence have been improperly received, or there have been misdirection, or a verdict contrary to the evidence.[e] An indictment for obstructing a navigation was holden not to be within this latter clause, inasmuch as in such a case the defendant is liable on conviction to fine and

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[a] 4 Chitty's Gen. Practice, 31; 1 Stark. Ev. 468; Bomascine *v.* Farebother, 3 Bar. & Adol. 372; New Castle *v.* Broxtowe, 4 Bar. & Adol. 273; Roberts *v.* State, 3 Kelly, 310.

[b] Minor *v.* Mead, 3 Conn. 289.

[c] State *v.* Duestoe, 1 Bay, 377.

[d] U. S. *v.* Gilbert, 2 Sumner, 20; State *v.* Riley, 2 Brevard, 444; State *v.* M'Cory, 2 Blackf. 5; State *v.* Norvell, 2 Yerger, 24; State *v.* Wright, 3 Brevard, 431; State *v.* Davis, 4 Blackford, 346, note; Campbell *v.* State, 9 Yerger, 333; 4 M. & S. 337; 6 East, 315; 4 Bla. Commen. 361; 2 Salk. 646; 1 Wils. 298; 12 Mod. 9; 1 Lev. 124; 1 Sid. 149, 153; 1 Ld. Raym. 63; Bac. Abr. Trial, L. 9; Hawk. b. 2, c. 47, s. 12; Tidd, 5 Ed. 881; 4 Chit. Gen. Practice, 31; 10 East, 268; R. *v.* Sutton, 2 Nev. & M. 57; 5 B. & Ad. 52; State *v.* Kanouse, 1 Spencer, 115; Com. *v.* Cunningham, 13 Mass. 245; R. *v.* Cohen, 1 Stark. N. P. C. 516; State *v.* Anderson, 3 Sm. & Mar. 751; State *v.* Burris, 3 Texas, 403; State *v.* Baker, 19 Mo. 683. In a prominent case in New York, where the defendants had been acquitted on an indictment for conspiracy, a motion for a new trial on behalf of the public prosecutor was entertained by the Supreme Court. "The right of a court to grant a new trial in case the defendant has been acquitted," said Marcy, J., after refusing a new trial on the merits, "is called in question by the defendant. That such right does not exist, where the ground of the application is that the finding is against evidence, is conceded: but whether a new trial can be granted where the acquittal has resulted from the error of the judge in stating the law to the jury, seems to be involved in much doubt. It is a very important question, and not necessary to be now settled; the court have, therefore, deemed it discreet to forbear expressing an opinion on it till a case shall arise requiring them to do so." (People *v.* Mather, 4 Wendell, 266.) In a subsequent case, however, the point seems to have been decided substantially in accordance with the English practice. (People *v.* Comstock, 8 Wendell, 640.)

[e] R. *v.* Inhabitants of West Riding, 2 East, 352, n.; R. *v.* Chorley, 12 Q. B. 515; R. *v.* Crickdale, 3 E. & B. 947, n.; R. *v.* Russell, 3 E. & B. 942.

imprisonment, and the verdict of acquittal does not bind any right.[f] The test seems to be this: where only a fine can be imposed, there can be a new trial after an acquittal. Where the punishment involves imprisonment or other personal discipline, the acquittal is final.[g]

§ 3056. In North and South Carolina, where a defendant is acquitted upon one count in an indictment and convicted on another, and appeals, if a *venire de novo* is awarded, it must be to retry the whole case;[h] but in Tennessee, where a defendant has been acquitted on some counts and convicted upon others, a motion for a new trial made by him generally, is only applicable to the count upon which he was convicted, and if the court sets aside the whole verdict, it is said to be erroneous.[i]

§ 3057. Where a defendant, being indicted for burglary and larceny, according to the ordinary form, in one count, was acquitted of the burglary, but convicted of the larceny, and obtained a new trial, it was held that the revision of the case pervaded the whole indictment, and that on the second trial he was to be arraigned on the burglary as well as the larceny portion of the count.[j]

§ 3058. So the Circuit Court of the United States for the eastern district of Pennsylvania, recently held that after a new trial, on a conviction for manslaughter, the charge of murder was reopened;[k] though the contrary was held in Tennessee,[l] Mississippi,[m] California,[n] Illinois,[nn] Georgia, and Missouri.[o]

§ 3059. Where the acquittal has been produced by the fraud of the defendant, the plea of *autrefois acquit*, as has been already noticed, cannot be interposed.[oo] Thus, where the complaint was made to a justice by a person employed to do so by the defendant, and the warrant was served, and witnesses summoned by the defendant's direction, and an attorney retained and paid by him to appear on the part of the state, and the circumstances of the case were so represented to the justice that he imposed a lighter fine than he otherwise would have done; the case was held open to another trial.[p]

2d. After conviction.

3060. In misdemeanors, it is settled that a defendant may have a new

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[f] R. *v.* Russell, supra; as to cases in the courts where new trials have been granted on ground of fraud or by acquittal, see ante, § 546, post, § 3059.

[g] Jones *v.* State, 15 Arkansas, 261.

[h] State *v.* Stanton, 1 Iredell, 424; State *v.* The Commissioners, 3 Hill, S. C. 239.

[i] Campbell *v.* State, 9 Yerger, 333.

[j] State *v.* Morris, 1 Blackf. 37; ante, § 550.

[k] U. S. *v.* Harding, 6 Penn. L. J. 23; 1 Wall. Jun. 127.

[l] Slaughter *v.* State, 5 Humph. 410.

[m] Hunt *v.* State, 25 Miss. 378.

[n] People *v.* Gilmore, 4 Cal. 376.

[nn] Brennan *v.* People, 15 Illinois, 511.

[o] Ante, § 550.

[oo] See *ante*, § 546; State *v.* Little, 1 N. Hamp. 257; Com. *v.* Jackson, 2 Va. Cases, 501; State *v.* Wright 2 Const. Ct. Rep. 517; Thehard *v.* Nichols, 2 Root, 176; 2 Salk. 646; 12 Mod. 9; Sayer, 90; Hawk. b. 2, c. 47, s. 12; Bac. Abr. Trial, L. 9, *acc.*; 1 Sid. 153; 1 Lev. 9 *cont.*; see Pruden *v.* Northrup, 1 Root, 86; Hannaball *v.* Spalding, 1 Root, 86.

[p] State *v.* Little, 1 N. Hamp. 257; Com. *v.* Jackson, 2 Virg. Cases, 501; ante, § 546.

trial at the discretion of the court, after a verdict of conviction.[q] In cases of felony or treason, the former understanding in England was that no new trial in any case can be granted where the proceedings have been regular,[r] but if the conviction appear to the judge to be improper, he may respite the execution to enable the defendant to apply for a pardon.

§ 3061. But now the Court of Queen's Bench, when the record is before that court, will in its discretion order a new trial in cases of *felony*, where evidence has been improperly admitted, or where the jury have been misdirected.[s] An inferior court cannot grant a new trial, either in a civil or a criminal case, on the merits, though it can do so where there has been some irregularity in the proceedings.[t] And where a court of quarter sessions had ordered a new trial after a verdict of guilty against two prisoners, on the ground that, after the jury had retired, one of them had separated from his fellows and had conversed with a stranger respecting his verdict, and that therefore the verdict was bad, on a writ of error brought, it was held that the new trial had been properly ordered.[u]

In this country the uniform and unquestioned practice, down to a comparatively late period, has been to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions; and though, except in cases of fraud, no instance exists where an acquittal has been disturbed, new trials in cases of conviction have frequently been granted, as will be presently shown more fully, on account of irregularity in the jury, of misdirection by the judge, and of informality in the verdict. In 1832, however, the supposed English rule was pronounced by the Supreme Court of New York in force as part of the common law of the land;[v] and in 1833, in a case of great consideration and of solemn interest, it was declared by Mr. Justice Story,[w] that not only was there no case in this country where a new trial, in a capital case, had been granted on the merits where the authority of the court on the subject-matter had been agitated, but that after a verdict of a jury regularly rendered on the facts in such case, it was out of the power of a common law court to interpose, except by the recommendation of pardon. The common law doctrine, it was held, so far from being of imperfect application to this country, was invested with additional strength, not only by the federal constitution, but by the constitutions of most of the individual states. "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb;" and "No fact tried by a jury,

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[q] U. S. *v.* Gilbert, 2 Sumner, 19; People *v.* Comstock, 8 Wendell, 549; State *v.* Prescott, 7 N. Hamp. 287; People *v.* Vermilyea, 7 Cowen, 369; Com. *v.* Green, 17 Mass. 513; State *v.* Slack, 1 Bailey, 330; 6 Term R. 638; 13 East, 416; 1 Ch. C. L. 653.

[r] 1 Ch. C. L. 653, referring to 6 Term R. 525, 638; East, 416, n. b.; 4 B. & A. 275.

[s] R. *v.* Scaife, 2 Den. C. C. 281; 17 Q. B. 238.

[t] 2 Tidd Prac. 905; 13 East, 418, n. b.; Burn's J., New Trial; R. *v.* Day, Sayer, Rep. 203; R. *v.* Peters, 1 Bur. 568; Bac. Abr. Trial, (L.); R. *v.* Mayor of Oxford, 3 Nev. & M. 2.

[u] R. *v.* Fowler, 4 B. & Ald. 273.

[v] People *v.* Comstock, 8 Wendell, 549.

[w] U. S. *v.* Gilbert, 2 Sumner, 51.

shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[x]

§ 3062. The doctrine of new trials, as originally recognised in practice in this country, being thus unsettled, it becomes necessary to examine how far it is supported by authority, and how far it may be harmonized with the constitutional restrictions which have been just given.

§ 3063. The clause which prescribes that no man shall be twice put in jeopardy for the same offence, has been fully considered in a former chapter, and it was there shown, that while the courts of Pennsylvania, North Carolina, Tennessee, and perhaps of Alabama, held, that when a prisoner was once put on trial for a capital offence, he was put in jeopardy, so that he could not be placed on trial a second time for the same offence, the courts of the United States, of Massachusetts, New York, and Mississippi, united in the opinion that jeopardy could not strictly be said to exist until the trial was ended.[y] The immediate question, in these cases, was, whether it was in the power of a court to discharge a jury in a capital case at its discretion, before verdict rendered; but it is maintained by Mr. Justice Story, that if to be put on trial is to be put in jeopardy, to be regularly convicted on a sufficient indictment must be so even more strongly.[z] In those cases where it was held that jeopardy did not arise until the trial was finished, the question did not legitimately come up for consideration, whether the constitutional provision did not work immediately on the rendition of the verdict; and though it was maintained by Judge Washington,[a] that jeopardy meant nothing more than the acquittal or conviction of the prisoner, *and the judgment of the court thereon*, yet still, as on such a construction there might be a new trial after *acquittal* and before judgment, and as the view thus taken was not entertained in the Supreme Court of the United States,[b] when the same ultimate conclusion was reached, and is strongly dissented from by Story, J.,[c] it cannot be said to have been further adopted, so far as the federal judiciary is concerned, than by the eminent judge who pronounced it. But there is a distinction between the cases where the jury was discharged without the consent of the prisoner, and those where a new trial is asked for on his own application, which materially affects the applicability to the latter of the opinions given in the former case. Thus, in the first instance where it was held that the discharge of a jury in a capital case was a bar to a second trial, Duncan, J., in the course of his opinion,

[x] Whether these prohibitions bear on the state courts, has been doubted, (People *v.* Goodwin, 18 Johnson, 187; U. S. *v.* Gilbert, 2 Sumner, 51,) though the inclination of practice seems to be to regard them as limited to the federal tribunals, (State *v.* Keyes, 8 Vermont, 57,) and it is clear, that in the two leading cases in Massachusetts and New York, where the subject was disposed of, the result was placed on common law reasoning exclusively. (Com. *v.* Green, 17 Mass. 515; People *v.* Comstock, 8 Wendell, 549.) There are, however, in most of the states, similar limitations; and even where no such constitutional restriction exists, it is doubtful whether equal force is not applied by the doctrines of the common law. U. S. *v.* Gilbert, 2 Sumner, 41, 42; People *v.* Comstock, 8 Wendell, 549; see *ante*, § 211–4, 573.

[y] *Ante*, § 573–591. [z] Story, J., U. S. *v.* Gilbert, 2 Sumner, 54.

[a] U. S. *v.* Haskell, 4 Wash. C. C. R. 402. [b] U. S. *v.* Peres, 9 Wheaton, 579.

[c] U. S. *v.* Gilbert, 2 Sumner, 57.

expressly excepted from the operation of the rule those cases where the jury were discharged with the prisoner's consent.[d] If by such consenting, the prisoner can waive his constitutional rights, and may be again put in jeopardy for the same offence, there can be little doubt that the same waiver may be made on the much more solemn occasion of an application for a new trial. It was probably on such reasoning that, in a series of cases which appear to have escaped the notice of Mr. Justice Story, the same courts which held that the discharge of a jury without consent in a capital case was a bar to a second trial, felt no hesitation in entertaining the prisoner's application for a new trial after conviction of the same grade of offence.[e]

§ 3064. In Pennsylvania it has been the constant and unquestioned practice in the courts to exercise the right of granting new trials in criminal cases, after convictions of every grade. Thus, at a very early period, the Supreme Court granted a rule to show cause why a new trial should not be granted after a conviction of murder in the first degree, because the verdict was against law and evidence; and though the rule was ultimately refused, no doubt appears to have been suggested of the perfect authority of the court to determine it.[f] Some time subsequently, a few months after the extreme construction already noticed was given to the term jeopardy, by Gibson, C. J.,[g] the same learned judge entertained a motion for a new trial after a conviction of burglary, the full power of the court to dispose of the application being nowhere questioned.[h] The same practice has been followed in several cases of capital conviction in the court of Oyer and Terminer, &c., of Philadelphia county;[i] and in late cases, after conviction of murder in the first degree, a new trial was refused on the merits by the Supreme Court, without any suggestion of its incapacity to adjudicate the question.[j]

§ 3065. In North Carolina, a new trial was granted, in 1795, in a case of perjury, on account of after-discovered evidence;[k] though subsequently, in 1819, it was intimated in a capital case, that when a question of evidence was fairly submitted to a jury, and they determined it on the merits, their finding would not be disturbed.[l] Instances of new trials in felonies, in that state, however, are frequent, on account of mistakes of law or irregularity in trial.[m]

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[d] Com. *v.* Cook, 6 S. & R. 591.

[e] Com. *v.* Brown, 3 Rawle, 207; Com. *v.* Williams, 2 Ashmead, 69; Com. *v.* Murray, Ibid. 41; Com. *v.* O'Hara, 7 Smith's Laws, 695; State *v.* Jeffreys, 3 Murphey, 480; State *v.* Miller, 1 Dev. & Bat. 500; State *v.* Barton, 2 Dev. & Bat. 196; State *v.* Sparrow, 3 Murphey, 487; State *v.* Lipsey, 3 Dev. 485; Cassels *v.* State, 4 Yerger, 152; State *v.* Slack, 6 Alabama, 676.

[f] Com. *v.* O'Hara, 7 Smith's Laws, 694.

[g] Com. *v.* Clue, 3 Rawle, 500; see *ante*, § 575.

[h] Com. *v.* Brown, 3 Rawle, 207.

[i] Com. *v.* Murray, 2 Ashmead, 41; Com. *v.* Williams, Ibid. 69; Com. *v.* Green, 1 Ashmead, 289.

[j] Com. *v.* Flannagan, 7 Watts & Serg. 415; Com. *v.* Harman, 4 Barr, 269; Com. *v.* Mosler, Ibid. 264; see *ante*, § 575.

[k] State *v.* Greenwood, 1 Hay, 141.

[l] State *v.* Jeffreys, 3 Murphey, 480.

[m] State *v.* Miller, 1 Dev. & Bat. 500; State *v.* Barton, 2 Dev. & Bat. 196; State *v.* Sparrow, 3 Murphey, 287; State *v.* Lipsey, 4 Dev. 485.

§ 3066. In Tennessee, where there exists the same constitutional check, applied with the same scrupulous rigor, a motion for a new trial was heard in a case of larceny, and it was declared by the court that the rule was, that no new trial would be granted, "unless there be a great preponderance of evidence against the verdict, so as to present a case of uncommon rashness on the part of the jury." No hesitancy, however, was intimated as to exercising the power when a proper case arose.[n] A short time previous a new trial was granted after a capital conviction, in consequence of irregularity in the conduct of the jury.[o]

3067. In Indiana, under the same provision, a new trial was refused in a capital case after conviction, the application resting on the alleged inadequacy of testimony, no question being raised as to the competency of the court to interfere where the verdict was manifestly against evidence.[p]

§ 3068. The same practice appears to hold, not only in those states whose constitutions contain transcripts of the provision just cited, but in those where no such constitutional check exists. In South Carolina the question was first agitated shortly after the adoption of the Federal constitution.[q] The prisoner was convicted of passing a ten pound bill, knowing it to have been forged; and he moved for a new trial; which was granted by the court. There was another count in the indictment for forgery, upon which he was acquitted. "It does not distinctly appear upon the face of the report," remarks Mr. Justice Story, when commenting on the case,[r] "that the offence was capital, though the argument of counsel would lead us to that conclusion. But no point was made at the argument as to the power of the court to grant a new trial. It was silently taken for granted on all sides. Now, whether the laws of South Carolina gave such a power to their court, in such cases, is what I have no means of knowing. But it is material to state, that the constitution of South Carolina contains no prohibition on the subject. There is no clause in it like the prohibitory clause in the constitution of the United States. The point not having been made, the court did not even advert to it." But whatever may have been the justice with which the precedent was started, it has since been acquiesced in and enforced by a court, the learning and sagacity of whose judges forbid the supposition that they were ignorant of the existence of the English practice, or of the consequence of overturning it. A motion for a new trial, after conviction of highway robbery, was refused in 1820, on the merits; no doubt, however, being expressed by either counsel or court as to the power to act in the premises. Colcock, J., said, "Unless a verdict is clearly and manifestly against evidence, the court will not set it aside;" and then proceeded to review the sufficiency of the evidence as given on trial.[s] In 1830, on a motion for a new trial, after a verdict of

[n] Cassels *v.* State, 4 Yerger, 152.
[o] State *v.* Crawford, 2 Yerger, 66; and see State *v.* Jim, 4 Humphrey, 239; see *ante*, § 578.
[p] Jerry *v.* State, 1 Blackford, 395.
[q] State *v.* Hopkins, 1 Bay, 373.
[r] 2 Mason, 48.
[s] State *v.* Fisher, 2 Nott & M'Cord, 261.

guilty, in the case of murder, the authority was asserted still more explicitly. "The court," it was stated, "has always exercised the power of awarding new trials where verdicts are manifestly against the evidence, or where it preponderates so strongly as to strike the mind at once as a conclusion contrary to the truth, or as originating in a popular prejudice against which the best ordered communities are not always secure; and in a case, affecting the life of an unfortunate prisoner, the obligation to order a new trial under such circumstances would be imperative."[t]

§ 3069. On a trial for treason, in the Circuit Court of the United States, for the district of Pennsylvania, in 1799, a motion for a new trial was made, after conviction, on the ground that a mis-trial had been produced by the fact of a juror having expressed an absolute and decisive opinion on the case before he was sworn.[u] "The prisoner," exclaimed Mr. Lewis, on conducting the argument on his behalf, "does not come forward to prove that the verdict was given against evidence, but to insist that the prisoner had been tried by eleven jurors only."[v] Mr. Rawle, the District Attorney, does not appear to have interposed the constitutional objection, and the question of authority, therefore, was regarded by the court as conceded. The court was equally divided on the question, whether there had been a mis-trial; but, ultimately, Judge Peters gave way, and a new trial was ordered.

§ 3070. In Massachusetts, in an early case,[w] a new trial was granted, in a capital case, because there had been a mis-trial, the prisoner having been arraigned before an incompetent tribunal, and therefore, in legal interpretation, the trial being utterly void, as *coram non judice*. Some time afterwards the topic was again brought up in the same court, and argued at great length; and, though the motion was refused, it was held, generally, that the power to grant new trials, under such circumstances, was vested in the Supreme Court.[x] The merits of the application, however, were limited to the fact of the alleged erroneous admission, by the court, of a witness convicted of an infamous crime in another state, and there was no attempt made to obtain a revision of the evidence on the ground that it had been misconceived or misapplied by the judge. "Where the error appears of record," said Parker, C. J., "in either country, the court will arrest the judgment after a verdict of guilty; and the party may be again indicted and tried for the same offence. If the error does not appear of record, but arises from inadvertency of the judge, in rejecting or admitting evidence, or from misbehavior of the jury, or other cause, which would be good ground for a new trial in civil actions or misdemeanors, justice and consistency of principle would seem to demand that the person

[t] State *v.* Sims, 2 Bailey, 29; see State *v.* Anderson, 2 Bailey, 565; State *v.* Hooper, 2 Bailey, 37.
[u] U. S. *v.* Fries, 3 Dallas, 515; Wharton's St. Trials, 598.
[v] Pamphlet Trial, Appendix, 30.
[w] Com. *v.* Hardy, 2 Mass. 303.
[x] Com. *v.* Green, 17 Mass. 515.

convicted should, upon his own motion, have another trial; instead of being obliged to rely upon the disposition of the court to recommend a pardon, or of the executive power to grant it. It is enough that the life of the accused will, generally, be safe in the hands of such highly responsible public agents. The right of the subject to be tried by his peers, according to the *forms*, as well as principles of law, is the only *certain* security, that at all times, and under all circumstances, that protection which the constitution extends to all, will be effectually enjoyed. Nor is it for the public safety and interest that new trials should be refused in such cases. For it must be obvious that, in most cases of irregularity, which would be a good cause for another trial, if in the power of the court to grant it, a pardon upon the representation of the court would be thought to follow of course: and thus, in many cases, public justice might be prevented on account of defect in form, or some irregularity, not affecting the merits of the case; which mischief might be avoided by another trial."

§ 3071. In Virginia, in whose constitution no prohibitory clause exists, a motion for a new trial was heard by the General Court in a capital case,[y] after a conviction, and was denied on the merits, without, however, the authority of the court to grant it being questioned. In 1837, the question received a thorough examination, the English practice being urged on the Court of Errors as interposing a bar to any new trial after conviction in a capital case, and after an argument of great deliberation, that court solemnly asserted its right to exercise a revisory power over the verdict in all cases of conviction.[z] In a case in 1853, before the same court, after a

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y Com. *v.* Jones, 1 Leigh, 598; see Grayson *v.* Com., 6 Grat. 712.

z Ball's case, 8 Leigh, 726. This case is the first in which the question of the authority of the court was mooted. "It seems to be settled in England that, by the course of the common law, a new trial cannot be granted in any case of treason or felony. If the conviction is improper, the prisoner is respited until a pardon is applied for. In misdemeanor it is otherwise. (1 Chitty's Crim. Law, 653; 8 Wend. 549; 13 East, 416, note *b*; 3 Black. Com. 387, note by Christian.) Is this principle a part of the common law with us, and are the courts of this State bound by it? We are all of the opinion that it is not, and that our courts are not bound to follow it. It is believed that a contrary practice has long prevailed in this State. Many new trials are remembered by some of the judges. And we think that this practice is suitable to our constitution and laws, and agreeable to justice and humanity. To grant a new trial, on the application of the prisoner, cannot be said to be against the maxim that no one shall be twice put in jeopardy of his life for the same offence. As was said by the solicitor-general, in the case of the Commonwealth *v.* Green, 17 Mass. Rep. 525, it is really granting him a privilege which may operate to save his life, by standing a second trial for it. The remedy of a pardon, as a substitute for a new trial, falls short of complete justice to the prisoner, as well as to the public. To the prisoner a pardon is not equal to an acquittal, to which the case supposes he is entitled. His reputation and character are much more affected by the one than the other. A pardon discharges from punishment, an acquittal from guilt. Pardon may rescue him from the penitentiary, or a halter; but it cannot redeem him from the infamy of a conviction. Every one is entitled to a fair and legal trial. If convicted, it should be according to the law and evidence. And if it be clearly apparent to the court that injustice has been done in its own forum, it would seem to be appropriate and just that the court should redress it. To devolve the duty on the executive, besides that it falls short of complete justice to the prisoner, as before mentioned, is to throw it upon one over whom it has no control, who may leave the injustice in full force. And as Parker, C. J., said, in the case last mentioned, 'whatever confidence the court might feel in the executive, they would be unwilling to commit to other hands, in a case affecting life, an error com-

conviction of murder in the second degree, an application for a new trial on the merits was entertained, and it was declared by Field, J., who gave the opinion, "Where the finding of the jury is clearly against evidence, or clearly without evidence to justify it, it is the duty of the court to set the verdict aside, upon the application of the prisoner, and to grant a new trial."[a]

§ 3072. In New York, it appears originally to have been conceded that a new trial could be granted on the merits by a court of oyer and terminer,[b] but not by the sessions, except in cases of irregularity.[c] In 1830, on a motion for a new trial, after a conviction of perjury, it was ruled that in such a case a court of oyer and terminer was invested with full power in the premises, and it was declared by Marcy, J., in giving the opinion of the court, "that the policy in respect to new trials in criminal cases, which the English courts have pursued, has never been countenanced by our courts, and never would be tolerated by our people," and he sought to distinguish

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mitted by themselves, or by others concerned in the trial, the regularity of which they are bound to enforce.' For irregularities occurring at the trial, new trials have often been granted in our own courts, as the reported cases will show. And they have often been granted on the circuit, where the evidence did not warrant the finding, as before mentioned. For irregularities they have been frequently granted in other courts of the United States; though the rigid rule of the English courts would in like cases deny them.—(3 Dallas, 515; 1 Bay, 372.) In 1 Blackford's Rep. 396, the court granted a new trial, because the verdict was against the evidence. And the opinion and reasoning of Parker, C. J., in the case cited from 17 Mass. Rep., emphatically support the view taken by this court. He said, p. 534, 'That a prisoner, who has been tried for felony and acquitted, should not be subjected to a second trial for the same offence, seems consistent with the humane principles of the common law, in relation to those whose lives have been once put in jeopardy. But the same humane principle would appear to require that, after a conviction, a prisoner should be indulged with another opportunity to save his life, if anything had occurred upon the trial which rendered doubtful the justice or legality of his conviction. *Nemo bis debit vexari pro una et eadem causa*, is a maxim of justice as well as of humanity; and was established for the protection of the subject against the oppression of government. But it does not seem a legitimate consequence of this maxim, that one who has been illegally convicted should be prevented from having a second inquiry into his offence, that he may be acquitted if the law and the evidence will justify an acquittal.' 'Besides the injury to the accused, in denying a new trial, and giving a resort to the pardoning power only, justice might often be defeated by it. The pardoning power in this State is, in its nature or practice, more limited than that of the king of England. Conditional or commutative pardons are often granted there, by means of which a party may undergo a punishment more suitable to his crime, though less than that to which the judgment of the court consigned him. But with us pardons are, constitutionally or from practice, unconditional and absolute. A new trial might often redress an injury, without wholly discharging from punishment. But a pardon would discharge altogether. A person indicted for murder might be convicted of murder in the first degree. It might be clear that this was not right; but that the offence was murder in the second degree only, or manslaughter. If the court could not grant a new trial, the executive must pardon and discharge the prisoner. Whereas, if a new trial were granted, he might meet the punishment due to his proper offence. We have a more varied scale of crimes, with appropriate punishments, than that found in the British code. At the time the principle in question was established there, that code was simple and bloody. It was death or nothing, for most offences. It is believed that this difference in our criminal laws, as well as that in the exercise of the pardoning power, and the spirit of our institutions, together with a due regard to justice and humanity, fully justify a departure from the English rule."—Per Fry, J.

[a] M'Cune *v.* Com., 2 Robinson, 790.

[b] People *v.* Townsend, 1 Johnson's Cases, 104.

[c] People *v.* Justice, Ibid. 179.

the English practice from that of this country by the fact that, in the former case, the prerogative of the crown was there called into action to work justice in case of an erroneous conviction in a way which the relations of the judiciary and the executive in this country did not authorize.[d] In 1831, a new trial was refused by the Supreme Court, after a conviction of murder, without the power of the court to grant a new trial in such cases being questioned.[e] But in 1832, on a motion for a new trial after an acquittal on an indictment for larceny, it was proclaimed with great emphasis that "*it appears perfectly settled that, in offences greater than misdemeanors, a new trial cannot be granted on the merits, even where the prisoner has been convicted;*"[f] and the court proceeded to quote and adopt the English authorities at large, without, however, any notice being taken of the cases of People *v.* Stone, and People *v.* Ransom, occurring in the two immediately preceding volumes of reports. The question arose, it should be noticed, on an application for a new trial after an *acquittal* of felony, and consequently the opinions pronounced in reference to *convictions*, were aside of the issue. Amid, however, so great fluctuations of sentiment, there appears to have been great uniformity of practice, as cases have always been of frequent occurrence where new trials have been granted after convictions, in every grade of offence. It is hard, in fact, to regard the revised statutes as doing less than investing the Supreme Court with full authority in the premises, even if such authority did not before exist,[g] though such evidently was not the understanding of the court in the case last cited, which occurred several years after their publication. The right does not seem to have been lately questioned. Thus, in 1842, on an indictment for obtaining goods on false pretences, a statutory felony, a new trial was granted by the Supreme Court in consequence of the alleged misdirection of the court below in point of law.[h] In 1843, a new trial applied for on the same grounds, on an indictment for soliciting to commit arson, was refused.[i] In the same year a new trial was granted, in a case of grand larceny, in consequence of the erroneous admission of testimony.[j] In 1845, in a case of great interest, a new trial was granted after conviction of murder, in consequence of alleged errors in the ruling of the judge who tried the case.[k]

More lately, however, the power of a court of oyer and terminer to grant a new trial on the merits, has been again denied by the Supreme Court;[l] though since then it has continued to be exercised by a learned judge of the Supreme Court, sitting in Greene county at oyer and terminer, with the justices of the sessions.[m]

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[d] People *v.* Stone, 5 Wendell, 36.
[e] People *v.* Ransom, 7 Wend. 266.
[f] People *v.* Comstock, 8 Wend. 549.
[g] 2 Rev. Stat. 741, s. 26.
[h] People *v.* Williams, 4 Hill, 10.
[i] People *v.* Bush, 4 Hill, 134.
[j] People *v.* Newman, 5 Hill, 294.
[k] People *v.* Bodine, 1 Denio, 281.
[l] People *v.* Judges of Duchess county, 2 Barbour, S. C. 282.
[m] People *v.* Morrison, 1 Harris C. C. 625; see the able argument of Judge Harris in this case.

§ 3073. In New Jersey, no doubt seems to have existed as to the full authority of the courts in the premises.[n]

§ 3074. On a motion for a new trial in Connecticut, in 1825, in a case of statutory arson, it appeared that the information contained two counts, on one of which no evidence was offered, but that the jury had by mistake convicted on the wrong count. "The only question," it was said in the Court of Errors, "is whether the facts proved sustained the count on which the prisoner was convicted. So far from this, the facts proved were not even evidence to be submitted to the jury, on the first count of the information. It is a clear case of the jury misapplying the testimony, and a new trial must be advised."[o]

§ 3075. From an examination of the preceding cases, it will be observed that there is not a single instance where a new trial was refused on the merits after conviction, on the ground that there was no authority in the court to grant it; and that in the only case in which such a doctrine is suggested,[p] the point was foreign to the issue, and contrary to the practice, both previous and subsequent, of the court by which it was thrown out. The question thus appeared to be settled, when, in 1833, in an argument of singular learning, ability and boldness, which has been already more than once referred to, it was opened by the late Mr. Justice Story. "Upon the whole," said that learned judge, on a motion for a new trial after conviction for piracy, "having given this subject the fullest consideration, I am, upon the most mature deliberation, of opinion that this court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a regular and competent jury, whether there be a verdict of acquittal or conviction. My judgment is that the words in the constitution, 'nor shall any person for the same offence be twice put in jeopardy of life or limb,' mean that no person shall be tried a second time for the same offence, where a verdict has been already given by a jury. The party tried is, in a legal sense as well as common sense, in jeopardy of his life when a lawful jury have once had charge of his offence as a capital offence upon a good indictment, and have delivered themselves of the charge by a verdict. In this respect I follow the doctrine of the Supreme Court of New York, and the doctrine of the Supreme Court of Pennsylvania and North Carolina goes not only to the same extent, but includes cases where the party is once put upon his trial before the jury, and they are discharged from giving a verdict without extreme necessity. This, too, is the clear, determined and well-settled doctrine of the common law, acting upon the same principle as a fundamental rule of criminal jurisprudence. I deem it a privilege of inestimable value to the citizen; and that it was introduced into the constitution upon the soundest principles of prudence and justice. But if it were otherwise, it is my duty to administer the consti-

[n] State *v.* Parker, 1 Halst. 148; State *v.* Guild, 5 Halst. 178.
[o] State *v.* Stewart, 6 Conn. 47; see, also, 16 Conn. 54.
[p] People *v.* Comstock, 8 Wend. 549.

tution as it stands, and not to incorporate new provisions into it. If this clause does not prohibit a new trial, where there has already been a regular trial and verdict, then it is wholly immaterial whether the verdict is of acquittal or of conviction of the offence; and the same party may, in the discretion of the court, be put upon his trial ten, nay twenty times, if the court should think fit. It was, as I think, among other things, to get rid of the terrible precedents on this subject, alluded to by Lord Hale, and even acted upon by him in the reign of Charles II., in discharging juries from giving verdicts upon frivolous or oppressive suggestions, that this great maxim of the common law was engrafted into the constitution. The constitution, has also, in another clause, declared, that no fact once tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. The only modes of making this re-examination known to the common law, are by a writ of error and a new trial, and if by the common law there cannot be a new trial in a capital case, after a regular trial once had upon a good indictment, as seems to me to be conclusively established by the English authorities already cited, then this clause carries in its bosom another virtual prohibition. Lest I should be thought to have overlooked the case of United States *v.* Daniel,[q] where the Circuit Court divided upon a motion for a new trial, I beg only to say, that the point whether the Circuit Court had jurisdiction to grant a new trial in a capital case was not before the court. It was a mere certificate of division of opinion of the Circuit Court, and the Supreme Court held that it had no jurisdiction to entertain the point certified, so far as it regarded a new trial." Davis, J., concurring with Judge Story on refusing a new trial on the merits, expressed distinctly his belief that the court had full power to interpose if, in its discretion, it thought proper so to do; and the judgment of the court, therefore, rested on grounds exclusive of the abstract question of authority.[r]

§ 3076. In a case in Alabama, in 1844, after a conviction for murder, the opinion of Mr. Justice Story, in the last case, as well as the English practice, was pressed with great energy in opposition to a motion for a new trial; and the subject was carefully considered by the court. "It is certain," it was said, after a review of the reported cases, "that the English Courts, in modern times, do not grant new trials in cases of felony, but accomplish the same object by a recommendation to the crown for a pardon which is always granted. It does not, however, follow that it is against the principles of the ancient common law that the court should have power to grant a new trial where a doubt exists as to the correctness of the verdict. It would seem to be more consistent with the spirit of humanity which pervades it, that a new trial should be granted by the court, than that the prisoner should depend upon the mercy of the executive. It cannot be questioned that the clause in our bill of rights, upon which we have

[q] 6 Wheaton's R. 542.
[r] U. S. *v.* Gibert, 2 Sumner, 19; ante, § 591.

commented, was for the protection of the citizen, and it would be a mockery to put such a construction on it as will make it operate to his prejudice. We are, for these reasons, of the opinion that the court may, with the consent of the prisoner, grant a new trial after a conviction for a felony."[s] In the same year, a motion for a new trial, after a conviction of murder in the first degree was refused on the merits by the Supreme Court of Pennsylvania, the case of the United States *v.* Gilbert, and of People *v.* Comstock, not appearing to have been cited at the bar, or noticed by the court; but no doubt being suggested of the entire authority of the court to revise a verdict, under such circumstances, at its discretion.[t]

§ 3077. In 1846, in Philadelphia, where the same course of argument, backed by the same high authority, was presented to the Circuit Court of the United States, the two learned judges of whom that court was composed, after an elaborate review of the law, held not only that a new trial could be granted in a capital case, but that when the prisoner had on the first trial been convicted of manslaughter, the second trial opened to him again the charge of murder, to which by his own election, he had voluntarily subjected himself.[u] "I am aware," said Judge Kane in delivering the opinion of the court, "that one of the most eminent of our jurists, (Story, J.,) has found an inhibition in the constitution against the grant of new trials in cases involving jeopardy of life. But I cannot realize the correctness of the interpretation, which anxious to secure a citizen against the injustice of a second conviction, requires him to suffer under the injustice of a first. Certainly I would not subject the prisoner to the hazard of a new trial without his consent. If, being capitally convict, he elects to undergo the sentence, it may be his right, as it was, to have pleaded guilty to the indictment. When, however, he asks a second trial it is to relieve himself from the jeopardy in which he is already; and it is no new jeopardy that he encounters when his prayer is granted, but the same divested of the imminent certainty of its fatal issue." Such, also, was the reasoning of Mr. Justice McLean, in a case occurring about the same time;[v] of the Supreme Court of New Hampshire;[w] and of the Supreme Court of Indiana.[x]

§ 3078. Notwithstanding, therefore, the research and ability for which the opinion of Mr. Justice Story is distinguished, it cannotbe held to have shaken the practice of the country. It was delivered in a divided court, and with the exception of the dictum of Judge Sutherland,[y] it is, in this country, almost unsupported by judicial sentiment. It will be seen, also, that the chief American authorities on which Judge Story relies, viz., those of the courts of Pennsylvania, North Carolina and Tennessee, when

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[s] State *v.* Slack, 6 Ala. 676; see, also, Cobia *v.* State, 17 Ala. 190.
[t] Com. *v.* Flannagan, 7 Watts & Serg. 415.
[u] U. S. *v.* Harding, 6 Penn. L. Jour. 215; 1 Wal., Jr., 127.
[v] U. S. *v.* Conner, 3 M'Lean, 573; S. P., U. S. *v.* Macomb, 5 M'Lean, C. C. 286.
[w] State *v.* Prescott, 7 N. Hamp. 287.
[x] Weinzorflin *v.* State, 7 Blackf. 186.
[y] People *v.* Comstock, 8 Wendell, 549.

commenting on the word "jeopardy," in the federal and state constitutions, are diverted from their application to motions for new trials by a distinction noticed by each of them, between jeopardy incurred with the consent of the prisoner, and jeopardy incurred without that consent; and that in those very courts the practice is, acting upon such a distinction, to grant new trials, even in capital cases, at the prisoner's application. If there is any case on which, on principle of common law, the supervisory power of the courts should be most jealously exercised, it is that of a capital conviction, and there is no branch of the system of criminal practice to which the application of such a check is so important to the liberties of the citizen. To follow the language of Chief Justice Tindal,[z] not the less applicable here, because what in England is reserved to the mercy of the crown, is, in this country, determined by the discretion of the court, "I cannot conceive how the benefit of trial by jury can be, in any way, impaired by a cautious and prudent application of the corrective which is now applied for; on the contrary, I think that, without some power of this nature, residing in the breast of the court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public." Best, C. J., in speaking of new trials, observed, "It is one of the most beautiful parts of our constitution, that, when any thing occurs in one tribunal, which appears to be wrong, it may afterwards be corrected by another, so that the interest of a party cannot be prejudiced by a hasty decision; otherwise the trial by jury, instead of being a blessing would become a source of evil. If the jury were to be made judges of law as well as of fact, parties would be always liable to suffer from an arbitrary decision."[a] Nor are these opinions weakened by the very painful developments contained in the eighth report of the British Commissioners. It is there stated by Sir Frederick Pollock, that in a particular period of nine months, six persons convicted of capital crimes at the Old Bailey, were, upon investigation of their cases, after they had been ordered to execution found to be innocent. As the examination of these cases was induced by unusual circumstances, and as the attention ordinarily given to applications for reprieves was of only a superficial character, the inference was that the frightful number of ten executions a year of innocent men, in the city of London alone, might have been prevented, had the court before whom the conviction was obtained, had the power and the willingness to go into a careful examination of the grounds for new trials.[b]

III. For what reasons new trials will be granted.

§ 3079. Assuming it to be law, that in all cases where the application comes from the prisoner, it is discretionary in the courts to grant new trials, the cases in which that discretion may be exercised, will be considered, under the following heads:—

[z] Melin *v.* Taylor, 2 Hodges, 126, 127.
[a] Levi *v.* Milne, 4 Bing. 198.
[b] See 8 Rep. Brit. Com. 18, &c.; 2 Lond. Jur., part II. 449; N. York Com. Rep. 242.

1st. MISDIRECTION BY THE COURT TRYING THE CASE.

§ 3080. Any misdirection by the court trying the case, in point of law, on matters material to the issue, is a good ground for a new trial;[c] and such misdirection, even upon one point, is sufficient, although the jury may have properly found their verdict upon another point, as to which there was no misdirection;[d] though if the error was entirely immaterial and irrelevant, and justice has been done, the court will not set aside the verdict, nor enter into a discussion of the question of law.[e] Error committed by the court in the allowance or refusal of challenges,[f] or the allowance or refusal of a motion, either for continuance[g] or for compelling the prosecutor to elect,[h] or of any other peremptory motion,[i] will be ground for a new trial.

§ 3081. The due degree of weight to be given by the judge directing a jury to particular evidence, which has been promptly admitted, must be left to his own discretion; and his discretion, in that respect, will not be revised by the court above,[j] though, if the court instruct a jury that they may indulge a presumption not warranted by the evidence, a new trial will be awarded.[k] Thus, where the judge charged that the nonproduction by the defendant, of evidence of good character, should weigh against the defence, it was held error;[l] and where, on a trial for murder, there was evidence that a murder had been committed, and that the house in which the dead body was, had been subsequently set on fire, under such circumstances as to raise a suspicion that the same was done by the perpetrator of the murder,

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[c] People *v.* Cogdell, 1 Hill's N. York R. 95; People *v.* Thomas, 3 Hill's N. Y. R. 169; People *v.* Townsend, Id. 479; Com. *v.* Parr, 5 Watts & Serg. 345; People *v.* Bodine, 1 Denio, 282; Doe d. Bath *v.* Clarke, 3 Hodge, 49; Doe d. Read *v.* Harris, 1 Will. Wol. & D. 106; Haine *v.* Davey, 4 Ad. & El. 892; 6 Nev. & M. 356; 2 Har. & Wel. 30; Lyons *v.* Tomkies, 1 Mee. & W. 603; Anon. 6 Mod. 242; How. *v.* Stride, 2 Wils. 269; 10 John. R. 447; 5 Day, 479; 5 Mass. 487; Wilson *v.* Rastall, 4 T. R. 753; 4 Conn. 356; 3 Cranch, 298; Calcraft *v.* Gibbs, 5 T. R. 19; Crofts *v.* Waterhouse, 3 Bingham, 319; Young *v.* Spencer, 10 Barn. & C. 145; Holiday *v.* Atkinson, 5 Barn. & Co. 501; Boyden *v.* Moore, 5 Mass. 365; Wardell *v.* Hughes, 3 Wendell, 418; Baylies *v.* Davis, 1 Pick. 206; Lane *v.* Crombie, 12 Pick. 177; Doe *v.* Paine, 4 Hawks, 64; West *v.* Anderson, 9 Conn. 107; M'Faden *v.* Parker, 3 Yeates, 496.

[d] Doe d. Read *v.* Harris, Will. Wol. & D. 106; People *v.* Bodine, 1 Denio, 280.

[e] Stewart *v.* State, 1 Ohio St. Rep. 66; Edmonson *v.* Machell, 2 T. R. 4; How *v.* Strode, 2 Wils. 269; Smith *v.* Page, 2 Salk. 644; Denly *v.* Massarine, 2 Salk. 646; Cox *v.* Kitchen, 1 Bos. & Pul. 338; Brazier *v.* Clap, 5 Mass. 1; Remington *v.* Congdon, 2 Pick. 310; State *v.* Tudor, 5 Day, 329; Rogers *v.* Page, Brayt, 169; Breckinridge *v.* Anderson, 3 J. J. Marshall, 710; Ingraham *v.* Insurance Co., Const R. 717; Johnson *v.* Blackman, 11 Konn. 32; Coit *v.* Tracy, 9 Conn. 1; Peters *v.* Bamhill, 1 Hill's S. C. 234.

[f] Com *v.* Lesher, 17 S. & R. 155; People *v.* Mather, 4 Wend. 229; People *v.* Bodine, 1 Denio, 281; Heath's case, 1 Robinson, 735; People *v.* Rathbun, 21 Wend. 509; Armstead *v.* Com., 11 Leigh, 657; though see Henry *v.* State, 4 Humph. 549.

[g] State *v.* Fyles, 3 Brevard, 304; Vance *v.* Com., 2 Virg. Cas. 162; Com. *v.* Gwathin, 10 Leigh, 687; Bledsoe *v.* Com., 6 Rand. 674; People *v.* Vermilyea, 7 Cowen, 369.

[h] People *v.* Costello, 1 Denio, 83.

[i] Com. *v.* Church, 1 Barr, 105; see ante, § 643.

[j] Attorney-General *v.* Good, M'Clel. & Y. 286; 4 Ch. Gen. Practice, 42; People *v.* Genung, 11 Wendell, 18.

[k] Harris *v.* Wilson, 1 Wend. 511; Haine *v.* Davey, 4 Ad. & El. 899; 4 Wend. 639; 10 Wend. 461; Levingsworth *v.* Fox, 1 Bay, 520; Handley *v.* Harrison, 3 Bibb, 481.

[l] People *v.* Bodine, 1 Denio, 283; but see People *v.* White, 22 Wend. 167, ante, § 637.

to conceal that offence, and the evidence left it doubtful whether the prisoner was in the vicinity of the house when the fire was set, and the court charged the jury, that if the prisoner might have been at the scene of the fire "the *onus* was cast upon her to get rid of the suspicion which thus attached to her," and that she was bound to show where she was at the time of the fire, the presumption was held erroneous, and ground for a new trial.[m]

§ 3082. The omission by the judge, in summing up specifically, to leave to the jury a point made in the course of the trial (his attention not being expressly called to it,) is no ground for a motion for a new trial, if the whole of the case was substantially left to them.[n]

§ 3083. A new trial was refused where the complaint was, that the judge, although requested, declined to charge the jury, there being no dispute as to the law of the case; the trial closing so late on Saturday night that had the jury been charged, they must either have been dismissed, or kept over during Sunday; and the verdict being fully supported by the evidence.[o]

§ 3084. Where, however, from the absence of proper instructions, the jury fall into error, a new trial will be granted.[p] But the judge cannot be required to give an opinion on a mixed question of law and fact, and a refusal to do so is no error. In an action for maliciously and without reasonable or probable cause, charging the plaintiff with felony before a magistrate, it appeared that the plaintiff had lived in the service of the defendant and, on being discharged, took away with her a trunk and bag, the property of the defendant; that on the following day, the defendant wrote to desire the plaintiff to return those articles, stating, that unless she did so, he would, on the following Monday, cause her to be apprehended; that the latter being, in consequence of the plaintiff's absence, unanswered, the defendant obtained a warrant for the apprehension of the plaintiff, and carried her before a magistrate, who dismissed her, the defendant declining to press the charge; the judge before whom the cause was tried, left it to the jury to say, whether or not, the defendant had reasonable or probable cause for apprehending the plaintiff, and whether he was actuated by malice or not, and it was decided that this direction was proper, and that the judge was not bound to take upon himself to decide as to whether or not there was a reasonable or probable cause, it being a mixed question of law and fact.[q] In this country, however, it has been more than once held, that it is the duty of the court exclusively to determine whether the circumstances proved by the defendant amount to probable cause, leaving it to the jury to decide whether such circumstances are in proof or not.[r]

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[m] People *v.* Bodine, 1 Denio, 282.

[n] Robinson *v.* Gleadow, 2 Scott, 250; Den *v.* Sinnickson, 4 Halst. 149.

[o] People *v.* Oray, 5 Wend. 289.

[p] Morrison *v.* Muspratt, 12 Moore, 231; Calbreath *v.* Gracey, 1 Wash. C. C. R. 198; Page *v.* Pattee, 6 Mass. 459; Dunlap *v.* Patterson, 5 Cowen, 143; see Scott *v.* Lunt, 7 Peters, 596.

[q] Macdonald *v.* Booke, 2 Scott, 359; Shaw *v.* Wallace, 2 Stew. & Porter, 193; see 1 Greenl. R. 135; 4 Ch. Gen. Practice, 40.

[r] Whitney *v.* Peckham, 15 Mass. 243; Munns *v.* Dupont, 3 Wash. C. C. R. 32.

§ 3085. It is not the duty of a court, in conducting a trial, to determine abstract propositions, submitted by counsel, (*e. g.* whether certain testimony, which had been given, bore upon the issue, or only on the credit of witnesses;) it is enough if the court respond to all objections to testimony taken by either party, and give the proper instructions to the jury.[s] "Courts," said the Supreme Court of New York, "are under no obligation to listen to abstract propositions from counsel, and are not bound to explain them on the trial of causes."[t] If, however, incorrect abstract propositions are laid down, and the jury are misled by them, the better opinion is, that the verdict will be avoided.[u]

§ 3086. A judge has a right to express his opinion to the jury, on the weight of evidence,[v] and to comment thereon as much as he deems necessary for the course of justice.[w] An erroneous opinion on matter of fact, it is said, expressed by the judge in his charge, is no ground for new trial, unless the jury are thereby led to believe that such fact was withdrawn from their consideration.[x] But it is ground for a new trial that a judge expresses himself as to inferences of fact, so that the jury understand him to be stating principles of law.[xx]

§ 3087. Where, on the trial of an indictment, the jury returned into court without having agreed, and the judge instructed them a second time on the evidence as to matters about which they had made no inquiries, and had stated no difficulties or doubts as to the law; this was not a sufficient ground for a new trial,[y] though the case is different when the judge communicates his views of the law and facts in writing, without having the jury brought into open court for the purpose, and without procuring the attendance of the parties.[z]

§ 3088. When there are two good counts in an indictment, and the court gives erroneous instructions to the jury as to one of the counts, and there is a general verdict against the defendants, and judgment thereon, it is presumed that the judgment was given upon both counts, and a *venire de novo* will be awarded.[a]

2d. Mistake in the admission or rejection of evidence.

§ 3089. In any case where legal testimony has been admitted, or legal testimony rejected, a new trial may be had.[b] Thus, where, on an indict-

[s] People *v.* Cunningham, 1 Denio, 524.

[t] Ibid.; Lewis *v.* State, 4 Ham. 389; Van Hoesen *v.* Van Alstyne, 3 Wend. 75; Coleman *v.* Roberts, 1 Mis. 97; Clarke *v.* Baker, 7 J. J. Marshall, 194; Ross *v.* Garrison, 1 Dana, 35; Etting *v.* U. S. Bank, 11 Wheaton, 59.

[u] Etting *v.* U. S. Bank, 11 Wheaton, 59.

[v] See Am. Law Reg., Jan. 1853. Com. *v.* Child, 10 Pick. 252; Swift *v.* Stevens, 8 Conn. 431.

[w] Ware *v.* Ware, 8 Greenleaf, 42; Kinlock *v.* Palmer, 1 Rep. Con. Ct. 216.

[x] Riddle *v.* Murphey, 7 S. & R. 237; Com. *v.* Gallagher, 4 Penn. Law Jour. 517.

[xx] State *v.* Lynott, 2 Ames, (Rh. Is.) 295.

[y] Com. *v.* Snelling, 15 Pick. 321. [z] Sergeant *v.* Roberts, 1 Pick. 337, post, § 3139.

[a] State *v.* M'Canless, 9 Iredell, 375.

[b] People *v.* Spooner, 1 Denio, 343; Carter *v.* People, 2 Hill's N. Y. R. 317; People

ment for rape, the judge trying the case admitted evidence of the declarations of the injured party immediately after the event, though she herself had not been brought as a witness, being at the time incapable of testifying, such admission was held by the Supreme Court of New York ground for a new trial after conviction, the evidence being purely secondary, and the party injured not being produced.[c] In civil cases, the practice generally is, that though there be exceptionable testimony, yet if there be sufficient legal evidence to support the verdict, and justice appear to have been done, the verdict will not be set aside,[d] and the same rule applies where legal evidence has been excluded, but where, had it been admitted, it would have produced no variation in the result.[e] In the former case, however, the court must see that the evidence did not weigh with the jury in forming their opinion, or that an opposite verdict, given upon the remainder of the evidence, must have been set aside as against evidence.[f] And, Denman, C. J., once observed to the counsel who had put in such inadmissible evidence, "It is not enough for you to say that the reception of this evidence could have made no difference; you should have taken care not to put in bad evidence. The alleged unimportance of a piece of evidence improperly rejected or admitted, is no ground for refusing to send a case down for a new trial."[g]

§ 3090. In criminal cases, however, courts will rarely presume that the particular evidence which had been wrongfully admitted, could have no influence on the deliberations of the jury: and there have been but few exceptions, therefore, to the general rule, that in such cases of misdirection the defendant has a right to have his case given to another jury in a legal shape. But where, on a trial for conspiracy, a witness for the prosecution swore she had formerly sworn falsely at the instigation of the defendant, charging her bastard child to the prosecutor, and to discredit her, she was cross-examined to her own profligacy, and answered as to her criminal connection with other men; whereupon the defendant, further to discredit her, offered to prove her guilty with others, but the proof was rejected; on a motion to set aside the verdict, Lord Ellenborough, C. J., observed: "The other objection amounted to no more than this, that *Hannah Stringer*, the witness, having admitted that she had been connected with two or

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v. Restell, 3 Hill's N. Y. R. 289; People *v.* White, 14 Wendell, 111; Com. *v.* Parr, 5 Watts & Serg. 345; Doe *v.* Perkins, 3 Term R. 749; R. *v.* Wilts, &c., 6 Mod. 307; Norris *v.* Badger, 6 Cowen, 449; Brown *v.* May, 1 Munford, 288: Preston *v.* Harvey, 2 Hen. & Munf. 55; Walker *v.* Lieghton, 11 Mass. 140; Bignall *v.* Devnish, 6 Mod. 242; Gravenor *v.* Woodhouse, 1 Bingham, 38; Freeman *v.* Ashell, 2 Barn. & C. 494; Middlesex *v.* M'Gregor, 3 Mass. 124; Gurnee *v.* Dessies, 1 Johnson, 508; Hewlett *v.* Cook, 7 Wendell, 371; Young *v.* Buckingham, 5 Ham. 485; M'Elwee *v.* Sutton, 2 Bailey, 128; Hunt *v.* Adams, 7 Mass. 518; Com. *v.* Green, 17 Mass. 515.

[c] People *v.* McGee, 1 Denio, 21; see Com. *v.* Gallagher, 4 Pa. Law Jour. 516.

[d] Tullidge *v.* Wade, 3 Wils. 18; Herford *v.* Wilson, 1 Taunt. 12; Doe *v.* Tyler, 6 Bingham, 561; Nathan *v.* Buckley, 2 Moore, 153; Smith *v.* Harmanson, 1 Wash. R. 6; Prince *v.* Shepherd, 9 Pick. 176; Stiles *v.* Tilford, 10 Wendell, 338.

[e] Edwards *v.* Evans, 3 East, 451; Fitch *v.* Chapman, 10 Conn. 8; Landon *v.* Humphrey, 9 Conn. 209.

[f] Baron de Butzen *v.* Farr, 5 Nev. & Man. 617. [g] Ibid. 618.

three persons, the learned judge thought it immaterial to examine witnesses tendered on the part of the defendant, to show that she had also been connected, at other times, with several other persons; considering that, by her own showing, she was a common woman. But it was not urged that the extent of her prostitution might have shaken her credit in a greater degree. If, however, the evidence had been admitted, it could have made no difference, at least it ought not have made any difference in the verdict."[h] In Pennsylvania, and Georgia, the same principle appears to have been adopted.[i] In Tennessee, however, it has been broadly declared that in all cases where there has been illegal rejection of testimony for the defence, or improper admission of testimony for the prosecutor, a new trial will be ordered, though the court be satisfied that the verdict was correct.[j]

§ 3091. Where a witness called for the defence, was so much intoxicated at the time as to be incapable of comprehending the obligation of an oath, and the court refused to permit him to testify, but told the prisoner that he might recall him afterwards, but he was not so recalled, it was held that this was not ground in law for granting a new trial, the granting or refusing a new trial in such case being in the discretion of the judge.[k]

A new trial was granted where proof of the violent temper of the prisoner, who was charged with homicide, was introduced by the government, where it had not been put in issue by him.[l]

§ 3092. An objection to the competency of witnesses, discovered after a trial, is not a sufficient ground of itself for granting a new trial; but it may have some weight with the court where the party applying appears to have merits,[m] nor will a verdict be set aside because improper evidence was admitted, if no objection to its admission was made on trial.[n] Where a party neglects, at the proper time, to state for what purpose particular evidence is offered, and it is rejected for irrelevancy, he cannot afterwards obtain a new trial by showing that it might have been applied to a point material to the issue.[o]

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[h] R. *v.* Teal, 11 East, 307; see Com. *v.* Bosworth, 22 Pick. 397.

[i] Com. *v.* Eberle, 3 Serg. & R. 14, per Tilghman, C. J.; Com. *v.* Gallagher, 4 Penn. Law Jour. 516; Bird *v.* State, 14 Geo. 43; though see Com. *v.* McGowen, 2 Par. 347, where it is said, that after a court has rejected competent and material testimony offered by a defendant charged with an infamous crime, the court will not refuse relief on the assumption that the rejected evidence would not have availed the accused, if it had been received.—Per King, P. J.

[j] Peck *v.* State, 2 Humphreys, 78.

[k] State *v.* Underwood, 6 Iredell, 96; ante, § 753.

[l] State *v.* Merrill, 2 Dev. 269.

[m] Turner *v.* Pearce, 1 T. R. 177; Com. *v.* Green, 17 Mass. 515; Com. *v.* Wate, Mass. 261; Drew's case, 4 Mass. 399; see 3 Greenleaf, 92; post, § 3166.

[n] Wait *v.* Maxwell, 4 Pick. 217; Den. *v.* Gerger, 4 Halst. 225; Worford *v.* Isbell, 1 Dibb, 247; Cannon *v.* Alsbury, 1 A. K. Marshall, 76; Rice *v.* Bancroft, 11 Pick. 469.

[o] Barksdale *v.* Toomer, 2 Bailey, 180.

3d. Verdict against law.

§ 3093. Wherever, and as often as the finding of a jury is in point of law against the charge of the court, a due regard to public justice requires that the verdict should be set aside. On this principle, it is true, the doctrine of *autrefois acquit* grafts an important exception, but this exception arises, not from the doctrine sometimes broached that the jury are the judges of law in criminal cases, but from the fundamental policy of the common law, which forbids a man when once acquitted to be put on a second trial for the same offence. When a case is on trial the great weight of authority now is that the jury are to receive as binding on their consciences the law laid down by the court; and after a conviction it is hardly doubted in any quarter that if the verdict be against the law it will be set aside.[p]

§ 3094. For some time after the adoption of the federal constitution, a contrary doctrine, it is true, was generally received. In many of the states, the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance. Thus John Adams, in his diary for February 12, 1771,[q] in a passage which is probably either an extract from or memorandum of a speech before the colonial legislature, urges that in the then state of things, public policy demanded that not only in criminal but in civil cases juries should be at liberty to take the law in their own hands. It is not to be wondered at, therefore, that the early judges both of the federal and state courts should have continued for some time to assert a doctrine which, before the revolution, they had found so necessary for protection against oppression and persecution. To this may be added what in another place has been noticed more fully, that the Federal Supreme Court in particular, which was for some years so deeply immersed in politics, as to withdraw from its judicial duties most of its interest and a large part of its attention, was unwilling to assert any prerogative which might draw odium on itself, or expose the new constitution to any additional shock.[r] Hence it was that Judge Chase not only broadly denied

[p] R. *v.* Dean of St. Asaph, 3 Term R. 431; U. S. *v.* Battiste, 2 Sumner, 243; Com. *v.* Knapp, 10 Pick, 477; U. S. *v.* Shive, 1 Bald. 512; Com. *v.* Porter, 10 Metc. 286; Carpenter *v.* People, 8 Barbour, 610; People *v.* Pine, 2 Barbour, 571; Hardy *v.* State, 7 Miss. 607; Montee *v.* Com., 3 J. J. Marsh. 150; Davenport *v.* Com., 1 Leigh, 588.

[q] John Adams' Life and Works, 252.

[r] "It was not the least of the vices with which the early construction of the constitution was infected, that the judiciary, so far from being regarded as a separate estate of equal dignity with its sisters, did not hesitate to desert its own sovereign functions for the purpose of entering into their service. At the very outset, Mr. Jay held, at the same time, the office of Chief Justice and Secretary of State for nearly six months; and afterwards, while retaining the chief-justiceship, did not scruple to undertake the mission to England, which kept him from the bench from April 19th, 1794, to June 29th, 1795, when at last he resigned, not because he thought the two offices incompatible, but because he was elected to a third, that of Governor of New York. On February 27th, 1799, Mr. Ellsworth, then Chief Justice, was commissioned as minister plenipotentiary to France, holding on to the chief-justiceship until October, 1800, and resigning then only on the ground of ill-health. On January 20th, 1800, Mr. Marshall,

that the courts had any power to pronounce on the unconstitutionality of statutes, but over and over again declared that the Supreme Court was to

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then Secretary of State, was nominated as Chief Justice, presided during the whole of February term in the Supreme Court, and only left the secretaryship on March 4th, 1801, on the incoming of Mr. Jefferson, discharging in the meantime the duties of two offices concurrently: on the same day, issuing reports in the one capacity, and delivering judgments in the other. To these cases the precedent of the English Chancellor is scarcely in point, as he possesses no criminal jurisdiction; and in the only instances in England where a common law judge has blended judicial with ministerial duties, professional as well as public opinion has now determined that a great error was committed, and that few things could be so improper as for the executive who directs a prosecution to become the judge who enforces it. With us, objections still stronger exist. The judges, and eminently so those of the Federal Supreme Court, are not only the construers of all laws, whether established by treaty or legislation, but the arbiters of their constitutionality; and to commit to them the office of interpreting the laws which they themselves make, or of making the laws they themselves interpret, is a consolidation of power inconsistent with the genius of a government whose great felicity it is, that it is the government of reciprocal checks. But the mischief did not stop here. A judge who becomes a statesman is in some danger of becoming a partisan; and though neither of the three eminent men who first took the disease, received it in its worst type, yet in those of their associates to whom they communicated it, it raged with malign vivacity. At the beginning of August, 1800, Judge Chase left the bench to stump the State of Maryland on behalf of the existing administration, and the result was that the court, the Chief Justice being then on the French mission, was left for a whole term without a quorum There was not a charge to a grand jury which was not, at the same time, a party harangue, differing in the several cases, it is true, in intensity, but with the same general design; and even the guilt of a criminal was sometimes tested as much by the dogmas of the politician as the rules of the judge. The State courts, of course, did not hesitate to follow this august example. Of six presidential electors chosen that year in New Hampshire, three were members of the supreme judicial court, and one of them thought proper to select the opening of a term as the occasion for the personal castigation of a political opponent. In Vermont, one of the county judges became so strongly impregnated with what Mr. Ames might have called the French effluvium, as to sit on the bench in a liberty cap. In Massachusetts, the Chief Justice, in a charge to the grand jury, denounced 'the French system-mongers, from the quintumvirate of Paris to the Vice-President and minority of Congress, as apostles of atheism and anarchy, bloodshed and plunder.' In New York, Judge Cooper broke up an election by threatening to commit anybody who challenged voters favorable to his own way of thinking; and even Chancellor Livingston sullied his brilliant name by a system of political agitation so daring as to gain the motto which afterwards clung to the capable and ambitious family of which he was the head:

"'Rem facias rem,
Si possis recte, si non, quoque modo, rem.'

"That the same vice ran through the New Jersey courts appears from a very able pamphlet, now extinct, published by a learned jurist of that State; and even the fine judicial parts of the first Chief Justice of Pennsylvania were marred by a partizanship as undisguised as it was efficient. [Chief Justice McKean, in fact, was, at one and the same time, Governor of Delaware, President of Congress, Chief Justice of Pennsylvania, and a member of the convention to reform the constitution of the latter State, to which body, on the question coming up, he announced that he considered such functions perfectly compatible.] It is not necessary to go further south to show that the courts of the States did not hesitate to adopt, in its fullest development, the system of politico-judicialism promulgated by the Supreme Bench of the Union.

"Since these days fifty years have now passed, in the first twenty of which the federal judges had to struggle against an administration embittered by their personal onslaughts, and a majority irritated by their political encroachments. When Mr. Jefferson came in, the political consequence of the court seemed over. With its secular dignities destroyed, and its secular possessions confiscated, it was ordered, like a disgraced bishop of feudal days, to betake itself to its own diocese, and no longer to meddle in affairs of state. One part was lopped off by the repeal of the Judiciary Act of 1800, and there seemed no slight prospect that the whole would fall next. In the meantime, the court devoting itself solely to the discharge of its constitutional duties, began to exhibit a power which, in the palmiest days of executive favor, it had never

be treated as possessed only of such powers as the Legislature might from time to time impart to it. At the very time that this eminent but arbitrary judge, (whose arbitrariness, however, was much more of the temper than of the understanding, always impetuous in asserting authority, always backward in assuming jurisdiction,) was keeping the bar in an uproar by his assaults on counsel and witnesses, he was prompt in conceding to the jury as good a right to judge of the law as he had himself. Thus in Fries's case he said, "The jury are to decide on the present and in all criminal cases both the law and the facts, on their consideration of the whole case." "If, on consideration of the whole matter, *law as well as fact*, you are convinced that the prisoner is guilty, &c., you will find him guilty." No better illustration of Judge Chase's character can be found than in the fact, that in the very case where he thus recognized the power of the jury over the law, he succeeded, by stopping counsel when they undertook to dispute the law he laid down, in raising a turmoil, which ended in his own impeachment.

§ 3095. That Judge Chase was not peculiar in his view, appears from the testimony taken during his impeachment. Thus Mr. Edward Tilghman, a lawyer not only of great eminence, but of political sympathies which would have kept him from any ultra democratic tendencies, testified: "The court generally hear the counsel at large, on the law, and they are permitted to address the jury on the law and on the fact; after which the counsel for the state concludes; the court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and

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shown. Confiding itself under the guidance of the pure and intrepid jurists who then controlled its course, within its constitutional limits, it soon began to develop those sovereign prerogatives which to it, as a co-equal branch of the government, had been intrusted. The judicial veto, the existence of which in its political prosperity it had scarcely hinted, was now applied with equal firmness and vigor to both the executive and legislative departments.

"The high function of declaring an act void, because it disagrees with the constitution, which had laid dormant down to 1800, was now boldly exercised as a part of the ordinary jurisdiction of the court. In 1793, the collected bench, aided by the whole strength of Washington and his then undivided cabinet, could not procure the conviction of a flagrant state culprit, though it was notorious that his discharge would expose to defeat the whole foreign policy of the government. In 1807, a jury, under the direction of the Chief Justice, acquitted, on purely technical ground, a criminal about whose guilt they entertained no manner of doubt, and to effect whose conviction popular and executive influences were strained to their highest tension. In 1797, a brigade of militia was necessary to enable the marshal to execute process in Pennsylvania; in 1809, the same officer, in the face of the militia of the same State called out to resist him, went quietly through his functions, armed only by the precept of that most fearless and spotless of judges, Judge Washington; and in a few months after, the officer by whom that militia was commanded was brought into the federal court, and there convicted by a jury of the vicinage 'of obstructing, resisting and opposing' the execution of the process of the United States. This great change is not without its lesson. It has taught us that to the judiciary, as to the church, political consequence is moral peril; and that though, while occupying its own territory, its authority is sovereign and its edicts supreme, the moment it oversteps the boundaries by which that territory is confined—the moment it canvasses for popular honor or executive favors—that moment the magic of its power is gone, and it loses for itself those princely attributes with which it is by the constitution invested, and for the community, those high conservative sanctions by which that constitution is to be preserved."—(Wharton's State Trials, preliminary notes, 46–48.)

fact to the jury."[s] To the same effect, also, is Mr. Hay's evidence as to the state of practice at the time in Virginia.[t]

§ 3096. But it was not long before it was found necessary, if not entirely to abandon the rule, at least practically to ignore it. If juries have any moral right to construe the law, it becomes essential to know what was the construction they adopt; and the most strenuous advocates for the abstract doctrine soon confessed that the notions of juries even on fundamental questions, varied so much that it was difficult to report, much more to systematize them. And yet, if it were really to be settled that a jury's view of the law of a case was authoritative, it was vital to the community to know what such view was. Take for instance the statutory cheats growing out of the laws abolishing imprisonment for debt. The tendency of legislation in late years, has been to relieve a debtor from imprisonment in all cases except where a wilful false pretence is the consideration for the debt, or where there has been a subsequent fraudulent disposal of the acquired property. The tendency of judicial decision is to construe these exceptions strictly, and to hold that to entitle a creditor to avail himself of them, he must show that he had not the opportunity of detecting the false pretence at the time, that it related to an alleged existing fact, or that the property secreted was actually and fraudulently detached from an honest and vigilant execution. These views are well known to the community; they enter into every contract, and are binding upon the courts. But what would a jury say? At one time a false promise would be held within the statute, and thus the whole non-imprisonment for debt laws repealed, for the chance of such a thing happening would be even more fatal to the spirit of the acts than its certainty. At another time nothing under the most flagrant fraud would be held a false pretence at all. Or take for instance malicious mischief at common law, about which even among the courts there is already sufficient diversity of opinion. Certainly with jurors, no settled rule could be had as to what the offence is, or if there was, no one could undertake to classify their decisions. Or again, when the question arises whether the uncorroborated evidence of an accomplice is enough to convict in a particular case, a question in which the judiciary of almost each state holds a distinct shade of opinion, where would be the chances of uniformity of adjudication, if juries, acting on the particular circumstances at hand, were to be the arbiters?

§ 3097. But a practical illustration of much point, is found in a case to which may be attributed the change of sentiment on this question, of the late Mr. Justice Baldwin, a judge who, it is well known, was not disposed on light grounds to surrender any long-cherished opinions. On several occasions, in his early judicial history, he was unequivocal in his commitment of the whole law to the jury; and in one instance, after counsel had directly appealed from the court to the jury on a legal point, he went so far as to say, that in so doing, they had but "acted in the strict line of

[s] Chase's Trial, 143. [t] Ibid. 175.

their duty."[u] But when, some time afterwards, counsel, profiting by this encouragement, undertook to open to the jury, on an indictment for counterfeiting United States Bank notes, the unconstitutionality of the bank's charter, the learned judge paused. He felt that however legitimate a result of his own reasoning this course was, if permitted, it would defeat all prosecutions for the particular offence on trial. "Should you assume and exercise this power," he said, in language which applies with equal force to all questions of law whatever, "your opinion does not become a supreme law, no one is bound by it, other juries will decide for themselves, and you could not expect that courts would look to your verdict for the construction of the constitution, as to the acts of the legislative or judicial departments of the government; nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow-citizens or for the court. If one jury exercises this power, we are without a constitution or laws. One jury has the same power as another; you cannot bind those who may take your places; what you declare constitutional to-day, another jury may declare unconstitutional to-morrow. We shall cease to have a government of law, when what is the law depends on the arbitrary and fluctuating opinions of judges and jurors, instead of the standard of the constitution, expounded by the tribunal to which has been referred all cases arising under the constitution, laws and treaties of the United States."[v]

§ 3098. But in practice, however speciously the doctrine may be asserted, it is, except so far as it may sometimes lead a jury to acquit in a case where the facts demand a conviction, practically repudiated, and since its only operation now is mischievous, it is time it should be rejected in theory as well as reality. For, independently of the reasons already mentioned, an attempt to carry it out in practice, would involve a trial in endless absurdity. Thus, for instance, what questions of law are of more vital interest to a prisoner on trial than those of the admissibility of dying declarations, or of confessions? If the jury are to judge of the law, what grosser invasions of their rights, and those of the prisoner, could be, than to take from them the decision of questions thus distinctly within their province, and which, so far from being collateral to, as has been urged, are in most instances direct to the matter of guilt? And yet there is no judge sitting with a jury on the trial of a criminal case, who does not take to himself alone the hearing of the preliminary evidence as to whether the declarations were uttered under a consciousness of approaching dissolution, or whether the confession was extorted by duress or solicitation. The line of authority here and in England is unbroken, that in such and in kindred cases, the court alone is to determine.[w] But if such be the law, as a matter of principle, the jury have no more moral right to convict or acquit a man against the charge of the court that such evidence was to be

[u] U. S. *v.* Wilson, 1 Bald. 99.
[v] U. S. *v.* Shive, 1 Baldwin, 512.
[w] See ante, § 681, 698.

stricken out, if improvidently let in, than they would to convict or acquit him on the evidence if actually excluded.

§ 3099. This view is perhaps strengthened by the fact that in England and this country, the statutory or constitutional provisions giving juries the power of determining as to whether a written document is libellous or not, go no further than the particular instance of indictment for libel.

§ 3100. In England, it has always been held that the jury are no more the judges of law in criminal than in civil cases, with the qualification that owing to the peculiar doctrine of *autrefois acquit* a criminal *acquittal* cannot be overhauled.[x] In this country such is now the prevailing sentiment. "My opinion," said the late Mr. Justice Story, with his usual felicity, "is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party, for the court would not have any right to review the law as it had been settled by the jury. Indeed it would have been most impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret. If I thought that the jury were the proper judges of the law, in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state

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[x] As to law of *autrefois acquit*, see ante, § 539-572.

my views fully and openly on the present occasion."[y] Not less significant, though far more curt, was the reply of the late Judge Thompson, while presiding in the United States Circuit Court, in the city of New York, on the trial of a criminal case, when requested by one of the counsel to charge the jury that they were judges both of the law and the fact. His answer was,—"I shan't; they aint." Such, also, was the rule laid down by Chief Justice Cranch, in the United States Circuit Court for the District of Columbia.[z]

§ 3101. "I do consider," said Mr. Justice Curtis, more recently, after a solemn argument by counsel on the direct question; "that this power and corresponding duty of the court authoritatively to declare the law, is one of the highest safeguards of the citizen. The fixed course, indeed, the sole end of courts of justice, is to enforce the laws uniformly and impartially, without respect to persons, or times or the opinions of men. To enforce popular laws, to apply the law to unpopular causes, is easy. When an unpopular cause is a just cause,—when a law, unpopular in some locality, is to be enforced there,—then comes the strain upon the administration of justice; and few unprejudiced men will hesitate as to where that strain would be most firmly borne. My firm conviction is, that under the constitution of the United States, juries in criminal cases have not the right to decide any question of law, and that if they render a general verdict, their duty and their oath require them to apply to the facts as they may find them, the law given to them by the court.[a]

§ 3102. Perhaps, also, with this view alone can be reconciled the action of the same learned judge, and of Mr. Justice Grier and Mr. Justice Kane, in Philadelphia, in more recent cases, where they held that it was a good cause of challenge that a juryman differed from the court in his view of the constitutionality of the statute on which the prosecution rested. Certainly if the jury were the judges of the law, this would have been as arbitrary an act as was that of James II., who polled the court of King's Bench as to the dispensing power, and dismissed the judges who refused beforehand to pledge themselves to hold the prerogative constitutional. On the assumption that the jury are judges of the law as well as the court, there is no more reason, *a priori*, that the court should set aside a juror, than that the jury should set aside the judge.

§ 3103. "It is the duty of the court," says Chief Justice Shaw, of Massachusetts, in 1845, "to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court, upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the

[y] U. S. *v.* Battiste, 2 Sumner, 243.
[z] U. S. *v.* Fenwick, 4 Cranch C. C. R. 672; Stettinius *v.* U. S., 5 Cranch C. C. R. 573.
[a] U. S. *v.* Morris, 1 Curtis, C. C. R. 53.

facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide, contrary to such opinion or direction of the court in matter of law. To this duty, jurors are bound by a strong, social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to decide on all questions of fact according to the evidence.[b] It seems, however, that the same court will not prevent counsel addressing the jury on the law.[c]

In Massachusetts, the following statute has been passed:

§ 3104. In all trials for criminal offences, it shall be the duty of the jury to try according to established forms and principles of law, all causes which shall be committed to them, and, after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and also to charge the jury, and to allow bills of exception; and the court may grant a new trial in cases of conviction.—(Supplement to Revised Statutes, 1855, ch. 153.)

Under this act it was held that the jury have no rightful power to determine questions of law involved in the issue against the instructions of the court.[d]

It was also held, that the legislature cannot consistently with the constitution of the Commonwealth, confer on the jury, in criminal trials, the rightful power to determine questions of law involved in the issue, against the instructions of the court, even by a statute which also provides that the jury shall try the cases according to established forms and principles of law, and that the court shall superintend the course of the trials, decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon collateral and incidental proceedings, and charge the jury, and allow bills of exception, and may grant a new trial in cases of conviction.[e]

It has also been ruled that a refusal of the presiding judge to allow the defendant's counsel in a criminal case to read to the jury the whole of the statute, upon one section of which the prosecution is founded, is no ground of exception, if he is allowed to read all those parts which he contends affect the construction of that section, and to comment to the jury upon the whole of the statute.[f]

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[b] See Com. *v.* Anthes, 5 Gray, (Mass.) 185.
[c] Com. *v.* Porter, 10 Metc. 286; see Com. *v.* White, Ib. 14.
[d] Com. *v.* Anthes, 5 Gray, (Mass.) 185. DEWEY and THOMAS, JJ., dissenting.
[e] By SHAW, C. J., METCALF, BIGLOW, and MERRICK, JJ.; *contra*, DEWEY and THOMAS, JJ. Com. *v.* Anthes, 5 Gray, (Mass.) 185.
[f] Com. *v.* Austin, 7 Gray, (Mass.) 51.

§ 3105. In New York, though before the recent constitution the inclination was otherwise, the same view has been solemnly held in more than one case of very recent date.[d]

§ 3106. In Pennsylvania, though there has been no reported decision on the express point from the Supreme Court in banc, yet it has not been usual in that state to leave to the jury the law to decide. A very strong leaning to the contrary is shown by Gibson, C. J., in closing a charge in a capital case: "If the evidence on these points fail the prisoner, the conclusion of

[d] "It is often said, and has been said in the progress of this trial, that the jury, in criminal cases, are judges of the law, as well as the facts. If, by this, is meant that the jury are to assume the prerogative of the court as exercised in civil cases, adopt their own views of the law without regard to these entertained by the court, I am bound to say to you, that such is not the law of the land. This proposition is perfectly untenable, and has been distinctly repudiated on more than one occasion by the judges of the Supreme Court of the United States. If, however, by this expression is meant, merely that whatever decision the jury make, whether of law or fact, in favor of the prisoner, is final and cannot be reviewed—then the declaration is true. This is all that can be properly understood by the phrase, 'the jury are judges of the law as well as fact;' and the reason of this is, that the constitution does not permit a new trial in case of acquittal. But if the decision of the jury should be against a prisoner, contrary to the law as laid down by the court, a remedy can be applied. In this state the jury is presumed to receive the law from the court. The prisoner has the benefit of exceptions to the opinion of the court, and if they are well founded he can obtain a new trial. The jury, it is true, have the power to disregard the law, and to disregard their oaths—and to render a verdict contrary to both law and evidence; and in this respect they are judges of the law; and if in so doing they acquit a prisoner when he is guilty, the public is without redress. But it can hardly be contended that the jury has the right to do all this. This question has been recently discussed and decided by the Supreme Court of the state of Massachusetts, in the case of the Commonwealth *v.* Porter."

In delivering the opinion of the court, Chief Justice Shaw makes the following observations: "We consider it a well settled principle and rule, laying at the foundation of jury trial, admitted and recognized, ever since jury trial has been adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law, which arise, and that the responsibility of a correct decision is placed finally on them; that it is the province and duty of the jury to weigh and consider evidence, and decide all questions of fact, and that the responsibility of a correct decision is placed upon them. And the safety, efficacy, and purity of jury trials depend upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court in a jury trial, to decide authoritatively on the questions of fact, and for the jury to decide ultimately and authoritatively upon the questions of law." "This, as a general principle, is applicable alike to civil and criminal cases." "It is presumed that the jury followed the instruction of the court, in matters of law, because it was their duty so to do, and therefore if the instruction was wrong, the verdict was wrong." It is the duty of the court to instruct the jury on all questions of law which appear to rise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court on matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matter of law. To this duty, jurors are bound by a strong, social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner as they are conscientiously bound to decide all questions of fact according to the evidence." (People *v.* Pine, 2 Barbour, S. C. R. 566, Barculo, J.; see Carpenter *v.* People, 8 Barbour, S. C. R. 610.) See to the same effect, a very interesting and valuable article in 5 Bost. Law Rep. N. S. 2—(May, 1852.) See also, People *v.* Finnegan, 1 Harris, C. C. 147; People *v.* Crozier, Ibid. 453; contra, People *v* Thayers, Ibid. 595; People *v.* Videto, Ibid. 603.

his guilt will be irresistible, and it will be your duty to draw it."[e] So in a homicide case, in which the popular sentiment, excited by the recent riots in Kensington, set so strongly against the prisoner as to make possible a conviction on insufficient evidence, Rogers, J., in charging the jury, said, "You are, it is true, judges in a criminal case, in one sense, of both law and fact, for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. The popular impression is, that this power to definitely close a prosecution by an acquittal, arises from a right on the jury's part to decide the law as well as the facts according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law, that no man can twice be put in jeopardy for the same offence. No matter from what cause an acquittal results, the defendant cannot be retried. If, for instance, it should result from a usurpation by the court of the facts of the case, which undoubtedly belong to the jury, the acquittal would be final; and yet it would be very improper to draw from such a result the assumption that the disposition of the facts belongs to the court. It is important for you to keep this distinction in mind, remembering that while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. The sanctity of your conclusion in case of an acquittal, arises not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offence, a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the Attorney General. You are bound, notwithstanding this, to conform your verdict to the law of the land, in the same way that the two latter functionaries are bound to conform their conduct to the same standard; for it would be productive of the wildest consequences to establish the principle, that any officer whatever, in a criminal case, should be relieved from the restraint of the law as settled in a uniform system by the supreme authority. For your part, your duty is to receive the law for the purposes of this trial from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or an acquittal against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court, and the facts to the jury. My duty is, therefore, at the outset, to charge you, that while you will in this case form your own judgment of

[e] Com. *v.* Harman, 4 Barr, 269. See post, § 3108.

the facts, you will receive the law as it is given to you by the court." Not varying much from this, is the language of Sergeant, J., in a charge in a case of misdemeanor: "The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty."[g]

§ 3107. In Virginia, not only is it held that the jury has no right to take the law from the court, but it has been ruled expressly, that counsel will not be permitted to address an argument on the law except to the court.[h]

§ 3108. Independently of the federal courts which have been already noticed, it may now be considered that the courts of New Hampshire,[i] Massachusetts,[j] Rhode Island,[k] New York,[l] Pennsylvania,[m] Virginia,[n] North Carolina,[nn] Ohio,[o] Kentucky,[p] Alabama,[pp] Missouri,[q] Arkansas,[r] California,[rr] and Texas,[s] unite in the doctrine that the jury must take the law from the court; while the contrary seems to be held in Maine,[t] Vermont,[u] Tennessee,[v] Georgia,[w] and Indiana.[x] In the two latter States, however, the result was exacted by statute. So far as concerns the question immediately in discussion, it is not anywhere disputed, that if a jury, whatever may be its supposed elementary rights, finds against the court's charge, the verdict should be set aside.[xx]

§ 3109. Upon a question of law addressed to the court, at *nisi prius*, the judge is not bound to hear an argument from the prisoner's counsel, if his opinion is already formed.[y]

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[f] Com. *v.* Sherry, Wh. on Homicide, app. 481.

[g] Com. *v.* Vansyckle, Brightly R. 73.

[h] Davenport *v.* Com., 1 Leigh, 588; Com. *v.* Garth, 3 Leigh, 761; Howell *v.* Com., 5 Grat. 664; see, on these decisions, a learned article in 6 Am. Jurist, 237.

[i] Pierce *v.* State, 13 N. Hamp. 536.

[j] Com. *v.* Porter, 10 Metc. 286; Com. *v.* White, Ib. 14; Com. *v.* Abbott, 13 Metc. 120; though now changed by statute, ante, § 3104.

[k] Dorr's Trial, 121.

[l] People *v.* Pine, 2 Barbour, 566; Carpenter *v.* People, 8 Barbour, 610; Safferd *v.* People, 1 Parker, 474.

[m] Penn. *v.* Ball, Addison, 860; ante, § 3106.

[n] Ante, note (h.) [nn] State *v.* Pearce, 2 Jones, (Law,) 251.

[o] Montgomery *v.* State, 11 Ohio, 424; Robbins *v.* State, 8 Ohio St. R. (N. S.) 131.

[p] Montee *v.* Com., 3 J. J. Marsh, 150; Com. *v.* Van Tuyl, 1 Metc. Ky. 1.

[pp] Pierson *v.* State, 12 Alab. 153; Batre *v.* State, 18 Alab. 119; reviewing State *v.* Jones, 5 Alab. 666.

[q] Hardy *v.* State, 7 Miss. 607.

[r] Pleasant *v.* State, 8 Eng. (13 Ark.) 360. By the constitution, however, the jury are judges of law. See Patterson *v.* State, 2 English, 59.

[rr] People *v.* Stewart, 7 Cal. 40.

[s] Nels *v.* State, 2 Texas, 280. [t] State *v.* Snow, 6 Shepley, 346.

[u] State *v.* Crotean, 23 Vermont, 14. [v] Nelson *v.* State, 2 Swan, 482.

[w] Holden *v.* State, 5 Geo. 441; Ricks *v.* State, 16 Geo. 600; McGuffie *v.* State, 17 Geo. 497; McPherson *v.* State, 22 Geo. 478.

[x] Warren *v.* State, 4 Blackf. 150; Williams *v.* State, 10 Ind. 503. See also, 5 Law Rep. (N. S.) 6.

[xx] Daily *v.* State, 10 Ind. 536. The question of the power of the jury over the law, will be found elaborately discussed in the majority and minority opinions, in State *v.* Crotean, 23 Vermont, 14; 2 Bennett & Heard, Lead. Cases, 388.

[y] Howell *v.* Commonwealth, 5 Gratt. 664.

4th. Verdict against evidence.

§ 3110. A conviction clearly contrary to the weight of evidence will be set aside, and such is more particularly the case when any of the material allegations of the indictment remain unproved.[a] Thus, where the defendant was charged with burning the shop of B. & C., and no evidence was offered as to ownership;[a] where the evidence, on a charge of passing an altered note, failed to show that the prisoner knew of the alteration at the time of the passage;[b] where, on a trial for marking hogs with intent to steal them, there was no satisfactory evidence of a guilty intent;[c] where, on an indictment for murder, there was no reasonable evidence that the accused came to his death by any violence whatever;[b] where, on a charge of receiving stolen goods, no evidence existed as to the scienter;[e] where, on the same charge, the indictment averred a former conviction for the same offence, but no proof was offered on trial to prove the identity of the defendant with the former indictee;[f] in each of these cases a conviction was set aside on account of the insufficiency of the testimony to support the verdict. If, however, there be conflicting evidence on both sides, and the question be one of doubt, it seems the verdict will generally be permitted to stand.[g]

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[a] State *v.* Lyon, 12 Conn. 487; State *v.* Anderson, 2 Bailey, 565; State *v.* Bird, 1 Missouri, 417; Ball *v.* Com., 8 Leigh, 726; Bedford *v.* State, 5 Hum. 553; Com. *v.* Briggs, 5 Pick. 429; see Dayrolles *v.* Howard, 3 Burr. 1385; R. *v.* Malden, 4 Burr. 2135; Farriant *v.* Olmius, 3 Barn. & Alb. 692; Corbett *v.* Brown, 8 Bingham, 33; U. S. *v.* Duval, Gilpin, 356; State *v.* Sims, 2 Bailey, 29; State *v.* Hooper, 2 Bailey, 37; Copeland *v.* State, 7 Humph. 479; Cochran *v.* State, 7 Humph. 544; State *v.* Fisher, 2 N. & M. 261; Resp. *v.* Lacare, 2 Dallas, 118; Wait *v.* M'Neil, 7 Mass. 261; Curtis *v.* Jackson, 13 Mass. 507; Bartholomew *v.* Clark, 1 Conn. 472; Cockfield *v.* Daniel, 1 Rep. Con. Ct. 193; Ring *v.* Huntington, 1 Rep. Con. Ct. 162; Starke *v.* Cockerd, 2 Rep. Con. Ct. 337; Kinnie *v.* Kinnie, 4 Conn. 102; Talcott *v.* Wilcox, 9 Conn. 134; Bacon *v.* Parker, 12 Conn. 212; Zaleer *v.* Geiger, 2 Yeates, 532; Emmett *v.* Robinson, 2 Yea. 514; Swearingen *v.* Birch, 4 Yea. 322; Thomas *v.* Brown, 1 M'Cord, 557; Newson *v.* Lycar, 3 J. J. Marshall, 440; Kohne *v.* Ins. Com. of N. America, 1 Wash. C. C. 123; Chur. *v.* Keckley, 1 Bailey, 479; Lloyd *v.* Newell, 3 Halst. 296; Steele *v.* Logan, 3 A. K. Marsh. 394; Gibbs *v.* Tucker, 2 A. K. Marsh. 219; Hughes *v.* M'Gee, 1 A. K. Marsh. 28; Higden *v.* Higden, 2 A. K. Marsh. 42; Mann *v.* Clifton, 3 Blackf. 304; Hoagland *v.* Moore, 2 Blackf. 167; Bacon *v.* Brown, 1 Bibb, 334; Price *v.* Cockran, 1 Bibb, 334; Maxwell *v.* M'Alvoy, 2 Bibb, 211; Daniel *v.* Prather, 1 Bibb, 484; People *v.* Townsend, Coleman, 68; Pettes *v.* Smith, 2 A. K. Marsh. 194; Hughes *v.* Howard, 3 Har. & J. 9; Hammond *v.* Wadhanes, 5 Mass. 353; Coffin *v.* Phœnix Ins. Co., 15 Mass. 291; Oram *v.* Bishop, 7 Halst. 153; State Bank *v.* Holcomb, 7 Halst. 191; Haynes *v.* Wright, 4 Hay. 63; Murray *v.* Rable, 4 Hay. 203; Lewis *v.* Payne, 4 Wend. 423; People *v.* San Martin, 2 Cal. 484.

[a] State *v.* Lyon, 12 Conn. 478. [b] State *v.* Anderson, 2 Bailey, 565.
[c] State *v.* Bird, 1 Missouri, 417. [d] Ball *v.* Com., 8 Leigh, 726.
[e] Bedford *v.* State, 5 Humph. 553. [f] Com. *v.* Briggs, 5 Pick. 429.

[g] Com. *v.* Gallagher, 4 Penn. Law Jour. 514; Leake *v.* State, 10 Humph. 144; Com. *v.* Flannagan, 7 Watts & Serg. 422; Smith *v.* Hick, 5 Wendell, 48; Cassels *v.* State, 4 Yerger, 152; State *v.* Jim., 2 Bailey, 29; Kirby *v.* State, 3 Hump. 289; Pleasant *v.* State, 15 Ark. 624; State *v.* Lamont, 2 Wis. 437; Taylor *v.* State, 4 Ind. 540; Winfield *v.* State, 3 Iowa, 339; Jerry *v.* State, 1 Blackf. 395; Douglass *v.* Tousey, 2 Wendell, 352; Jeffreys *v.* State, 3 Murphy 480; Motley *v.* Montgomery, 2 Bailey, 11; Laval *v.* Cromwell, Const. Rep. 593; Stanton *v.* State, 8 Eng. (13 Ark.) 339; Bennet *v.* State, 8 Eng. (13 Ark.) 694; Darby *v.* Calhoun, 1 Rep. Con. Ct. 398; Miller *v.* M'Burney, 1 Rep. Con. Ct. 237; Cohn *v.* Simmons, 1 Rep. Con Ct. 446; Caldwell *v.*

The general court in Virginia will only set aside a verdict because it is contrary to the evidence, in a case where the jury has plainly decided against the evidence, or without evidence.[h] Where the evidence is contradictory, and the verdict is against the weight of evidence, though a new trial may be granted by the court trying the case, at their discretion, their decision is not examinable by an appellate court.[i]

5th. Irregularity in conduct of jury.

§ 3111. (*a*) *Separation of jurors.*—The general rule is that the verdict will not be set aside on account of the misconduct or irregularity of a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions.[j] An exception, however, formerly existed in England, and is still recognised in several of the United States, in felonies, where the jury separate after the opening of the evidence. While on the one hand the present practice in England, and in a portion of the American courts, is to sustain the verdict when the separation has been inadvertent or unnecessary, and no abuse has resulted from it, on the other hand it has been considered in several instances that the mere separation without permission, is in itself *prima facie* reason for a new trial.[k]

§ 3112. The latter doctrine was pressed with great rigor by the early common law authorities, in all cases, both civil and criminal; it being agreed that by "the law of England, a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed."[l] A more humane system has since been recognised; and in all cases, not capital, it appears that juries are permitted to separate when-

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Barkley, 2 Rep. Con. Ct. 452; Roberts *v.* State, 3 Kelly, 310; Hudgins *v.* State, 2 Kelly, 173; Palmer *v.* Hyde, 4 Conn. 426; Lafflin *v.* Pomeroy, 11 Conn. 440; Trowbridge *v.* Baker, 1 Cow. 251; Winchell *v.* Latham, 6 Cow. 682; M'Knight *v.* Wells, 1 Miss. 13; Clasky *v.* January, Hardin, 539; Nelson *v.* Chalfant, 3 Litt. 165; Lee *v.* Banks, 4 Ibid. 11; Johnson *v.* Davenport, 3 J. J. Marshall, 390; Reid *v.* Langford, Ibid. 420; Creel *v.* Bell, 2 Ibid. 309; Talbot *v.* Talbot, Ibid. 3; Fitzgerald *v.* Barker, 4 Ibid. 398; Swain *v.* Hall, 3 Wilson, 45; Gregory *v.* Tuffs, 1 Crom. M. & Ros. 310; 1 Camp. 450; Melin *v.* Taylor, 2 Hodge, 125; 3 Bing. N. C. 109; Empson *v.* Farifford, 1 Wilm. Woll. & Dav. 10; Stanley *v.* Wharton, 8 Price, 301; Lofft, 147; Hankey *v.* Trotman, 1 W. Bla. 1; Wilton *v.* Stephenson, 2 Price, 282; Farewell *v.* Chaffey, 1 Burr. 54.

[h] Hill's case, 2 Gratt. 594.

[i] Grayson *v.* Com., 6 Gratt. 712; see Heber *v.* State, 7 Texas, 69; State *v.* Cruise, 16 Mis. (1 Bennett) 391.

[j] Com. *v.* Roby, 12 Pick. 496, 519; People *v.* Douglass, 4 Cowen, 26; State *v.* Babcock, 1 Conn. 401; State *v.* Prescott, 7 New Hamp. 290; Beebee *v.* People, 5 Hill, 32; Tooel *v.* Com., 11 Leigh, 714; Martin *v.* Com., 17 Leigh, 745; M'Carter *v.* Com., 11 Leigh, 633; R. *v.* Woolf, 1 Chitty, 401; Stone *v.* State, 4 Humph. 27; Whitney *v.* State, 8 Mis. 165; State *v.* Fox, Geo. Decis., Part I., 35; State *v.* Peter, Ibid. 46; State *v.* Barton, 19 Mis. (4 Bennett) 227; State *v.* Igo, 21 Mis. (6 Bennett) 459.

[k] See this subject examined in reference to the plea of once in jeopardy, ante, §§ 573-91.

[l] Co. Lit. 227; see Bro. Ab. Verdicts, pl. 19; Com. Dig. Inquest, F.

ever in the discretion of the court it seems proper.[m] In capital cases, however, it would seem that under no circumstances will separation be permitted until a verdict is agreed on;[n] and so far, as has been seen,[o] has this doctrine been pushed in several instances in this country, that it has been held that if a jury when once charged and sworn be discharged, except in case of such necessity as may be considered as the act of God, such discharge is a bar to a second trial. In England no case until lately occurred of an application for a new trial under such circumstances, the practice there being, as has been shown, after a conviction for felony, for the judges, in case of irregularity, to recommend a pardon.

§ 3113. But recently, where the jury, on a trial for murder at the assizes, were locked up from the middle of the day until the following morning, and then, on their being sent for into court, stated that it was impossible they should ever agree, and that was the first day of business at the next assize town, whereupon the judge discharged them, it was held that he was warranted by law in doing so.[p] It seems, however, that the *mere* lapse of a considerable time during which the jury have not agreed, will not warrant the judge, in a capital case in discharging them, though they state that there is no probability of their agreeing.[q]

§ 3114. In a capital case before the Supreme Court of Pennsylvania in 1851, it appeared by the record that, "on the 15th of March, 1851, after the jury were sworn, it was agreed by the counsel of the commonwealth, and the counsel of the defendant, and agreed by the court, that the jurors sworn in this case be permitted to separate and return to their respective homes, and return to the jury box on Tuesday morning next, March 18th," when they all attended, and a verdict of murder in the first degree was rendered. The judgment was reversed, and the prisoner ordered back for another trial.[r]

Subsequently, on the trial of a party charged with burglary, the jury, after being cautioned by the court to avoid all conversation with any person about the case, was allowed to separate at the usual times of adjournment.[rr]

§ 3115. In Virginia, the weight of authority is, that in cases of felony it is not necessary, in order to set aside the verdict, to show actual tampering, or conversation on the subject of the trial with a juryman, but that the mere fact of the separation from the custody of the officer is sufficient. Mr. Justice Nelson, who delivered the opinion of the court, in an early case,[s] said, "From the mode in which collusion and tampering is generally carried on, such circumstance is generally known to no person except the one tampering, and the person tampered with, or the person between whom a con-

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[m] R. *v.* Woolf, 1 Chitty R. 401; 1 Ch. C. L. 664.
[n] Bac. Abr. Juries, G.; Cochran *v.* State, 7 Humph. 544, ante, § 588-91.
[o] See antea, § 573-591.
[p] R. *v.* Newton, 13 Q. B. 716.
[q] Conway *v.* Reg., 7 Irish Law, R. 149.
[r] Pieffer *v.* Com., 3 Harris, 471.
[rr] McCreary *v.* Com., 29 Penn. State R. 323.
[s] Com. *v.* M'Call, 1 Va. Cases, 271.

versation may be held which might influence a verdict. If you question either of these persons on the subject, he must criminate or declare himself innocent; and you lay before him an inducement not to give correct testimony." A verdict of conviction in a later case of felony was set aside where, pending the trial, and before the testimony was closed, five of the jury received permission to retire from the court-room accompanied by the sheriff, and another juror thereupon left the jury-box without the knowledge of the court, passed out of the court-house through a crowd of persons collected about the door, and remained absent a few minutes, after which he returned into the court; having, (as he deposed,) held no communication whatever with any person during his absence, but not having been, during that period, in charge of the sheriff, or even seen by him.[t] But the bare possibility of tampering, it is conceded, is not adequate reason for a new trial.[u] Thus, upon trial of an indictment for murder, the jury not agreeing on a verdict, were, after dark, adjourned over till the next morning, and committed to two sheriffs to be enclosed in a room to be prepared for them; in conducting them from the court-house to the room, one juror separated from his fellows, moved twenty-five yards from them and the sheriffs having them in charge, told a servant whom he met with, to take care of his horse, and said nothing else to any one, and no one speaking to him, when he was immediately pursued by one of the sheriffs, and brought back to the rest of the jury, his separation from his fellows not exceeding a minute, and he being a yet shorter time out of sight of the sheriffs. The jury having found the prisoner guilty of murder in the first degree, it was held that such separation was no cause for setting aside the verdict.[v] Where the jury, in another case, was placed at night up stairs, in a tavern, in five lodging-rooms, which were separated from each other by a passage, into which they all opened, the doors of the lodging-rooms being generally open, but the door of the passage being constantly closed, it was held that the disposition of the jury had been in compliance with law.[w]

§ 3116. In Tennessee, it has been determined, that where there is an unauthorized separation of a jury for fifteen or twenty minutes, it is not necessary for the prisoner to prove that they were, during their absence tampered with; it is sufficient if they might have been.[x] Where, however, it was affirmatively shown that no communication with other persons was had, a new trial was refused.[y] In felonies, however, a separation from day to day, even with the prisoner's consent, vitiates the verdict.[z]

In Louisiana it is said, that in all criminal cases, the separation of the

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[t] Overbee *v.* Com., 1 Robinson, 756.
[u] Sprouce *v.* Com., 2 Va. Cases, 375.
[v] M'Carter *v.* Com., 11 Leigh, 633; see Martin *v.* Com., 11 Leigh, 745; Tooel *v.* Com., Ibid. 714.
[w] Kennedy *v.* Com., 2 Virginia Cases, 510: see post, § 3135.
[x] M'Lain *v.* State, 10 Yerger, 241; Jamagin *v.* State, 10 Yerger, 529; though see Stone *v.* State, 4 Hump. 27.
[y] Hovies *v.* State, 8 Humphreys, 597.
[z] Wiley *v.* State, 1 Swan (Ten.), 256.

jury, though by leave of the court, and with the consent of the accused and his counsel, will vitiate the verdict, if such separation take place after the evidence had been closed and the charge given.[zz]

§ 3117. A more liberal practice, however, has obtained in most of the states. In New York, mere separation, without permission, appears, formerly, to have been considered *prima facie* evidence of misbehavior;[a] but the better opinion now is, that to vitiate the verdict, reasonable suspicion of abuse must exist.[b] "The conclusion, from these cases," said Sutherland, J., "it appears to me to be this, that any mere informality or mistake of an officer, in drawing a jury, or any irregularity or misconduct in the jury themselves, will not be a sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not, and could not have, sustained any injury from it."[c] But where a jury, empanneled to try a prisoner upon an indictment for murder, were allowed to leave the court-house during the trial, under the charge of two sworn constables, and, having left the court-house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cake, took some with them on their return, and drank spirituous liquor, though not enough to affect them in the least, and one of them conversed on the subject of the trial; it was held, that though the mere separation was not, in itself, fatal, the drinking of spirituous liquor, and the conversing on the case, were sufficient reasons for a new trial.[d]

After the evidence in a trial for murder had all been submitted, six of the jury, leaving their fellows, went, under the charge of an officer, on a walk for exercise, in the course of which, they visited and viewed the premises where the homicide was alleged to have been committed, and returned after an absence of an hour. No person had been permitted to speak to them, and no improper conduct had taken place. But after conviction and sentence, this was ruled to be good ground for a new trial.[dd]

On the record alone, it is not error in law in a capital trial, for the judge with the assent of the prisoner, to permit the jury to separate from time to time before the charge is given to them, and they retire to deliberate upon their verdict.[e]

The consent of a prisoner to his trial by less than a full jury of twelve is a nullity, and a conviction thereby produced is illegal.[ee]

§ 3118. In New Hampshire, after a review of the authorities, the more liberal rule was adopted; it being determined that it was necessary to show

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[zz] State *v.* Populus, 12 La. An. 710.

[a] See Spencer, J., 18 Johnson, 218.

[b] People *v.* Douglass, 4 Cowen, 26; Horton *v.* Horton, 3 Cowen, 589; Oliver *v.* Trustees, 5 Cowen, 284; People *v.* Ransom, 17 Wendell, 423; People *v.* Beebee, 5 Hill, 32.

[c] People *v.* Ransom, 7 Wendell, 423. [d] People *v.* Douglass, 4 Cowen, 26.

[dd] Eastwood *v.* People, 3 Parker C. R. (N. Y.) 25.

[e] Id.; Stephens *v.* People, 5 E. D. Smith (N. Y.), 549.

[ee] Ruloff *v.* People, 4 E. D. Smith, 179.

something more than mere separation to set aside the verdict;[f] and the same course appears to be pursued in Connecticut,[ff] in North Carolina,[g] in Indiana,[h] and in Georgia.[i]

§ 3119. In Massachusetts, where the jury, in a capital trial, had retired with the cause, one of the constables, having them in charge, and a stranger carried reasonable refreshment into their room, at their request, and with the consent of the constable, but no conversation respecting the cause took place. It was held that the prisoner, who was convicted, was not entitled to a new trial.[j]

§ 3120. In South Carolina, the jury, it is said, are not required to remain together even after they are charged, though the case be capital,[k] and it is clear that it is within the sound discretion of the presiding judge to allow a juror to leave the jury-box for a brief time, even during the trial of a capital case.[l]

§ 3121. In Missouri, it is said that even in a capital case, the court will not discharge a defendant on habeas corpus, though the jury trying him having been unable to agree were discharged.[m]

§ 3122. In Mississippi the tendency of authority is to set aside a verdict after separation, unless it affirmatively appear there was nothing communicated to the jury on the subject of the trial.[n]

Where one of the jury, pending the trial, being at the window of the court-room, called to a person in the street and asked him to request his (the juror's) wife to send him his supper, to which the person thus addressed, replied that "he would," and the supper was sent, as requested, and the person who brought it came into the room where the jury were confined, but was not permitted to deliver it to the juror, the officer in charge of the jury receiving it from his hands, and delivering it to the jury; and where it appeared that the officer also kept the person who brought the supper on the opposite side of the room, sixty feet from the jury, while the supper was being eaten, and the officer also testified that nothing passed between the juror and the person addressed by him in the street, except what is above stated; and that to his knowledge, the jury conversed with no one; It was held, that there was no improper tampering with, or sinister influence brought to bear on, the jury, and there was no cause for setting aside the verdict.[nn]

In Illinois, it is said that the burden is on the prosecution to show that the prisoner was not prejudiced.[o]

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[f] State *v.* Prescott, 7 New Ham. 290. [ff] State *v.* Babcock, 1 Connect. 401.
[g] State *v.* Miller, 1 Dev. & Bat. 500; see 1 Hayw. 238.
[h] Wyatt *v.* State, 1 Blackford, 25; Porter *v.* State, 2 Carter, 435.
[i] Roberts *v.* State, 14 Geo. 8; though see Monroe *v.* State, 5 Georgia, 85.
[j] Com. *v.* Roby, 12 Pick. 496.
[k] State *v.* M'Kee, 1 Bailey, 651; State *v.* Whitney, 8 Mo. 165; State *v.* Barton, 19 Mo. 227; State *v.* Harlow, 21 Mo. 447.
[l] State *v.* M'Elmurray, Strobh. 33. [m] Ruthven ex parte, 17 Mo. (2 Bennett) 541.
[n] M'Cann *v.* State, 9 Sm. & Mars. 465; Nelins *v.* State, 13 Ibid. 500; Boles *v.* State, 13 Ibid. 398; Hare *v.* State, 4 Howard, 194; Browning *v.* State, 33 Miss. 48.
[nn] Ned and Taylor *v.* State, 33 Miss. 364.
[o] Jumpertz *v.* People, 21 Ill. 375.

§ 3123. In Arkansas, it has been determined that where proof of separation and of exposure to undue influences is had, it is for the state to show that no undue influences were used, and if it fails, the verdict must be set aside.[o]

§ 3124. Separation before the jury are sworn and charged, does not seem, even in the strictest practice, to be considered cause for setting aside a verdict.[p] Thus, where the jury was empanneled and sworn, but before any evidence was given, three of the jurors separated from their fellows for a brief space of time; it was ruled that such separation, before any evidence given, was no cause for setting aside a verdict of conviction; especially in the case at bar, where the separation was so momentary, that any tampering with the jurors was hardly possible.[q] In another case, in empanneling a jury for trial on an indictment for felony, eight were elected and sworn, and three elected, but not sworn; one, who had been sworn, separated from the rest, went some miles off and staid some hours; the other ten were put in charge of the sheriff, to be kept together and separate from other persons, till the ensuing morning; the absconding juryman was taken the same night, and placed in the same room with other jurymen till next morning; but there appeared to have been no conversation on the subject of the prosecution; the next morning, by allowance of the court, this juryman was challenged by the prisoner for cause, and set aside; the jury was then completed, and, on a motion for new trial, after conviction, it was held that the separation of the absconding juryman from his fellows, and his subsequent association with them, though he was afterwards struck from the panel, did not vitiate the verdict, and was no good reason for a new trial.[r]

§ 3125. In misdemeanors there is no difficulty in practice in permitting the jury to separate during the trial. Thus, in a case which has been generally followed in this country, on a motion for a new trial, after conviction for conspiracy, it appeared that the trial had lasted two days; that on the first day the court sat from the morning till eleven o'clock at night; and that, on the adjournment, the jury separated, going to their several homes, and returned the next morning. The separation was without the knowledge of the defendant and his counsel, and without the consent of the court. "I am of opinion," said Abbot, C. J., "that there is no sufficient foundation for the present application. The application is grounded upon the suggestion of these two facts; First, that the jury had dispersed during the night. Secondly, that that fact was not known to the defendants until after the trial was over. Now, the trial began between nine and ten in the morning; it had proceeded until eleven o'clock at night, or later, before the evidence on the part of the prosecution was closed. Learned counsel were employed, separately, for several de-

[o] Cornelius *v.* State, 7 Eng. 782.
[p] Ante, § 590; M'Fadden *v.* Com., 11 Harris, 12; Martin *v.* Com., 11 Leigh, 745.
[q] M'Fadden *v.* Com., 11 Harris, 12.
[r] Tooel *v.* Com., 11 Leigh, 714; ante, § 591.

fendants. It must be assumed, that in that stage of the case, evidence would be laid before the jury on the part of the defendants. It became matter, therefore, of necessity, that the trial should be adjourned, and an adjournment, accordingly, took place from the necessity of the case, the jury being fatigued both in mind and body; and it would have been most injurious to the case of the defendants, even if the judge and jury had had strength enough to go on, till the trial came to a close, I say, most injurious to the case of the defendants, if their case was heard by persons whose minds were exhausted with fatigue, as it would have been, if an adjournment had not taken place. An adjournment of this nature is not necessarily followed by the dispersion of the jury, for in many cases, they are kept together till the final close of the trial. But I am of opinion, that in a case of misdemeanor, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact, that there are many instances, of late years, in which juries, upon trials for misdemeanors, have dispersed and gone to their abodes, during the night for which the adjournment took place, and I consider every instance in which that has been done, to be proof that it may be lawfully done. It is said, that, in some of those instances, the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion, that that can make no difference. I think the consent of the defendant, in such case, ought not to be asked; and my reason for thinking so is, that if that question is put to him, he cannot be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it; for if he refuses to accede to such an accommodation, it will excite that feeling against him which every person, standing in the situation of a defendant, would wish to avoid. I am also of opinon, that the consent of the judge, would not make, in such case, that lawful which was unlawful in itself; for if the law requires that the jury shall, at all events, be kept together until the close of a trial for misdemeanor, it does not appear to me that the judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating, with or without the approbation of the judge, as it seems to me, is this, that if it be done without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But though it may be a misdemeanor in them to separate without his consent, it will not avoid the verdict, in a case of this kind, as it would if the law required the jury to be absolutely kept together. It seems to me, that the law has vested in the judge the discretion of saying, whether or not, in any particular case, it may be allowed to the jury to go to their own homes, during a necessary adjournment throughout the night. For these reasons, it appears to me, that there is no ground for the present application; and, I conceive, we ought not to give any reason to suppose that any doubt exists, when none really exists

in our minds."[s] There is no doubt that, in cases not affecting life and limb, the court has the power to discharge the jury, upon due cause existing, and it is the constant practice throughout the Union, in such case to exercise it.[t]

§ 3126. The jury, it has been held, may even be discharged while the trial is proceeding.[u] In a case before Mr. Justice Story, the principal witness for the prosecution refusing to testify, the case was brought to a stand-still, whereupon the court, on motion of the District Attorney, discharged the jury, and remanded the case for another trial. "In misdemeanors," said the learned judge, "there is certainly a larger discretion, and, until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose that, in the course of the trial, the accused should be reduced to such a situation as to be totally incapable of vindicating himself—shall the trial proceed, that he be condemned? Suppose a juryman taken suddenly ill, and incapable of attending to the cause, shall the prisoner be acquitted? Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared that on Lee's testimony depended a conviction or acquittal, would it be reasonable that the cause should proceed? Lee may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion, that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see whether the witness will not consent to an examination."[v] From the printed report, however, it does not appear that the order of court was that the jury should be *discharged,* but merely that the case should be *postponed.*

§ 3127. In conflict with this is an English case, where it was held no ground to withdraw a juror that the prosecutor's principal witness was incapable of being examined, having no idea of a future state of rewards

[s] R. *v.* Woolf, 1 Chitty R. 401; see State *v.* M'Kee, 1 Bailey, 651; Wyatt *v.* State, 1 Blackf. 25; State *v.* Miller, 1 Dev. & Bat. 500; Ex parte Hill, 3 Cowen, 355; State *v.* Carstaphen, 2 Hayw. 338; State *v.* Bonwell, 2 Harrington, 529; 6 Term R. 539; 4 Taunton, 311.

[t] People *v.* Olcott, 2 Johnson, C. 301; People *v.* Goodwin, 18 Johnson, 187; People *v.* Green, 13 Wendell, 55; Com. *v.* Weems, 1 Boston Law Rep. 257; Heotor *v.* State, 2 Missouri, 135; People *v.* Thompson (Gen. Court of Va.), 2 Wheeler's C. C. 473; Com. *v.* Bowden, 9 Mass. 494; Com. *v.* Purchase, 2 Pick. 521; People *v.* Ellis, 15 Wendell, 371; Com. *v.* Cook, 6 Serg. & R. 577; Com. *v.* Clue, 3 Rawle, 498; Spier's case, 1 Dever. 491; State *v.* Garrigues, 1 Hayw. 241; U. S. *v.* Peres, 9 Wheaton, 570; U. S. *v.* Coolridge, 2 Gallison, 364; U. S. *v.* Shoemaker, 2 M'Lean, 114; U. S. *v.* Morris, 1 Curtis C. C. R. 23; Moore *v.* State, 1 Walker, 134; U. S. *v.* Haskill, 4 Wash. C. C. R. 409; Com. *v.* Olds, 5 Little, 140; Gerard *v.* People, 3 Scammon, 363; State *v.* Miller, 1 Dev. & Bat. 500; Tennessee *v.* Waterhouse, Mart. & Yerger, 278; State *v.* Hall, 4 Halsted, 236; State *v.* M'Kee, 1 Bailey, 154; Wyatt *v.* State, 1 Blackf. 257; State *v.* Weaver, 13 Ired. 203; State *v.* Waber, 22 Mis. (1 Jones) 321; see ante, § 3027.

[u] Com. *v.* Merrill, Thacher's C. C. 1.

[v] U. S. *v.* Coolidge, 2 Gallison, 364; see also U. S. *v.* Haskell, 4 Wash. C. C. 402, ante, 293.

and punishments, though it was said that by such a course there would be opportunity by which the witness could be properly instructed as to the nature of an oath.[w] The latter decision, however, does not go on the ground of there being no power in the court to withdraw a juror, but on that of the case not being a proper one for the exercise of such a power.

In New York, the right to discharge at discretion has been asserted, though its operation has been confined to misdemeanors.[x] In Ohio, it is said, that whether the jury shall be permitted to separate during the progress of the trial, in a criminal case, is matter of sound discretion with the court, and cannot be questioned on error.[y] In Virginia, where a jury was dismissed because they could not agree in a case of malicious trespass, and it did not appear that the defendant objected, it was presumed that it was done for sufficient cause, and with the defendant's consent. In all cases of misdemeanors, it was ruled, the court has authority to dismiss the jury with or without the defendant's consent.[z] In North Carolina, the discretion of the court has been restrained, in cases of felony, by requiring that when such absolute necessity arises as requires a discharge, it should be set out on the record.[a] In South Carolina, Indiana, and Alabama, it has been ruled that the necessary adjournment of the court in order to attend to other business is a good cause of discharge.[b]

The English practice seems to be, when a member of the jury holds out, and refuses to assent to a verdict, to award a new *venire*, as if a juror had died before verdict.[c]

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[w] R. *v.* Wade, 1 Mood. C. C. 86; see R. *v.* White, 1 Leach, 430; see ante, § 755.

[x] People *v.* Ellis, 15 Wendell, 371.

[y] Davis *v.* State, 15 Ohio, 72; Henley *v.* State, 6 Ohio R. 238; Poage *v.* State, 3 Ohio St. R. (N. S.) 329.

[z] Dye *v.* Com., 7 Gratt, 662.

[a] State *v.* Ephraim, 2 Dev. & Bat. 162; see State *v.* Lytle, 5 Iredell, 58.

[b] Powell *v.* State, 19 Ala. 577; State *v.* M'Lemour, 2 Hill, S. C. 680; Wright *v.* State, 5 Ind. 290; though see Spier's case, 1 Dev. 491.

[c] Ch. L. 634; 2 Hale, 294, 295, 297, 309; Doct. & Stu. 271, 272; Tri. per Pale, 248; Burn's J., tit. Juris, Williams, J., Juries, vii.; though see 1 Harg. St. Tri., pref. 2d ed. vi. vii. A *nolle prosequi*, as has been noticed in another connection, (see ante, § 513-8,) is no bar to a subsequent indictment for the same offence; and at present it need only be considered, so far as it relates to the progress and termination of trial. At common law, the attorney-general may enter a *nolle prosequi* at any time before judgment. (Com. *v.* Briggs, 7 Pick. 179; Com. *v.* Tuck, 20 Pick. 356; State *v.* Roe, 12 Ver. 73.) Throughout the Union, however, statutes are in force limiting the power. The New York statute, it has been held, requiring the assent of the court to the entry of a *nolle prosequi* by a district attorney, does not confer the power on the court to direct a discontinuance, without the motion of that officer. (People *v.* M'Leod, 25 Wend. 483; 1 Hill, 377.) In Pennsylvania, the act restraining the power in certain offences, seems to be held not to interfere with a *nolle prosequi* even in such offences, with leave of court, when required by public justice. (Com. *v.* Gillespie, 7 Serg. & R. 469.) In this case, a *nolle prosequi* was entered on a particular count of an indictment, after conviction, judgment being rendered on the other counts. See, also, Agnew *v.* Commissioners, 12 Serg. & R. 94, where the power of the attorney-general, in case of perjury, under the act of 29th March, 1819, to enter a *nolle prosequi*, even with leave of court, is doubted. But after the jury are empanneled, and witnesses sworn, the prosecuting attorney, it seems, has no right to enter a *nolle pro equi* without leave of court, because the evidence is insufficient to convict. (State *v.* J. S., 1 Tyler, 178; State *v.* M'Kee, 1 Bailey, 631; U. S. *v.* Shoemaker, 2 M'Lean, 114; Com. *v.* Good-enough, Thach. C. C. 432.) Such an abandonment of the prosecution, it has been

§ 3128. An arbitrary discharge of the jury, without sufficient reason, relieves the defendant from a second trial.[a]

§ 3129. It used to be thought that a juror cannot be withdrawn in case of a capital felony.[e] But even here it is said that a juror may be withdrawn whenever, as has been just seen, he is too sick to be able to attend,[f] where he turns out to be an alien, and thus disqualified,[g] where he is discovered to be deranged,[h] whenever he is either favorable or hostile to the party indicted,[i] where he has purposely kept back evidence for the prosecution, or where a material witness is suddenly incapacitated by illness from attending.[j] And the "legal necessity," in the view of Judge Story, exists, even in a capital case, in each of the above cases.[k]

In conformity with the common law rule, as declared by Sir E. Coke, it was the practice in Pennsylvania, in capital cases, even till 1831, to withhold all food whatever, until either a verdict or utter inability to render one was produced.[m] Such compulsory process, however, is now generally abandoned ;[n] and though it may be held a contempt for the jury to eat and drink without the consent of the court, such conduct will not vitiate the verdict, unless the expense of such refreshments was provided for by the prevailing party.[o]

§ 3130. In a trial for a capital felony, one of the jurors, in the presence of the court and jury, spoke to a person not of the jury, and asked him to give him a vest. This was held no ground for a new trial. And so, in

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held, is equivalent to a verdict of acquittal. (U. S. *v.* Shoemaker, 2 M'Lean, 114; see ante, § 513–8.) In Massachusetts, it has been said, before the jury is empanneled, and after the conviction, the right exists; but that it is suspended while the case is before the jury. (Com. *v.* Tuck. 20 Pick. 356; Com. *v.* Briggs, 7 Pick. 179.) If there be two counts in one indictment, for offences committed at the same time and place, and of the same class, but different in degree—as one for a revolt, and another for an attempt to excite it—the judgment will not be arrested, though a verdict of guilty is returned on both. (U. S. *v.* Peterson, 1 W. & M. 305.) The district attorney is allowed, before judgment, to enter a *nolle prosequi* on one, if he deems it advisable. (Ibid.; see ante, § 513–8.)

[d] Poage *v.* State, 3 Ohio St. Rep. 229; Klock *v.* People, 2 Parker, C. R. (N. Y.) 676; Atkins *v.* State, 16 Ark. 568.

[e] R. *v.* Perkins, 9 Nov. 1698, Carth. 465, by all the judges; S. C. Sir T. Raym. 84.

[f] Kinloch's case, Foster, J., diss., Fost. 28; Com. *v.* Fells, 9 Leigh, 613; Mahala *v.* State, 10 Yerger, 32; State *v.* Curtis, 5 Hump. 601; Hector *v.* State, 2 Mis. 166; U. S. *v.* Haskell, 4 Wash. C. C. 402.

[g] Stone *v.* State, 2 Scam. 326.

[h] U. S. *v.* Haskell, 4 Wash. C. C. R. 402.

[i] 13 Wend. 351; 2 Gallison, 364. See Com. *v.* M'Fadden, 11 Harris, 12.

[j] 1 Ch. Cr. L. 631.

[k] U. S. *v.* Coolidge, 2 Gall. 364; see, also, People *v.* Damon, 13 Wend. 351; People *v.* Ellis, 15 Wend. 371. As to latter case, see Klock *v.* People, 2 Parker, C. R. 676.

[m] Com. *v.* Cook, 6 Serg. & R. 577; Com. *v.* Clue, 3 Rawle, 498.

[n] Com. *v.* Purchase, 2 Pick. 521; People *v.* Goodwin, 18 Johns. 187; Moore *v.* State, 1 Walker, 134; Com. *v.* Clue, 3 Rawle, 498; U. S. *v.* Gilbert, 2 Sumner, 19; U. S. *v.* Coolidge, 2 Gal. 364; U. S. *v.* Shoemaker, 2 M'Lean, 114; People *v.* Olcott, 2 Johns. 201; Spier's Case, 1 Dev. 49; State *v.* Ephraim, 2 Dev. & Bat. 162; Mahela *v.* State, 10 Yerger, 532.

[o] Purinton *v.* Humphreys, 6 Greenleaf, 379; Harrison *v.* Rowan, 4 Wash. C. C. R. 32; Duke of Richmond *v.* Wise, 1 Vent. 124; Munson's Case, 1 Ander. 182; U. S. *v.* Haskell, 4 Wash. C. C. R. 402.

the same case, where one of the jurors went about fifteen steps apart from his fellows, but was under the eye of the officer.[p]

And so where a juror, in a trial for manslaughter, after having been sworn, left the jury box, and walked about the room unattended, conversing with various persons.[pp]

§ 3131. In Massachusetts, where the sheriff to whom the jury was committed, walked with them to a neighboring house, and whilst there, withdrew from the room where they were, leaving them in the company of three other persons; it was held, that although these other persons swore that there was no allusion by them to the trial during such absence of the sheriff, yet the verdict of the jury against the prisoner was to be set aside, and a new trial directed.[q]

§ 3132. In Virginia, where, after a jury had retired under the attendance of an officer, and before the court adjourned, another officer was sworn to attend upon them, but after the adjournment a third was sworn by the clerk to supply the place of the second for a few minutes; it was held, that this was according to usage, and no ground for a new trial.[r]

§ 3133. In Mississippi, where a jury, when out, are under the charge of an unsworn officer, the verdict will be set aside unless it affirmatively appear that the jury were in no way affected thereby.[s]

In California, it is said that if a juror, in a criminal trial, separate without leave of the court, though with the prisoner's consent, and if the separation was such that he might have been improperly influenced by others, the verdict will be set aside.[ss]

§ 3134. Where a juror called by the prisoner as a witness, stated that on a certain morning during the progress of the trial, before the rest of the jury had risen, he rose, dressed himself, and went down stairs to the pavement before the door of the hotel where the jury were lodged for the night, for the purpose of meeting with a passer-by to send a message to his family; and after remaining there about five minutes, and seeing no one passing, he returned to the rest of the jury; it was held, that the only proof of the separation of the jury being that of the juror, the prisoner's witness, who negatived all abuse, tampering, or improper influence, the act of the juror was not sufficient grounds for setting aside the verdict, and granting a new trial.[t]

And so where the jury through inadvertence, separated and mingled with the court, it appearing affirmatively that no improper communications were received by them during such dispersion, the court refused a new trial.[u]

Under the statutes of Indiana, the jury, in the trial of a criminal case,

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[p] Rowe *v.* State, 11 Humph. 491; Stanton *v.* State, 8 Eng. (13 Ark.) 317; see also, Epps *v.* State, 19 Geo. 102.

[pp] Cohron *v.* State, 20 Geo. 752.

[q] Com. *v.* Jenkins, Thacher's C. C. 118.

[r] Wormeley's Case, 8 Grattan, 808.

[s] M'Cann *v.* State, 9 S. & M. 465.

[ss] People *v.* Buckus, 5 Cal. 275.

[t] Thompson's Case, 8 Grattan, 638.

[u] Roberts *v.* State, 14 Georg. 8; see also Burtine *v.* State, 18 Geo. 534; Epps *v.* State, 19 Geo. 102.

and before the cause is submitted to them, may separate, and during such separation they need not be kept in charge of a sworn officer.[uu]

§ 3135. In the progress of a trial which lasted several days, upon the adjournment of the court at night the jury were committed to the sheriff, to be kept until next day. The most convenient and suitable accommodation which could be provided for the jury, was in the third story in a large hotel, where they were placed in five different rooms opening upon a common passage, which communicated with the street below by flights of stairs; the doors of their chambers being unlocked during the night, the jurors being unwilling to have them locked, from apprehension of fire during the night, and there being no doors or other fastenings at either end of the passage. It was held that this was not separation of the jury for which the prisoner was entitled to a new trial.[v] And so, also, where in the morning, before the court met, the jury were walking out, accompanied by the sheriff, for relaxation and exercise, and passed the boundary line separating the county in which the trial is progressing from an adjoining county, and remained in the adjoining county a few minutes, but there was no separation, conversation or communication with any one, by any of the jurors.[w]

The jury having come in with a verdict in a capital case, the court inquired if the defendant's counsel would poll the jury, and then if he knew any reason why the verdict should not be received, to both which he replied in the negative. After the verdict was delivered, and the jury dismissed and dispersed, but within ten minutes, the court remembering that the jury had not been called over each by name before the verdict was delivered, had them re-assembled, an oath administered, and each juror sworn that he was in the box when the verdict was delivered, that he heard it read; that it found the defendant guilty of murder, and that he agreed to it. It was held that there was no ground for a new trial.[x]

As has already been seen, the question of the right of the jury to be discharged may be raised by the prisoner.[y]

Summary of cases.—From the above cases the following principles may be extracted:—

1st. Separation of the jury, in a capital case, in such a way as to enable them or either of them to be tampered with, is ground for a new trial. The authorities, however, differ, as to whether (1) this ground is absolute, or (2) *prima facie*, subject to be rebutted by proof from the prosecution, that no improper influence reached the jury, or (3) merely contingent upon proof, to be offered by the defence, that a tampering really took place.

(1). Among those holding the *first* view, the courts of Pennsylvania, Louisiana, California and Tennessee take the most extreme position, they

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[uu] Evans *v.* State, 7 Ind. 271.

[v] Roberts *v.* State, 14 Georg. 8; see also Burtine *v.* State, 18 Geo. 534; Epps *v.* State, 19 Geo. 102.

[w] Ibid. See State *v.* Perry, 1 Busbee, 330.

[x] Mitchell *v.* State, 22 Geo. 211; [y] Ante, § 591.

maintaining that even consent of prisoner cannot, in such cases, cure a separation.[a] Besides these courts, those of Virginia and Missouri seem to hold that bare separation, in a capital case, is absolute ground for a new trial.[a]

(2). That such separation, in a capital case, is *prima facie* ground for a new trial, subject to be rebutted by proof from the prosecution, that no improper influence reached the jury, is the position generally taken by the American courts.[b]

(3). In one or two cases it has been held that separation of the jury is only ground for new trial when sustained by proof of tampering, the burden of which is on the defendant.[c] It is further held that such separation is within the discretion of the judge trying the case, not subject to revision on error.[e]

2d. In felonies, not capital, and misdemeanors, it is for the defendant to prove tampering, and separation is within the discretion of the court.[f] Even in Pennsylvania, where, in capital cases, the extremest rule is taken, it has been held that in burglary, the jury, after being cautioned to avoid all conversation with any person about the case, might be allowed to separate at the usual hour of adjournment.[ff]

§ 3136. (*b*) *Improper reception of papers or books not in evidence.*— As has already been seen, the question of the right of the jury to be discharged, may be waived by the prisoner.[g] There are, however, irregularities other than that of separation, which are considered grounds for new trial. Thus, if the jury receive papers not submitted in evidence, or conditionally or imperfectly submitted, the verdict will be set aside in civil cases, if resulting from the party concerned in the irregularity, and in criminal cases, it would seem in all cases whatever, if there be a conviction, unless it appear that the error was the result of the misconduct of the defendant himself.[gg] Where the solicitor for the plaintiffs, after the evidence was concluded, delivered a bundle of depositions to the jury, a portion of which were not in evidence, the verdict for the plaintiffs was set

[a] Pieffer *v.* Com., 3 Harris, 469; Wesley *v.* State, 11 Humph. 502; Wiley *v.* State, 1 Swan, 256; People *v.* Backus, 5 Cal. 275; State *v.* Populus, 12 La. Ann. 710; see ante, § 591.

[a] Com. *v.* McCaul, 1 Virg. Cases, 271; Overbee *v.* Com., 1 Robins. 756; McLean *v.* State, 3 Missouri, 153.

[b] Com. *v.* Roby, 12 Pick. 496; State *v.* Prescott, 7 N. H. 291; State *v.* Babcock, 1 Connect. 401; State *v.* Tilghman, 11 Iredell, 514; Hines *v.* State, 8 Humph. 597; McCann *v.* State, 9 Sm. & M. 465; Boles *v.* State, 13 Ibid. 397; Organ *v.* State, 26 Missis. 76; People *v.* Douglass, 4 Cowen, 26; Eastwood *v.* People, 3 Parker C. R. 25; Capron *v.* State, 20 Geo. 752; Cornelius *v.* State, 7 Eng. R. 782; Jumpertz *v.* People, 21 Ill. 375.

[c] State *v.* Camp, 23 Verm. 554.

[e] State *v.* Anderson, 2 Bailey, 565; State *v.* McElmurray, 3 Strobh. 34; Sargent *v.* State, 11 Ohio, 472; State *v.* Engles, 13 Ohio, 490; Davis *v.* State, 15 Ohio, 72.

[f] See cases cited, ante, § 3111-35.

[ff] McCreary *v.* Com., 29 Penn. St. R. 323.

[g] 2 Hale, P. C. 308.

[gg] R. *v.* Sutton, 4 Maule & Sel. 532; 2 Hale, P. C. 306; Whitney *v.* Whitman, 5 Mass. 405; Co. Lit. 227; Purinton *v.* Humphreys, 6 Greenl. 379; Benson *v.* Fish, Ibid. 141; Talmadge *v.* Northrop, 1 Root, 522; Price *v.* Warren, 1 Har. & Mu ıf. 385; Thompson *v.* Mallet, 1 South. 146; Jessup *v.* Eldridge, Coxe, 401; Atkins *v.* State, 16 Ark. 568.

aside though the jury swore that they had not opened the bundle;[h] and in Massachusetts, where, through mistake, a similar paper, containing material evidence for the party ultimately prevailing, found its way to the jury box, the same result took place.[i] Subsequently, however, in a case of the same character, this opinion was reviewed, and it was held that where the paper was taken out by the jury through accident, and it was shown that it was not opened, this of itself did not vitiate the verdict; but where it was delivered by design, or where, being opened, it made for the prevailing party, the case was otherwise.[j] In New York,[k] and Pennsylvania,[l] the same distinction has been followed, and such may be considered the settled law.[m]

§ 3137. Where the officers attending upon the jury, under a mistake of duty, permitted them to read the newspapers, the officers first inspecting them, and cutting out everything that in any manner related to the trial; and it appeared that, in point of fact, the jurors never saw anything in any newspaper relative to the trial, and after the charge from the court, were not allowed to see any until after they had delivered their verdict; it was held, that this was an irregularity in the officers, but not sufficient to justify the court in setting aside a verdict, and granting a new trial, or treating the matter as a mis-trial.[f]

§ 3138. The old rule was, that if a jury send for a book, after departure from the bar, and read it, the verdict is avoided;[g] and, on one occasion, Lord Tenterden, though the counsel on both sides consented, refused to send out to the jury, on their request, a copy of "Selwyn's Law of Nisi Prius," observing that the proper course for the jury to adopt was for them to come into court, state their question, and receive the law from the court.[h] It was held, however, by the late Judge Thacher, that it was not a sufficient ground for a new trial, that, on the trial of a case in which the jury were to decide upon both law and fact, the officer in attendance delivered to them, at their request without application to the court, after they had retired to consult upon a verdict, a volume of the laws of the commonwealth containing the act upon which the indictment was founded, which act had been commented upon by the counsel and by the court, and which volume the court would have given them leave to take with them if requested.[i]

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[h] 2 Hale, P. C. 308.

[i] Whitney *v.* Whitman, 5 Mass. 405.

[j] Hix *v.* Drury, 5 Pick. 296.

[k] Hackley *v.* Hastie, 3 Johns. 252.

[l] Sheaff *v.* Gray, 2 Yeates, 273.

[m] Vicary *v.* Futhering, Cro. Eliz. 411; Lonsdale *v.* Brown, 4 Wash. C. C. R. 148; Alexander *v.* Jamieson, 5 Binney, 238; State *v.* Tindall, 10 Rich. Law (S. C.), 212.

[f] U. S. *v.* Gibert, 2 Sumner, 21.

[g] Vin. Abr. Trial, pl. 18; Co. Lit. 227; Farrer *v.* State, 2 Ohio St. Rep. (N. S.) 54.

[h] Burrows *v.* Unwin, 3 Carr. & P. 310.

[i] Com. *v.* Jenkins, Thach. C. C. 118. In a case of treason, before Wilson, Blair and Patterson, Justices, in the U. S. Circuit Court, the jury, as is stated by Mr. Dallas, were permitted, with consent of parties, to take with them Foster's Crown Law and the Acts of Congress. (U. S. *v.* Vigol, 2 Dallas, 347; Wharton's St. Tr. 176; see also, U. S. *v.* Gibert, 2 Sumner, 21; Com. *v.* Jenkins, Thach. C. C. 118.)

§ 3139. (*c*) *Irregular communications from court.*—So strictly is the independence of the jury guarded, that any communication even from the court, not made in open court, and before the parties, will avoid the verdict.[j] Thus, where a case had consumed three days in trial, and the jury, after having been out six hours, stated to the judge, in writing, through the foreman, that they could not agree, upon which the judge returned an answer, in writing, that he was unwilling, after so much time had been consumed in the case, to permit them to separate, and giving them directions to enable them to pursue their examination of the case in a more systematic manner; ordering them to bring this letter into court, so that it could be filed among the papers of the case; "We are all of opinion," said Parker, C. J., on a motion for a new trial, "after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause had been committed to them by the charge of the judge, unless in open court, and, when practicable, in presence of the counsel in the cause. The oath administered to the officer seems to indicate this as the proper course. He is to suffer no one to speak to them, nor to speak to them himself, unless to ask them whether they are agreed; and he is not to suffer them to separate until they are agreed, unless by order of court."[k] The sending in by the judge of a prior written charge to a grand jury, was held also to avoid the verdict.[l] And so where the judge, after the jury had retired, and had declared that they were unable to agree, told the jury that the case was a peculiar one and that he had reason to believe they had been tampered with,[m] and where the jury obained possession of a part of a newspaper containing the charge or part of the charge of the judge on the issue before them.[n] It is not, however, ground to set aside the verdict that the judge in presence of counsel charged the jury a second time upon matters of evidence, after they returned to court, stating they could not agree, but without request for further instructions;[o] and where, after the jury had retired to consult on their verdict, they sent a note in writing to the court, in absence of parties and counsel, requesting advice on certain points in the case, and the judge returned the writing without reply, and directed the officer to hand a volume of reports to the foreman, and to request him to read a part of a decision, to the effect that a jury in such circumstances could not communicate with the judge except in open court.[p]

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[j] See Crawford *v.* State, 12 Georg. 142.

[k] Sergeant *v.* Roberts, 1 Pick. 337; see 6 Greenleaf, 141.

[l] Holten *v.* State, 3 Florida, 476. Judge Edmonds, at a Court of Oyer and Terminer, held in New York in 1851, sent word to a jury, who had applied to him for a law book on manslaughter, that they "had nothing to do with manslaughter." This was communicated to them by the officer in the absence of counsel. The defendant was convicted, and on a motion for a new trial, Judge Edmonds and his associates held, that this was no sufficient ground. The case, however, cannot be reconciled with the weight of authority in the text. (People *v.* Carnal, 1 Parker C. C. 256.)

[m] State *v.* Ladd, 10 La. R. 271.

[n] Farrer *v.* State, 2 Ohio St. Rep. (N. S.) 54.

[o] Com. *v.* Snelling, 15 Pick. 321; see Crawford *v.* State, 12 Geo. 142.

[p] Com. *v.* Jenkins, Thacher's C. C. 118; Farrer *v.* State, 2 Ohio St. Rep. (N. S.) 54.

But it is otherwise when the court, after the jury retires, reads evidence to them in the absence of the counsel.[q]

§ 3140. (*d*) *Conversing with others, and reception of information as to the case.* It is well settled, that if a jury, after retiring to consider of their verdict, and before its sealing for rendition, hear other testimony, or converse with strangers on the subject of the case, it will vitiate the whole procedure.[r] Thus, where one of the jurors separated from the rest and obtained from a broker information as to the price of certificates at a particular period, and communicated the same to his fellows, the verdict was set aside.[s] But where the jury had retired to consider on their verdict, and afterwards came into court to hear explanations from a witness, who stated an additional and important fact, not before stated by him, but which fact the court immediately told the jury they were to disregard; it was held, that the affidavit of a juror stating that he founded his verdict entirely upon this additional fact, would not authorize a new trial.[t]

§ 3141. In Virginia where a medical witness for the commonwealth, being accidentally present at the hotel when the jury were brought there by the sheriff to be lodged for the night, invited the jury in the presence of the sheriff to drink with him, and some of them accepted the invitation, it was ruled that as this act was inadvertent, but intended only as an act of courtesy, and as it was all in the presence of the sheriff, this was not sufficient to set aside the verdict.[u]

Nor is it any ground for a new trial that the jury passed through crowds of people going to the hotel where they dined, or that they dined at the public table at the hotel, under the charge of their officer, no one speaking to, or tampering with them.[v]

Where it appeared that the prosecutor had been in the room with the jury during their deliberations it was held ground for new trial, though he was acting officially as high sheriff, and though there was no misconduct shown.[w]

§ 3142. If any testimony material to the issue be acted on by the jury, without having been previously submitted in evidence, but be communicated to the jury by one of their number, it will avoid the verdict, if such testimony thus submitted were operative.[x] But it does not follow that a new trial will be ordered because the jury take into consideration general knowledge of the character of the transaction. Thus, in an indictment for a seditious libel, tending to excite public outrages, the judge referred to the personal knowledge of the jury for proof of the fact that serious riots had for some time back been occurring in the particular neighborhood, and

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[q] Wade *v.* State, 12 Geo. 25.

[r] Hudson *v.* State, 9 Yerger, 468; Perkins *v.* Knight, 2 New Hamp. 474; Bennett *v.* Howard, 3 Day, 223; Knight *v.* Freeport, 13 Mass. 218; post, § 3159.

[s] Brunson *v.* Graham, 2 Yeates, 166.

[t] Hudson *v.* State, 9 Yerger, 468; State *v.* Abbott, 2 Jones' Law (N. C.) 418.

[u] Thompson's case, 8 Grattan, 638.

[v] Rowe *v.* State, 11 Hump. 491.

[w] M'Elrath *v.* State, 2 Swan, 378.

[x] Sam *v.* State, 1 Swan (Ten.), 61.

it was held that such a reference was right, such riot forming part of the history of the country.[y] Where one of the jury communicated to his fellows his opinion, tending to discredit a material witness for the plaintiff, it was held no ground for a new trial.[z] But the case is different where the issue is affected by the irregular submission by one juror to the others, of material facts connected with the merits.[a]

§ 3144. In Tennessee, where one of the jurymen stated to his fellows, after they had retired, that he had heard a witness whose credibility was attacked at the trial, sworn before the grand jury, and that his statement was the same as he had made on the trial, and it appeared that this statement had much influence in producing the verdict of guilty; it was held that this proceeding was illegal, and vitiated the verdict.[b]

After the jury had retired to a room in the care of an officer, to consider their verdict, a person, during the temporary absence of the officer, entered the room, and was seated by invitation from the jury, but no other communication was had with him, and the officer, upon his return, removed him. A new trial upon that ground was refused, it not appearing that there was any improper motive for the intrusion, or that he made any effort to confer with the jury.[c]

If burglar's tools, found on the principal, are, during a recess of the court, while the cause is on the trial, exhibited, and their use explained in the presence of one of the jurors, with the knowledge of the defendant and his counsel, and no objection is made until after verdict, the objection will be regarded as waived.[cc]

In a case in New Hampshire, the court went the questionable length of sustaining a verdict where it appeared that a witness for the prosecution had made statements prejudicial to the prisoner in the presence of a juror, not knowing the latter to be present.[d]

§ 3145. As a general rule, the accidental *approach* of strangers, unless conversation as to the case is proved, will not avoid the verdict.[e]

§ 3146. (*e*) *Inattention of juror.*— During the progress of a trial for murder, one of the jurors, while one of the counsel for the prisoner was addressing the jury, had a chill, and was by order of the court placed upon a pallet. During a part of the time he was in a slumber, and did not fully comprehend the whole of the argument, though he had understood the whole of the evidence, and all that had been said by counsel previously. The fact that he was asleep was known to the prisoner at the time, but the attention of no one was called to it. It was held that this was not sufficient cause for setting aside the verdict.[f]

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[y] R. *v.* Sutton, 4 M. & S. 532.
[z] Purinton *v.* Humphreys, 6 Greenleaf, 379; Price *v.* Warren, 1 Hen. & Munf. 385.
[a] Talmadge *v.* Northrop, 1 Root, 522.
[b] Donston *v.* State, 6 Hump. 275.
[c] Shuster *v.* State, 11 Hump. 169.
[cc] State *v.* Rand, 33 N. H. 216.
[d] State *v.* Ayer, 3 Foster, (N. H.) 301.
[e] Rowe *v.* State, 11 Humph. 491; Stanton *v.* State, 8 Eng. (12 Ark.) 317; M'Cann *v.* State, 9 S. & M. 465; see ante, § 3135.
[f] Baxter *v.* People, 3 Gilman, 368.

§ 3147. (*f*) *Intoxication of juror.*—Any indulgence in spirituous liquors, during trial, it was once said in New York, will avoid the verdict.[g] "We cannot," declared the Supreme Court, "allow jurors thus of their own accord to drink spirituous liquor while thus engaged in the course of a cause. We are satisfied that there has been no mischief, but the rule is absolute, and does not meddle with consequences, nor should exceptions be multiplied. We have set aside verdicts in error for this cause, even where the parties consented that the jury should drink."[h] Since then, however, the contrary doctrine has been held in the same state.[i] And it was declared by Mr. Justice Story, in a capital case, not to be sufficient for this purpose, to show that some of the jurors drank ardent spirits during the trial, when the prisoner's counsel consented in open court to this indulgence to those whose health might require it, unless it was also shown that the indulgence was grossly abused, and operated injuriously to the prisoners.[j] In Virginia, it is not misbehavior in a juror between the adjournment of the court in the evening, and its meeting next morning, to drink spirituous liquors in moderation.[k] In Tennessee, where spirituous liquors were furnished by the officer to the jury during the trial, of which they drank, but not to excess, or so as to disqualify them from an intelligent performance of their duty, it was held no ground for a new trial.[l] And in Pennsylvania and Missouri the same opinion has recently been held;[m] though in capital cases it seems otherwise in Texas.[mm]

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[g] Dennison *v.* Colins, 1 Cowen, 111; Rose *v.* Smith, 4 Cowen, 17.

[h] Grant *v.* Fowler, 7 Cowen, 562.

[i] Wilson *v.* Abrahams, 1 Hill, 207.

[j] U. S. *v.* Gibert et al., 2 Sumner, 21; and see Coleman *v.* Moody, 4 H. & M. 1; Stone *v.* State, 4 Humphrey, 27.

[k] Thompson's case, 8 Grattan, 638.

[l] Rowe *v.* State, 11 Hump. 491.

[m] State *v.* Upton, 20 Mo. 397; Com. *v.* Beale, Phila. 1854, where Thompson, P. J., said: "The use of spirituous liquors by the jurors, about which so much was said upon the argument, is certainly to be discouraged, and had it been shown that any one of the number had at any time during the progress of the cause been affected by such potations, it would have afforded a sufficient cause for disregarding the verdict. No such charge was made in this case. The jury, at all times when in court, sustained the character of prudent and thoughtful men, careful and attentive to the progress of the case, and evinced by intelligent inquiries a full understanding of its merits. The affidavits produced showed that, during the four days of the trial, some of the jurors had used spirituous liquors, to what extent did not appear, nor was it shown that any were thereby disqualified from attending to their duties. The modern system of trial renders it absolutely necessary that jurors should be furnished with meat and drink, when kept together during the recess of the court. It has never been the practice to prescribe the nature of the refreshments to be furnished; this has usually been left to the option of the jurors themselves; and the rule adopted by both ancient and modern decisions is, that the drinking of the jurors, at their own expense, is not, of itself, a reason for disturbing their verdict, where there is no reason to believe that they indulged to excess. Certainly it was not known to this court that spirituous liquors were furnished to jurors by the proprietors of the hotels, to which the want of proper jury-rooms renders it necessary to send our juries. Such a practice cannot but meet with our decided reprobation, and will hereafter be checked as far as is in our power. But the mere exhibition of the fact, as in this case, would not, under any recognized rule of law, justify us in setting aside the verdict. In the earlier cases, the misbehavior of jurors in this behalf subjected them to punishment by fine and imprisonment, but did not vitiate the verdict. (Dyer, 37; Ib. 218.) Even where the jury

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[mm] Jones *v.* State, 13 Texas, 168.

§ 3148. (*g*) *Casting lots by jurors or other irregularity in their consultations.*—Where the jury have cast lots, or resorted to chance, in any way whatever to determine their verdict, a new trial will be ordered.[n] Where each of the jurors made an estimate of what he thought proper as damages, and an average was struck between the whole, which they had agreed upon beforehand to adopt, and did ultimately render as their verdict, the court held the result as void.[o] Where, however, such a method of arriving at an estimate is taken, without any previous agreement by which the jurors bind themselves individually to adopt the quotient, but where each juror reserves to himself the right of dissenting, and where all, after consideration, elect the result as a reasonable measure of damages, this is no objection to the verdict.[p] The same distinction will apply to cases where the indictment covers several degrees, and where, if the result be produced by lot, the verdict will be vacated; but where the result is a compromise, *e. g.*, where murder in the second degree is found as a mean between murder in the first degree and manslaughter, the finding will rarely be disturbed.[q] And, where one of the jury, through a mistaken sense of duty, thought he ought to assent to the views of a majority, and thereby concurred in a verdict of murder, such mistake was held no ground for a new trial.[r]

§ 3149. And so where the jury concurred in opinion as to the guilt of the prisoner, but differed as to the length of the time for which he should be sentenced to the penitentiary; and they agreed that each one should state the time for which he would send him to the penitentiary, and that the aggregate of these periods, divided by twelve, should be the verdict. After it was done they struck off the odd months, and all agreed to the

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drank wine while they were deliberating, and were treated by the plaintiff's solicitor, after they had agreed upon their verdict, but before it had been delivered in court, the motion to set aside the verdict was denied. (1 Vent. 123.) The rule adopted by the courts of other States is in accordance with the decisions referred to. The case of Brant *v.* Fowler, (7 Com. 562,) referred to on the argument, in which a stricter rule was applied, is contrary to the current of decisions on the subject, and was overruled by the same court, in Wilson *v.* Abrahams, (1 Hill, 207,) in which it was held that the irregularity charged upon the jury, though subjecting them to censure, will not overturn the verdict, unless it appears to have had an influence on the final result of the cause. The same doctrine is held in Virginia, and is well expressed in the case in 8 Grattan, 637, which was a capital case. So also in Rowe *v.* State, 11 Humph. (Ten.) Rep., where, in a capital case, spirituous liquors were brought to the jury-room, of which they drank, but not to excess, so as to disqualify them from deliberating and considering the case properly, it was held to be no ground for a new trial. We do not find that any other rule has ever been applied to the conduct of jurors in the courts of this State, and while we are disposed to hold them strictly responsible for any abuse or excess, we cannot, without evidence of such excess, and of its influence upon the case, permit the verdict to be disturbed upon the mere presumption of such influence—this reason must therefore be dismissed."

[n] Hale *v.* Cove, 1 Strange, 642; Parr *v.* Seames, Barnes, 438; Millish *v.* Arnold, Bunb. 51; Crabtree *v.* State, 3 Sneed, (Tenn.) 302; Birchard *v.* Booth, 4 Wis. 67; see Monroe *v.* State, 5 Geo. 85.

[o] Smith *v.* Chapman, 3 Carnes, 57; Roberts *v.* Failis, 1 Cowen, 288; Harvey *v.* Rickett, 15 Johns. 87; Warner *v.* Robinson, 1 Root, 194.

[p] Dana *v.* Tucker, 4 Johns. 487; Shobe *v.* Bell, 1 Randolph, 39; Grinnell *v.* Phillips, 1 Mass. R. 541; Cowperthwaite *v.* Jones, 2 Dallas, 55.

[q] See ante, § 1112.

[r] Com. *v.* Drew, 4 Mass. 391.

verdict, understanding what it was. It was held, that this was not misbehavior in the jury for which the verdict would be set aside and a new trial awarded.[s]

§ 3150. Where, however, a juror was not satisfied of the guilt of the prisoner, but assented to a verdict of guilty under an impression (suggested by his fellow jurors,) that the governor would pardon the defendant, if the jury by their verdict recommended it; it was held, in Tennessee, that this was sufficient cause to set aside the verdict.[t] In the same state,—the uncommon fruitfulness of whose judicial history in cases of this character may be traced to the habit which there prevails of examining jurors at large, after verdict, as to the character of their deliberations,—where great levity was exhibited by the jury in their deliberations, and where the result, though not produced by lot, was reached by a course of frivolous experiments having but an imperfect bearing on the issue, the verdict was set aside.[u] And so a juror's affidavit that he believed the prisoner was innocent, and that he assented to a verdict of guilty under the belief, induced by the assertions of his fellow-jurors that there were fatal defects in the proceedings which would prevent the prisoner from being sent to the penitentiary, and that the governor would pardon the defendant if recommended to mercy in the verdict, was held in the same state sufficient to set aside the verdict.[v]

§ 3151. But mere collateral levity on the part of the jury will be no ground to set aside a verdict, unless it appeared that such levity interfered with their deliberations.[w]

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[s] Thompson's case, 8 Grattan, 638.

[t] Crawford *v.* State, 2 Yerger, 60.

[u] Jervis *v.* State, 4 Humphrey, 289.

[v] Cochran *v.* State. 7 Humph. 544. In this case, the case of Crawford *v.* State, 2 Yerg. 60, was referred to and approved.

[w] Com. *v.* Beale, Phila. 1854: "It is further alleged," said Thompson, J., "that the jury misbehaved by singing and acting in a trifling manner while in the jury-room, and immediately before rendering their verdict. That some of the jurors displayed levity of conduct, which, when casually overheard, might have seemed unbecoming, may be perfectly true; but there is no proof that such levity attended or interfered with their deliberations. On the contrary, the evidence shows that the noises alluded to occurred after their deliberations had ceased, and while they were waiting for the arrival of the hour to which the court had adjourned. The gentlemen who happened to overhear the noise alluded to, state that it continued from the time they first heard it until the jury returned to court—showing that it was not during their deliberations, but after they had agreed. This would not, therefore, be sufficient to affect their verdict. Comparing all the time at which the jury left the court, with the time at which they dined, and the subsequent noise in their room, it seems probable that they had agreed on their verdict before dinner—in which case, the meat and drink used at dinner could not have affected their deliberations. For the reasons adverted to, much censure was cast upon the jury during the argument. but without the production of sufficient evidence to induce us to believe that the interests of the defendant were prejudiced by the alleged improprieties. The hearsay testimony of what one of the jurors said a day or two after the verdict had been rendered, is inadmissible upon any principle whatever, and we therefore decline entirely to consider it. 'To yield accusations against jurors, lightly made, or without strong proof,' says Judge Rogers, (Com. *v.* Flannagan, 7 W. & S. 421,) 'would weaken, if not bring into contempt, that useful and indispensable institution in the administration of justice.' And again he observes: 'We must not lend too ready an ear to such applications; for it is to be feared, that were we to do so, as soon as all the acoused was convicted, the trial of jurors would begin.' The truth of these remarks is illustrated by the proceedings in

§ 3152. (*h*) *Preadjudication by juror or judge.*—When it appears after trial, that a juror had, beforehand, prejudged the case, but had omitted to avow such conclusion before the trial; or when asked as to opinion on *voire dire*, had given false answers; and such formation of opinion was unknown to the party at the time, a new trial will be granted.[x] Thus it was held a sufficient reason for a new trial, that one of the jurors, some time before the trial, had declared "such a man as Fries (the defendant) ought to be hung, who brings on such a disturbance."[y] The same ruling took place where the foreman had declared that the plaintiff should never have a verdict, whatever witnesses he produced;[z] and where a juror had stated on the morning of trial, that he had come from home for the purpose of hanging every counterfeiting rascal, and that he was determined to hang the prisoner at all events.[a] A qualified opinion, however, dependent on a particular state of facts, will be no ground for new trial;[b] and where a juror stated that, if it was true the prisoner had made the attempt to commit the crime charged upon him, he would go to the penitentiary;

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the present case; and we feel ourselves bound to declare, that the evidence before us is insufficient to cast upon the jury the imputation of moral turpitude or dishonest conduct." The remark of a juror, during a recess of the trial, that there was no use in taking up time in trying to humbug the jury, and the lawyer who made the shortest speech would win the case, is not such conduct as will vitiate the verdict. Taylor *v.* California Stage Co., 6 Cal. 228.

[x] Dent *v.* Hundred, &c., 2 Salk. 645; People *v.* Bodine, 1 Denio, 281; U. S. *v.* Fries, 1 Wharton St. Tr. 606; People *v.* Vermilyea, 7 Cowen, 108; Com. *v.* Jones, 1 Leigh, 598; Presbury *v.* Com., 9 Dana, 203; State *v.* Hopkins, 1 Bay, 373; Busick *v.* State, 19 Ohio. 198; Wade *v.* State, 12 Geo. 25; Ray *v.* State, 15 Geo. 223; Wade *v.* State, 6 Geo. 25; State *v.* Patrick, 3 Jones Law, (N. C.) 443; Parks *v.* State, 4 Ohio, (N. S.) 234; Keener *v.* State, 18 Geo. 194; Heath *v.* Com., 1 Robin. 735; post, § 3153, 3321. Where a juror, during the progress of the cause, after the evidence was opened, expressed a decided opinion as to the guilt of the defendant in the hearing of by-standers, it was held that though in so doing he was guilty of gross misconduct, it was no cause to set aside the verdict. (Com. *v.* Gallagher, 4 Pa. Law Jour. 512; per Bell, President J.) See State *v.* Ayer, 3 Foster, (N. H.) 301; Brakefield *v.* State, 1 Sneed, 215; see post, § 3221. If the prisoner has neglected to avail himself before the trial, of any of the means provided by law of ascertaining the incompetency of a juror, on account of prejudice, he would not, under our statute, be entitled to a new trial on the ground of such prejudice. (Meyers *v.* The State, 19 Ark. 156.) On a trial in Virginia, after a verdict of conviction for murder in the first degree, prisoner adduced testimony that two of the jurors who tried the case, and who, on the *voire dire*, declared that they had not formed or expressed an opinion as to the guilt or innocence of the prisoner, had, in fact, previous to the trial, expressed decided opinions that the prisoner was guilty and ought to be hung—of which circumstance prisoner alleged he had no knowledge until since the verdict was rendered; and on this ground he moved to set aside the verdict. Held, 1st. Such inquiry was open and the evidence admissible, for the purpose of showing perjury and corruption in the jurors. But, 2d. It belonged exclusively to the judge who presided at the trial, to weigh the conflicting credibility of the witnesses adduced by the prisoner, and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought not to be awarded. (Heath *v.* Com., 1 Robin. 735.)

[y] U. S. *v.* Fries, 1 Wharton's St. Tr. 606. [z] 2 Salk. 645.

[a] State *v.* Hopkins, 1 Bay, 373; see Ibid. 377.

[b] Kennedy *v.* Com., 2 Virg. Cases, 510; Com. *v.* Hughes, 5 Rand. 655; Brown *v.* Com., 2 Virg. Cases, 516; Poore *v.* Com., Ibid. 474; Michener *v.* State, 11 Georgia, 616; State *v.* Ayer, 3 Foster, (N. H.) 301; Anderson *v.* State, 14 Georg. 709; see *antea*, p. 936, &c.

it was held sufficient ground was not laid.[c] A new trial will not be granted, because of strong prejudices against the prisoner existing in the minds of several of the jury in particular;[d] nor of a general excitement against him at the time of trial, in the community at large;[e] nor because the judge himself had been the author of an account of a former trial of the prisoner, containing severe reflections on him, it appearing that such fact was not known in sufficient time to have influenced the jury in their deliberations.[f]

That a petit juror, in a trial for assault and battery, had been a member of the grand jury, which returned a true bill against the defendant for the same assault and battery, if a sufficient objection, should have been urged when the jury was impanneled, or the respondent should have presented his affidavit that the fact was not then known to him.[ff]

§ 3153. (*i*) *Other incompetency of juror.*—A new trial will not be granted on the ground that a juror was liable to be challenged, if the

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[c] Kennedy *v.* Com., 2 Virg. Cases, 510, and see Com. *v.* Hughes, 5 Rand. 655. The reason of this distinction is clearly exhibited in a late opinion of Rogers, J., in refusing a new trial in the Supreme Court of Pennsylvania. (Com. *v.* Flannagan, 7 Watts & Serg. 421.) "Prejudging and giving an opinion," as is there said, (see M'Causland *v.* Crawford, 1 Yeates, 378,) "on a statement of certain facts, are very different things. The first implies a strong disposition to favor the one side or the other—a determination to find in one way, let the evidence be what it may. The last involves the truth of certain facts and propositions in the sentiments delivered; and impressions thus made, may be effaced by the production of other evidence. The first involves a charge of gross misbehavior, amounting to criminality, on the part of a juror who consents to serve on a jury, when he must know he has precluded himself from forming a just judgment, by the prejudication of the case—a determination to decide, right or wrong, in a particular way. The second—that which is natural to the human mind, to form, and even express an opinion on a supposed state of facts—an opinion only binding or influencing them, provided the case should turn out as it has been represented. While the first, to the credit of human nature be it spoken, is rare, and cannot be believed without full and unexceptionable proof, the latter is of daily and common occurrence. One is immoral—the other may be excused—for experience teaches every man that few persons can keep their minds unbiassed upon hearing a strong one-sided statement, and particularly where the welfare and safety of society are at stake, as where an enormous crime has been committed. Now, the impression which has been made on my mind, from an attentive consideration of all the evidence, which it is unnecessary for me to give in detail is, that it amounts to nothing more than the expression of an opinion on a given state of facts; to that abhorrence of crime which is excusable, if not commendable, immediately after the commission of a great outrage against the peace and welfare of the community of which the jurors were members. That it was of such a nature that it might and would have been effaced, provided the facts proved had been different from what was represented, there is not the least reason to doubt. The distinction I take to be this: that where there is a legal adjudication of the case by the jurors, before the trial—that is, a predetermination evinced to find a verdict, without regard to the evidence—it is a mis-trial, which *per se*, entitles the party to another hearing; but where the evidence falls short of this, then, in addition, it is necessary to the success of the application, to satisfy the court that injustice had been done by the verdict, and that another jury would find in a different way—making, of course, every reasonable allowance in favor of the party asking a new trial. And, as I believe the latter to be the case here, it is necessary to examine the remaining reasons which have been assigned for another hearing."

[d] Poore *v.* Com., 2 Virg. Cases, 474; Com. *v.* Flannagan, 7 Watts & Serg. 422.

[e] Com. *v.* Flannagan, 7 Watts & S. 422.

[f] Vance *v.* Com., 2 Virg. Cases, 162.

[ff] McGehee *v.* Shafer, 9 Texas, 20.

party had had an opportunity of making his challenge,[h] and knew the facts beforehand.[i] Where by-standers were called as jurors, in a capital case, and, at the instance of the prisoner, sworn and examined touching their indifferency, and then elected by the prisoner, and sworn of the jury: upon objections to the indifferency of these jurors, discovered after the trial, not directly inconsistent with what was disclosed by the jurors themselves on their examination touching their indifferency, the court ought not to set aside a verdict of guilty, just in itself, though the objections be such, that if known and disclosed before the jurors were elected and sworn, there might have been good cause to challenge the jurors; much less, if the objections be such as would not have been good cause of challenge.[j]

§ 3154. The jury, on the trial of an indictment, returned a written verdict of guilty, which was not signed. This verdict was then read in their hearing and recorded. The prisoner's counsel declined to poll the jury. It was held that this irregularity was not a ground for setting aside the verdict.[k]

Where it appeared, after conviction, that one juror was an atheist, it was held no ground for a new trial.[l]

§ 3155. (*j*) *Admissibility of juror to impeach verdict.*—Though the former practice was different, it is now settled, in England, that a juror is inadmissible to impeach the verdict of his fellows. "It would open each juror," declared Mansfield, C. J., "to great temptation, and would unsettle every verdict in which there could be found upon the jury a man who could be induced to throw discredit on their common deliberations."[m] Nor are subsequent declarations of jurymen, after a general verdict, admissible to explain or qualify it,[n] though the affidavits of by-standers, as to what passed within their knowledge, touching the delivery of the verdict, may be received.[o] In this country the English rule has generally been adopted,[p] though the affidavits of jurors will be entertained for the

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[h] R. *v.* Sutton, 8 B. & C. 417; 2 M. & R. 406.

[i] Givens *v.* State, 6 Texas, 344; McAllister *v.* State, 17 Ala. 434; ante, § 3152.

[j] Com. *v.* Jones, 1 Leigh, 598; Presbury *v.* Com., 9 Dana, 208; Greenup *v.* Stok r, 3 Gilm. 202.

[k] Roberts *v.* State, 14 Geo. 8.

[l] McClure *v.* State, 1 Yerger, 206; see R. *v.* Tremaine, 7 Dowl. & Ry. 684; S. C., 5 B. & C. 254.

[m] Owen *v.* Warburton, 1 N. R. 326; Hindle *v.* Birch, 1 Moore, 455; Aylett *v.* Jewell, 1 H. Black, 1299; Vaise *v.* Delaval, 1 Term. R. 11; Straker *v.* Graham, 4 M. & W. 721.

[n] Clark *v.* Stevenson, 2 H. Blac. 803.

[o] R. *v.* Wooller, 6 M. & S. 366.

[p] State *v.* Goodwin, 5 Iredell, 401; Dana *v.* Tucker, 4 Johns. 487; Sergeant *v.* Denniston, 5 Cowen, 106; Ex parte Claykendall, 6 Cowen, 53; People *v.* Columbia, &c., 1 Wendell, 297; State *v.* Freeman, 5 Connect. 348; Cochran *v.* Steel, 1 Wash. 79; Price *v.* Tugna, 1 Hen. & Mun. 385; Cluggage *v.* Swan, 4 Binney, 150; Stanton *v.* State, 8 Eng. (13 Ark.) 317; Bennett *v.* State, 3 Indiana, 167; State *v.* Ayer, 3 Foster, (N. H.) 301; Clark *v.* Carter, 12 Geo. 500; People *v.* Carnal, 1 Parker C. C. 256; Burns *v.* Paine, 8 Texas, 159; People *v.* Baker, 1 Cal. 403; Willing *v.* Swasey, 1 Browne, 123; Robbins *v.* Wendover, 2 Tyler, 11; Bladen *v.* Cockey, 1 Har. & McHenry, 230; State *v.* Doom, Charlton, 1; Taylor *v.* Giger, Hardin, 586; Steele *v.* Logan, 3 A. K. Marshall, 394; Heath *v.* Conway, 1 Bibb, 398; Den *v.* McAllister, 2 Halst. 46; Johnson *v.* Davenport, 3 J. J. Marshall, 390; Briggs *v.* Eggleston, 14

purpose of explaining, correcting, or enforcing their verdict.[q] Thus, where a doubt existed, in consequence of confusion in the court room, as to what the exact verdict was, the affidavits of jurors and by-standers were received for the purpose of showing the facts of the case, though all reference was excluded as to the motives or intentions with which such verdict was agreed to, or the circumstances attending the deliberations which led to it.[r] In Tennessee the English rule appears to be rejected altogether,[s] though it is proper to observe that in that State, in one instance at least, a disposition has there been shown to conform more closely to the general practice, it having been held that affidavits by jurors, that they founded their verdict upon particular parts of the testimony given in court, which particular testimony might abstractly be illegal, are not sufficient to authorize a new trial.[t]

In Vermont, Mississippi, Georgia and California, it is held, that an affidavit of the juror cannot be admitted to purge his conduct from the imputation of bias, corruption or impropriety.[tt] But elsewhere, such affidavits have been received.[u]

§ 3156. The court, it is said, will not permit affidavits to be read, imputing improper motives to the jury, or tending to impeach their integrity.[uu] The affidavit of third persons as to what they have heard jurors say respecting their verdict, is inadmissible to impeach it.[v]

Where a juror has denied, on oath, before the triers, having formed and expressed an opinion in a criminal case, the affidavit of a single witness to the contrary will not impeach the verdict.[vv]

6th. Misconduct by the prevailing party.

§ 3157. Any misconduct by the prevailing party, intended to affect the jury, and tending so to do, will be cause for a new trial,[w] and even an acquittal, obtained by fraud or embracery, will be no bar to a subsequent indictment.[x]

Mass. 245; Com. *v.* Drew, 4 Mass. 439; Forester *v.* Guard, Breese, 49; though see Sawyer *v.* Stephenson, Breese, 6; Grinnell *v.* Phillips, 1 Mass. 530; Hudson *v.* State, 9 Yerger, 408; Crawford *v.* State, 2 Yerger, 60; as to grand jurors, see ante, § 508, 777.

[q] Cogan *v.* Ebden, 1 Burr, 383; R. *v.* Woodfall, 5 Burr. 2667; Dana *v.* Tucker, 4 Johns. 487; Jackson *v.* Dickenson, 15 Johnson, 309; Cochran *v.* Street, 1 Wash. R. 79; State *v.* Ayer, 3 Foster, (N. H.) 301; Farrer *v.* State, 2 Ohio St. Rep. (N. S.) 54.

[r] R. *v.* Woodfall, 5 Burr. 2667; R. *v.* Simons, Sayre, 35.

[s] Crawford *v.* State, 2 Yerger, 60; Cochran *v.* State, 7 Humph. 544.

[t] Hudson *v.* State, 9 Yerger, 408; see, as to jurors generally, as to grand jurors, § 508, 777.

[tt] French *v.* Smith, 4 Ver. 363; People *v.* Bachus, 5 Cal. 275; Hogan *v.* State, 26 Miss. 78; Ray *v.* State, 15 Geo. 223; McGuffie *v.* State, 17 Geor. 497.

[u] Taylor *v.* Greely, 3 Greenl. 204; Fries' Case, 1 Wh. St. Tr. 606.

[uu] Hartwright *v.* Badham, 11 Price, 383; Cook *v.* Green, 11 Price, 736; Onions *v.* Nash, 7 Price, 203; Graham on New Trials, 126.

[v] Drummond *v.* Leslie, 5 Blackf. 453.

[vv] Epps *v.* State, 19 Geo. 102.

[w] 2 Hale, P. C. 308; State *v.* Hascall, 6 New Hamp. 352; Knight *v.* Inhabitants, &c., 13 Mass. 218; Lee's Rep. Tem. Hardwicke, 116; Bennett *v.* Howard, 3 Day, 223; Perkins *v.* Knight, 2 N. Hamp., 474; Jeffries *v.* Randall, 14 Mass. 205; Amherst *v.* Hadley, 1 Pick. 38, 42; Richie *v.* Holbrooke, 7 Serg. & R. 458; Metcalf *v.* Dean, Cro. Eliz. 189; Thompson *v.* Mallet, 1 Bay, 94; Knight *v.* Inhabitants, 13 Mass. 218; Blaize *v.* Chambers, 1 Serg. & R. 169; Cottle *v.* Cottle, 6 Greenleaf, 146.

[x] See ante, § 251; Hyliard *v.* Nichols, 2 Root, 176.

§ 3158. Evidence that the prosecutor, by exhibiting papers at places where the jury boarded, had been attempting to bias and influence them, will be sufficient to sustain a motion for new trial,[y] and so where it appeared that the prosecutor spent a night in a room with the jury during their deliberations, and this though the conviction was one of manslaughter, and the prosecutor had acted officially as high sheriff both when prosecuting the suit and attending the jury.[z]

§ 3159. Where papers, as has already been seen, not in evidence, are surreptitiously handed to the jury, the verdict will be avoided;[a] and the same result will take place where it appears that a witness on one side has been spirited away by the opposite party.[b] Such efforts, however, must be traced to a party or his agents; for the mere absenting of himself by a witness will not be sufficient ground.[c]

§ 3160. A new trial will be granted when it appears any unfair trick or artifice had been employed, resulting in a verdict in favor of the party using it.[d]

7th. After-discovered evidence.

§ 3161. After-discovered evidence, in order to afford a proper ground for the granting of a new trial, must possess the following qualifications:

(*a*) It must have been discovered since the former trial.

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

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

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

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

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[y] State *v.* Hascall, 6 New Hamp. 352; Coster *v.* Merest, 3 Brod. & Bing. 272; 7 Moore, 87; Spenceley *v.* De Willot, 7 East, 108.

[z] McElrath *v.* State, 2 Swan, 378.

[a] Co. Litt. 227; Graves *v.* Short, Cro. Eliz. 616; Palmer, 325; see ante, § 3140.

[b] Bull. N. P. 328; Davis *v.* Daverill, 11 Mod. 141.

[c] Governor *v.* Fernwick, 7 Mod. 156.

[d] Anderson *v.* George, 1 Burr. 352; Graham on New Trials, 56; Bodington *v.* Harris, 1 Bing. 187; Jackson *v.* Waterford, 7 Wendell, 62; Hyliard *v.* Nichols, 2 Root, 176; Trubody *v.* Brain, 9 Price, 76; Niles *v.* Brackett, 15 Mass. 378.

[e] Com. *v.* Williams, 2 Asm. 69; People *v.* Talcott, 1 Cowen, 359; Thompson *v.* Com. 8 Gratt. 637; State *v.* Carr. 1 Foster, 166; Moore *v.* Phil. Bank, 5 Serg. & R. 41; 2 Bin. 582; People *v.* Superior Court of N. Y. 10 Wend. 492; 2 Caines, 129; 8 Johns. 84; 15 Johns. 489; 5 Wend. 121; Knox *v.* Work, 2 Binn. 582; Schlenker *v.* Risely, 3 Sca. 487; Com. *v.* Murray, 2 Ash. 41; Royley *v.* Kinney, 14 Johns. 186; Pike *v.* Evans, 15 Johns. 489; Evans *v.* Rogers, 2 Nott & M'Cord, 563; Nichols *v.* Alsop, 11 Louis, R. 409; Jones *v.* Lollicoffer, 2 Hawks, 498; Smith *v.* Shultz, 1 Scam. 491. In Pennsylvania, (Moore *v.* The Philada. Bank, 5 Serg. & Rawle, 41,) it was said by the court that it is incumbent on the party who asks for a new trial, on the ground of newly-discovered testimony, to satisfy the court, 1st. That the evidence has come to his knowledge since the trial; 2d. That it was not owing to the want of the diligence, that it did not come sooner; and 3d. That it would probably produce a different verdict if a new trial were granted. The same doctrine was adopted in a much later case. (Com. *v.* Murray, 2 Ashm. 41.) So also in a case in Maine, (Warren *v.* Hoke, 6 Greenl. 479,) the court laid down the following rules, as governing applications of

§ 3162. There are, in addition, one or two preliminary points of practice, which must be conformed to before a motion on this ground will be entertained. It is necessary that the party should mention the witnesses by name, and what he expects to prove by them: and that either the witnesses themselves should state, on oath, the evidence they can give, or that the party should add his own belief to the statement made by the witnesses.[f]

§ 3163. The rule, in general, will not be granted, if supported only by the affidavit of the party, or one interested. The motion must be accompanied by the affidavit of the newly-discovered witnesses.[g]

§ 3164. The adverse party may show, by affidavits, that the witnesses whose testimony is stated to be material are wholly unworthy of credit.[h]

§ 3165. A motion for a new trial will not be heard after a judgment has been regularly perfected, although it be on the ground of evidence newly-discovered since the judgment.[i]

§ 3166. (*a*) *The evidence must have been discoverd since the former trial.*[j]—Where, on an action in assumpsit on a policy of insurance, the jury rendered a verdict for a total loss, and a new trial was moved for, partly on the ground of newly-discovered evidence, but from the affidavit it did not appear that this testimony had been discovered since the last

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this kind: "The petitioners will not be permitted to offer testimony, as to any newly-discovered evidence, except that which may be stated in the petition. No new trial or review will be granted, on account of newly-discovered evidence, which is merely of a cumulative nature. But the following kinds of proof may be considered as exceptions to the general rule, and furnish ground for a new trial or review; 1st. That a witness, whose testimony on the trial was, in its tendency, against the interest of the petitioner, has ascertained that he testified under a mistake, and that the facts do not exist, as he testified that they did. 2. When the newly-discovered evidence relates to the confessions or declarations of the other party, as to some influential fact, unknown to the petitioner at the time of trial, and inconsistent with the proofs adduced and urged by such party. 3d. Where such newly-discovered evidence was directly or indirectly placed beyond the knowledge or control of the petitioner, by means of the other party, and with the view to prejudice the petitioner's cause."

[f] Hollingsworth *v.* Napier, 3 Cai. 182; Denn *v.* Morrell et al. 1 Ham. 382; Brown *v.* Swan, 1 Mass. 202; Adams *v.* Ashley, 2 Bibb, 287; Andre *v.* Beinvenu, 1 Mart. Lo. 148; Locard *v.* Bullitt, 3 Mast. (N. S.) 170.

[g] Webber *v.* Tres. 1 Tyler, 441; Noyce *v.* Huntington, Kirby, 282; though see Chambers *v.* Brown, Cooke, 292; Scott *v.* Wilson, Cooke, 315.

[h] Williams *v.* Baldwin, 18 Johns. 489; Pomroy *v.* Columbian Ins. Co. 2 Caines, 260; Parker *v.* Hardy, 24 Pick. 246.

[i] Jackson *v.* Chase, 15 Johns. 355; Evans *v.* Rogers, 2 N. & M 563; Eckfort *v.* Des Coudres, 1 Rep. Con. Ct. 69.

Thus, where judgment has been perfected, a motion for new trial was made, on the ground of newly-discovered evidence. From the affidavits that were read, it appeared that the suit was commenced in 1807, and after a trial and verdict for plaintiff, judgment was entered for plaintiff, in Oct. 1816, there being no order to stay proceedings, but no execution was issued until some time in July, 1818; and that the new evidence was not known or discovered by defendant until April, 1818. The motion was denied. Jackson *v.* Chace, 15 Johns. 355. But see Case *v.* Sheppard, 1 Johns. Cases, 245; Birb *v.* Barlow, 1 Doug. 170.

[j] Com. *v.* Murray, 2 Ashmead, 41; Com. *v.* Williams, Ibid.; Marshall *v.* Union Ins. Co. 2 W. C. C. R. 411; 15 Johns. 293; Vandervoort *v.* Smith, 2 Cai. 155; Hollingsworth *v.* Napier, 3 Cai. 182; Thurtell *v.* Beaumont, 8 Moore, 612; Palmer *v.* Mulligan, Ibid. 307; Vernon *v.* Hankey, 2 T. R. 113; Ingram *v.* Croft, 7 Lo. R. 84; State *v.* Harding, 2 Bay, 267; Dixon *v.* Graham, 5 Dow, 267; Doe *v.* Roe, 1 Johns. Ca. 402; Williams *v.* Baldwin, 15 Johns. 489; Brayt. 170; 1 Greenleaf, 32; Standen *v.* Edwards, 1 Ves. Jun. 133.

trial, but only that it had arrived in New York since that time; it was held, that as from the nature of the evidence, it must have been discovered as soon as the cause of the loss was known, and that there must have been a want of due diligence in procuring it, the verdict could not be disturbed.[k]

§ 3167. But in another case,[l] where the new evidence consisted of documents, from the custom house at New York, tending to invalidate some of the testimony given at the trial, and to show the sale was not *bona fide*, but a mere cover, and the goods not neutral property, it was held, that this was sufficient ground for granting the motion for a new trial, notwithstanding that the defendant's counsel, upon seeing the New York commission which had come to hand for a few days before the trial, suspected, from some parts of it, that some useful information might be collected.

§ 3168. A new trial will not be granted, on motion of a defendant convicted in a criminal case, on the ground that a co-defendant tried at the same time, and acquitted, was a material witness for the convicted defendant, such testimony not being newly-discovered; though the acquitted defendant was then, for the first time a competent witness.[m] Where, however, after an application for severance in order to admit the wife of one party as a witness for the other, the former was acquitted, but the latter convicted, and the wife of the former swore in an affidavit to a complete *alibi* as to the latter, it was held that as she herself was not on the record, but was excluded merely by policy of law on the joint trial, and as she had been made competent by the verdict of a jury, a new trial would be granted.[n]

§ 3169. If new evidence be discovered before the verdict is rendered, it should be submitted to the jury; and if neglected, a new trial will not be granted.[o] The judge at the trial has discretion as to the admission of evidence out of the regular and usual course. Thus, after the defendant's counsel had summed up, and while the counsel for the plaintiff were speaking, the counsel for defendant informed the judge, that he had just discovered from a paper in the possession of one of the plaintiff's witnesses, that the money, &c., was not in fact received, &c., and asked leave to introduce the new evidence; upon the judge's refusal, the court granted a new trial, with costs to abide the event of the suit.[p]

§ 3170(*b*). *It must be such as could not have been secured at the former trial by a reasonable diligence on part of the defendant.*[q]—Where the de-

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[k] Vandervoort *v.* Smith, 2 Caines, 155; Rogers *v.* Simons, 1 Rep. Con. Ct. 143.

[l] Marshall *v.* Union Ins. Co., 2 Wash. C. C. R. 411.

[m] People *v.* Vermilyea, 7 Cow. 369; Sawyer *v.* Merrill, 10 Pick. 16; see ante, § 790-4; post, § 3194.

[n] Com. *v.* Manson, 2 Ashmead.

[o] Higden *v.* Higden, 2 A. K. Marsh. 42; U. S. *v.* Gibert, 2 Sumner, 19; People *v.* Vermilyea, 7 Cow. 369.

[p] Mercer *v.* Sayre, 7 Johns. 306.

[q] State *v.* Harding, Bay, 467; Thompson *v.* Com, 8 Grattan, 637; Com. *v.* Drew, 4

fendant was convicted of horse stealing, and a new trial moved for, on several grounds, among others that since the trial new evidence had been discovered, which, if produced, would have established the prisoner's innocence, but no proof of diligence was made; the judges unanimously refused a new trial.[r]

§ 3171. So, in the trial of an indictment, for obtaining goods by false pretences, a book was produced in evidence, in which the representations made by the defendant, at the time of procuring the goods were recorded; and, after conviction, the counsel for the defence moved for a new trial, because since the trial, it had been discovered, upon the examination of the book, that the entry made therein of such representations by the prosecutor, and sworn to by him as having been entered at the time they were made, was in fact entered many weeks after the making of such representations: the new trial was refused principally for the reason that it was in the power of the defendant at the trial, by due diligence to have discovered the alleged error.[s]

§ 3172. A slave was found guilty of murder on circumstantial evidence and one of the circumstances adduced in evidence against him, was that blood was seen on his clothes on the day the murder was committed, and after it was committed. On a motion for a new trial, he introduced his affidavit, in which he stated that he was surprised by the introduction of this proof, and that the blood was thrown on his clothes by an opossum which he had killed that day. He also introduced the affidavit of a man who stated that he had seen the slave on that day with the opossum hanging by his side. It was held that this was a case of negligence, and not of surprise, within the rule of the law, and that the grounds laid were not sufficient to authorize the granting of a new trial.[t]

§ 3173. Where it appeared that the witness, on whose testimony was sought a new trial, after a conviction of murder, was with the prisoner until a late hour of the evening on which the murder was committed, was in court while the trial was progressing, and had gone to a relative of the prisoner and told him what she was able to testify to; it appearing that

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Mass. 399; Lesher *v.* State, 11 Conn. 415; Roberts *v.* State. 3 Kelly, 310; Friar *v.* State, 3 How. Miss. 422; Com. *v.* Williams, 2 Ashmead, 69; Price *v.* Brown, H. 12, G.; Cooke *v.* Berry, 1 Wils. 98; Stanford *v.* Cullihan, 3 Mart. (N. S.) 124; Findley *v.* Nancey, 3 Monr. R. 403; Findley *v.* Com., 2 Bibb, 18; People *v.* Vermilyea, 7 Cowen, 369; Holeman *v.* State, 8 Eng. (13 Ark.) 105; Gordon *v.* Harvey, 4 Call, 450; Palmer *v.* Mulligan, 3 Cai. 307; Wilber *v.* M'Guilicuddy, 3 Lo. R. 383; Rawle *v.* Skipurtt, 8 Mast. N. S. 593; Dixon *v.* Graham, 5 Dow. 267; Coe *v.* Givan, 1 Blackf. 367; William *v* Baldwin, 18 Johns. 489; Sheppard *v.* Sheppard, 5 Halst. 250; Deacon *v.* Allen, 1 South. 338; Litcomb *v.* Potter, 2 Fairf. 208; Vandervoort *v.* Smith, 2 Cai. R. 155; Den. *v.* Geiger, 4 Halst. 225; Lesher *v.* State, 11 Conn. 15; Drayton *v.* Thompson, 1 Bay, 263; State *v.* Gordon, Ibid. 491; Hollingsworth *v.* Napier, 3 Cai. 182; Trumbull *v.* O'Hara, 4 Halst. 446; Waln *v.* Wilkins, Ibid. 461; Howe *v.* Work, 2 Binn. 582; S. C. 1 Br. 101; Aubell *v.* Ealer, 2 Ibid. 582, note; Hawley *v.* Blanton, 1 Miss. 49; Hope *v.* Atkins, 1 Price, 143; Anonymous, 6 Mod. 222; Watson *v.* Sutton, 12 Mod. 583; 1 Salk. 273.

[r] State *v.* Harding, 2 Bay, 267; see, also, Com. *v.* Drew, 4 Mass. 599.

[s] Com. *v.* Benesh, Thach, C. C. 84.

[t] Gilbert *v.* State, 7 Humph. 524.

due diligence had not been used by the defendant, the motion for a new trial was refused.[u]

§ 3174. In a case in Virginia, after a verdict of guilty on an indictment for murder, the prisoner made affidavit that S. C. was a material witness for him in the prosecution; that he was not summoned to attend the trial, because the prisoner had not been informed that he knew anything relating to the affair; and that the prisoner considered that his testimony would have an important effect on a subsequent trial of the cause, but no allegation was made of diligence; it was held by the Court of Errors, that the new trial was properly refused.[v]

§ 3175. Nor will a new trial be granted, because the district attorney withheld in his hands papers important to the defendant, unless the latter use due diligence to obtain them. Thus, where the district attorney told the defendant that certain papers were in the hands of C., who, being applied to, answered they were in the possession of the district attorney, but the defendant did not explain the mistake and apply to the district attorney again, a new trial was refused because of the want of due diligence.[w]

§ 3176. A new trial will sometimes be granted on the affidavit of a witness, that he was mistaken, or surprised at his examination.[x] Thus, in an action upon a policy, where the defendant, by mistake of his witness, failed in producing the necessary documents from the admiralty for proving a breach of the Convoy Act, the Court of C. D. granted a new trial, in order to let him into this defence, after verdict for the plaintiff on the merits.[y]

§ 3177. A party who seeks for a new trial on the ground of newly-discovered evidence, is chargeable with laches, if previous to the trial, he knew that the witness, whose testimony he seeks to introduce as newly-discovered, must probably, from his continuation and employment at the time of the transaction, the subject of the controversy, be conversant with the facts in relation to the transaction, and especially where, previous to the trial, the party knew, as the witness himself testifies to, what the witness could prove, although at the time of the trial, and while preparing therefor, the party had forgotten the facts.[z] It is not such newly-discovered evidence, that the party applying for a new trial could not procure in time the witness whom he seeks to introduce, as will entitle him to a new trial. He should have applied to the court for a postponement, and if he has gone to the trial without the testimony, a new trial will not be granted for the purpose of letting in such evidence.[a] Nor is the absence of a witness who had not been subpœnaed, a good cause for granting a new trial;[b] but it seems that

[u] Com. *v.* Williams, 2 Ashmead, 69.
[v] Bennett *v.* Com., 8 Leigh, 745; Palmer *v.* Mulligan, 3 Caines, 307.
[w] People *v.* Vermilyea, 7 Cowen, 369.
[x] Ainsworth *v.* Sessions, 2 Caines, 216; Warren *v.* Hope, 2 Marshall, 265; Graham on New Trials, 218; De Gion *v.* Dover, 2 Anst. 517.
[y] D'Aguilar *v.* Tobin, 2 Marsh. 265.
[z] People *v.* Superior Court of New York, 10 Wendell, 285.
[a] Jackson *v.* Malin, 15 Johns. 293; Gordon *v.* Harvey, 4 Call, 450.
[b] Kelly *v.* Holdchip, 1 Br. 36; Lister *v.* Goode, 2 Murph. 37.

the sudden illness of a witness is.[c] Nor will a new trial be granted to admit newly-discovered evidence to points, of which the party was before apprised, and had not shaped his pleas to admit it;[d] nor on account of the want of recollection of a fact, which by due attention, might have been remembered; want of recollection being easy to be pretended, and hard to be disproved.[e]

§ 3178. Where the plaintiff had refused to produce a letter at the time, thinking the defendant had put in a sham plea, the court refused to grant a new trial, because it appeared that the evidence might have been produced had it not been for his own default.[f] Nor will the court grant a new trial on the ground of a claim which the party might have brought forward on the trial, but did not.[g]

§ 3179. (*c*) *It must be material in its object, and not merely cumulative and corroborative, or collateral.*[h]—Cumulative evidence is such as goes to support the facts principally controverted on the former trial, and respecting which the party asking for a new trial, as well as the adverse party, produced testimony.

§ 3180. In an action upon a contract that the defendant should make up and deliver certain clothing to the plaintiff, during the trial, it became a question whether the clothes had been delivered by the defendant within the time contracted for. The verdict was found for the plaintiff; upon which the defendant moved for a new trial; and one of the grounds was, newly-discovered evidence, as to which affidavits were produced of testimony, the object of which was to substantiate the delivery of the clothes within the time contracted for. A new trial was refused, and the only ground of objection to granting it was, that the newly-discovered evidence did not relate to any new fact, but was merely cumulative or corroborative.[i]

§ 3182. It has been held, however, that though a new trial is not usually granted for the discovery of new evidence to a point which was presented

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[c] Fiss *v.* Smith, 1 Br. App. 61; Gorgerat *v.* M'Carty, 1 Yeates, 253.

[d] Eccles *v.* Shackleford, 1 Litt. 35.

[e] Bond *v.* Cutler, 7 Mass. 205; Durgnan *v.* Wyatt, 3 Blackf. 385.

[f] Cooke *v.* Berry, 1 Wils. 98. In another case, in an action upon a policy, the verdict was given for plaintiff, and the defendants moved for a new trial, assigning as the reason why the evidence had not been offered at the trial, a presumption that the jury, of their own knowledge, must have taken notice of the fact. This was held an insufficient reason, and a new trial was refused. (Gist *v.* Mason et al., 1 T. R. 84.)

[g] M'Dermott *v.* U. S. Ins. Co., 3 S. & R. 604.

[h] State *v.* Blennerhasset, Walker, 7; Com. *v.* Flannagan, 8 Watts & Serg. 415; U. S. *v.* Gibert, 2 Sumner, 97; State *v.* Larrimore, 20 Mo. 425; White *v.* State, 17 Ark. 404; State *v.* Stumbo, 26 Mis. (5 Jones,) 306; Bixly *v.* State, 15 Arkansas, 375; Gardner *v.* Mitchell, 6 Pick. 114; Yarmouth *v.* Dennis, 1b. 116; Sawyer *v.* Merrill, 10 Pick. 16; Chambers *v.* Chambers, 2 A. K. Marsh. 348; Ames *v.* Howard, 1 Sumner, 482; Alsop *v.* Ins. Co., Ih. 451; Bullock *v.* Beach, 3 Verm. 72; Den *v.* Geiger, 4 Halst. 228; Pike *v.* Evans, 15 Johns. 210; Steinback *v.* Ins. Co., 2 Caines, 129; Smith *v.* Brush, 8 Johns. 84; Whiteback *v.* Whiteback, 9 Cow. 266; Reed *v.* Grew, 5 Ham. 375; Wheelright *v.* Beers, 2 Hall, 391; Guyot *v.* Butts, 4 Wend. 579; People *v.* Superior Court of New York, 10 Wend. 285; Com. Williams, 2 Ashm. 60; Moore *v.* Philada. Bank, 5 S. & R. 41.

[i] Pike *v.* Evans, 15 Johns. 210.

on the former trial, yet a case of surprise will form an exception to the rule.

§ 3183. It cannot, in general, be objected to granting a motion for a new trial, on the ground of newly-discovered evidence, that such evidence is cumulative, if it is of a different kind or character from that adduced on the trial, viz., positive and direct, instead of circumstantial.[m] Thus, for instance, in an action for a breach of warranty in the sale of oil, warranted to be of a fair merchantable quality, where each party introduced testimony of witnesses who examined the oil, and a verdict was found for the plaintiff, a new trial was granted on the defendant's motion, on the ground of evidence newly-discovered of the plaintiff's admission that the oil was of a proper quality; this being a new fact and not cumulative, and the evidence at the trial being nearly balanced.[n]

§ 3184. Where the object is to discredit a witness on the opposite side, the general rule is that a new trial will not be granted.[o] Thus, where the defendant was convicted of forgery, chiefly on the evidence of B. R., and on a motion for a new trial, evidence was produced to show the bias of B. R.; it was held by the Supreme Court of Massachusetts that such evidence was no ground for the motion.[p]

§ 3185. And so, where, after a verdict of guilty upon an indictment for perjury, the prisoner applied for a new trial on account of newly-discovered evidence, and furnished proof that a material witness for the prosecution had, subsequently to his examination upon the stand, expressed strong feelings of hostility toward the prisoner. It was held, that the new evidence going only to discredit a former witness, was not that kind of material evidence, upon the discovery of which no new trial can be granted.[q]

§ 3186. Where a witness, whose testimony was not unexpected, was discredited by the party against whom he was produced, a new trial will not be granted on the ground that the party has since discovered further evidence of his want of credit;[r] nor will a new trial be granted for newly-

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[l] Millar *v.* Field, 3 A. K. Marsh. 104; Gardner *v.* Laird, 8 Johns. 489; Sargent *v.* ———, Cow. 106; Burge *v.* Callaway, 7 Price, 677; Broadhead *v.* Marshall, 2 W. Bl. 955.

[m] Guyott *v.* Butts, 4 Wend. 579.

[n] Gardner *v.* Mitchell, 6 Pick. 114; Parker *v.* Hardy, 24 Pick. 246.

[o] Com. *v.* Waite, 5 Mass. 261; Thompson *v.* Com., 8 Gratt. 637; Bland *v.* State, 2 Carter, (Ind.) 608; Com. *v.* Williams, 2 Ashm. 69; Com. *v.* Green, 17 Mass. 515; Levining *v.* State, 13 Georg. 358; Heber *v.* State, 7 Texas, 69; People *v.* Superior Court of N. Y., 10 Wend. 292; Halsey *v.* Watson, 1 Cai. R. 24; Shummey *v.* Fowler, 4 Johns. 425; Duryee *v.* Dennison, 5 Johns. 248; Rowley *v.* Kinney, 14 Johns. 186; Binne *v.* Hoyt, 3 Johns. 255; Turner *v.* Pearle, 1 T. R. 717; Com. *v.* Waite. 5 Mass. 261; Hammonds *v.* Wadhams, 5 Mass. 353; Com. *v.* Drew, 4 Mass. 399; Dodge *v.* Kendall, 4 Verm. 31; Clark *v.* Rutledge, 2 A. K. Marsh. 381; Campbell *v.* Hyde, 1 Chip. 70; Dickenson *v.* Black, 7 Bro. P. C. 177; Com. *v.* Green, 17 Mass. 515; Reed *v.* Grew, 5 Ham. 375; see contra, 10 Wend. 285, where it was said the court would grant a new trial for purposes of impeaching the principal witness of the opposite party, and 3 Burr. 1771, where it was held, that the discovery of evidence that the witness had been suborned, is a ground for a new trial; see post, § 3213.

[p] Com. *v.* Waite, 5 Mass. 261.

[q] State *v.* Cann, 1 Foster, 166.

[r] Hammond *v.* Wadhams, 5 Mass. 353.

discovered evidence which goes only to discredit a witness sworn on the trial, and might have been proved by other witnesses who were sworn.[s]

§ 3187. It has, however, been decided, that where a witness on whose testimony a verdict was found, denied on the *voir dire*, having an interest in the case, newly-discovered evidence that he was interested was admissible on an application for a new trial, and it being proved, by similar evidence of declarations of the witness and of the prevailing party that the witness had testified untruly, a new trial should be granted.[t]

§ 3188. An indictment for perjury against a witness on whose testimony the verdict was obtained, unless the case was so gross as to make it probable that the verdict was obtained by perjury, or that the false testimony occasioned a surprise to the opposite party, will not be sufficient cause for a new trial.[u] Thus, where the defendant was convicted of bribery, and it was moved to postpone judgment till an indictment, which he had preferred against one Burbage, for perjury in his evidence, was determined, it was said by Mansfield, C. J., in answer to the application, "I am clear that Heyden can be no witness in this case, if they mean by this indictment to alleviate the judgment of the court for the bribery, because he is swearing in his own cause. And the witnesses on the indictment having all been previously examined at the former trial, makes an end of this motion; for their credit has already been weighed by a jury, and found wanting."[v] So, where the plaintiff obtained a verdict of £150, and had judgment, upon which the defendant brought error, and after argument, judgment was affirmed, but before the case came on to be heard in error, he preferred an indictment against two of the plaintiff's witnesses for perjury in their evidence at the trial, and shortly afterwards succeeded in obtainining a rule *nisi* for staying an execution upon the judgment, until the trial of the indictment, upon an affidavit made by himself, charging the said witnesses with perjury. Lord Ellenborough, C. J., however, declared, "It would be highly dangerous to allow this rule to be made absolute, for this would be a receipt to every person, after verdict and judgment against him, how to delay the fruit of such judgment, by indicting some of the plaintiff's witnesses for perjury. And should this rule be made absolute, it would, perhaps, prevent the plaintiff from being a witness at the trial of the persons indicted."[w] Where there has been a surprise, however, arising from the unexpected introduction of the alleged perjured witness,[x] a new trial has been granted.

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[s] Clark *v.* Rntledge, 2 A. K. Marsh. 381; Dodge *v.* Kendall, 4 Verm. 31. Neither will the law allow a new trial to the defendant, merely to afford him an opportunity of proving the plaintiff to be a felon. (Beers *v.* Root, 9 Johns. 264.)

[t] Chatfield *v.* Lathrop, 6 Pick. 417.

[u] R. *v.* Heyden, 1 W. Black. 404; Benfield *v.* Petrie, 3 Douglas, 24; Warwick *v.* Bruce, 3 Price, 3; 9 Price, 89; Resp. *v.* Newell, 2 Yeates, 479; 4 Maule & Selwyn, 140; Seely *v.* Mayhew, 4 Bingham, 561; Wheatley *v.* Edwards, Lofft, 87; Moore *v.* Kimball, 1 Greenleaf, 322; Pott *v.* Parker, 2 Chitty, 269; see ante, § 2280.

[v] R. *v.* Heyden, 1 W. Blackstone, 404.

[w] Warwick *v.* Bruce, 4 Maule & Sel. 140; Benfield *v.* Petrie, 3 Doug. 24.

[x] Morrell *v.* Kimball, 1 Greenl. 322; Thurtell *v.* Beaumont, 1 Bingham, 337.

§ 3189. (*d*) *It must be such as ought to produce, on another trial, an opposite result on the merits.*[y]—"After the verdict," said Rogers, J., on a motion for a new trial, after a capital conviction, in Pennsylvania, "when the motion for a new trial is considered, the court must judge not only of the competency, but of the effect of evidence. If, with the newly-discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise they are bound to refuse the application. And in Lewellen *v.* Parker,[z] it is ruled that, in considering the motion, the court will not inquire whether, taking the newly-discovered testimony in connection with that exhibited on the trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would require a different verdict. The question, therefore, is (supposing all the testimony, new and old, before another jury,) not whether they might, but whether they ought to give another verdict. It is manifest, therefore, if these principles be correct, granting a new trial would be almost, if not quite, equivalent to a verdict of acquittal."[a]

§ 3190. The confession of a wife, that she herself had committed the offence without her husband's privity, after the conviction of the husband of forgery, was held not sufficient, when taken in connection with the evidence given on trial, to justify a new trial being granted.[b]

§ 3191. (*e*) *It must go to the merits, and not rest on a merely technical defence.*—After a conviction on an indictment for selling *spirituous* liquors, &c., "without being duly licensed as an innholder or common victualler," a new trial will not be granted for the purpose of allowing the defendant to give in evidence a license, which he had omitted to produce; to sell *fermented* liquor, and thus raise a question as to the mere form of the indictment.[c]

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

§ 3192. A new trial will not be granted on behalf of a defendant convicted in a criminal case, because a co-defendant, tried at the same time, and acquitted, is a material witness for the convicted defendant.[d]

§ 3193. Thus, where several defendants being charged with conspiracy, and one was acquitted, but the others convicted, Savage, C. J., on giving the opinion of the Supreme Court of New York, on a motion for a new trial, on the ground of the materiality of the acquitted defendant as a wit-

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[y] Thompson *v.* Com., 8 Gratt. 637; Carr *v.* State, 14 Georg. 358; Ewing *v.* M'Connell, 1 A. K. Marsh. 188; Ludlow *v.* Parke, 4 Ham. 5; Sheppard *v.* Sheppard, 5 Halst. 250; Kenrick *v.* Delafield, 2 Cai. 67; Halley *v.* Watson, 1 Caines, 24; Com. *v.* Manson et al., 2 Ashm. 31; State *v.* Greenwood, 1 Hay. 141; Earl *v.* Sharldee, 6 Ham. 409; Jessup *v.* Cook, 1 Halst. 434.

[z] 4 Har. Ohio R. 5; Ludlow *v.* Parke, 4 Hammond, 5.

[a] Com. *v.* Flannagan, 7 W. & Serg. 423.

[b] State *v.* J. W., 1 Tyler, 417.

[c] Com. *v.* Churchill, 2 Metc. 118.

[d] People *v.* Vermilyea, 7 Cowen, 367; U. S. *v.* Gibert, 2 Sumner, 20; Com. *v.* Chauncey, 2 Ashmead, 90; Breckenbridge's Law Miscellanies, 220; State *v.* Bean, 36 N. H. 122.

ness, said, "He became a competent witness in virtue of his acquittal; but the absence of all authority on the point, is a strong argument against the sufficiency of this ground for granting a new trial. Such a rule would be highly inconvenient in practice. The proper course was, if the testimony against Davis was slight, to have the jury pass on his case, and then introduce him as a witness on behalf of this co-defendant. Such testimony is not newly-discovered, though the acquitted defendant is now, for the first time, competent as a witness. This ground, of itself, cannot be considered sufficient, though I will not say that, among other considerations, it is not entitled to some weight."[e] A qualification of the rule, however, has been recognized as existing where, on an indictment containing two counts, one for conspiracy, and another for assault, a new trial was sought by one defendant, acquitted of the conspiracy, but convicted of the assault, on the ground that the wife of a co-defendant, acquitted on both counts, was a material witness for him. "In deciding in favor of this application," said King, J., "we do not say, as is supposed, that in any case where we have refused to grant a separate trial, in order to let in the testimony of an accomplice or co-defendant, we will set aside the verdict when such co-defendant happens to be acquitted. Respectable authority has settled, that in no case, where two or more persons are jointly charged with an offence, shall one be a witness for the other, whether jointly or separately tried, at least until the party offered as a witness was either previously acquitted or convicted; and even this last qualification to the general rule has been doubted, and the position to the full extent contended for, that a party to the record cannot, in any event, be received as a witness for his associates in accusation. But the wife of one of several defendants is no party to the record; and her testimony in a case in which her husband is on trial, is excluded for a different reason, viz., the peculiar civil relation which she holds to him, and which, from consideration of legal policy, disqualifies her as a witness in a case directly affecting him." "Authorities equally respectable and unqualified, have determined that, although in a joint charge, jointly tried against her husband and others, she cannot be heard, yet, if they are separately tried, she is a competent witness for the other co-defendants; and that, to give them the benefit of her testimony, separate trials will be awarded them in all cases except that of a criminal conspiracy.[f] We do not, therefore, in saying that Margaret Manson is a competent witness for Joseph B. Strafford, in the only part of the accusation against him as to which he has not been relieved by the verdict, establish any new precedent, or introduce any eccentric doctrine into the criminal law. Nor can this case ever be offered as authority to show that the rejection of a co-defendant, as a witness for his associates, or the refusal to award such associate a separate trial, in order to introduce the testimony of such co-defendant, will afford, in itself, ground for setting

[e] People *v.* Vermilyea, 7 Cowen, 369.
[f] 1 Mass. Rep. 15; State *v.* Anthony, 1 M'Cord, 286; ante, § 790.

aside a verdict, where the defendant offered as a witness is afterwards acquitted, and he for whom he has been offered as a witness condemned. All we wish to be understood as deciding is, that under the whole circumstances disclosed in this cause, a case has been made out, imperiously and solemnly calling on this court to exercise their judicial discretion in awarding a new trial, in order that justice, according to law, may be fairly meted out to the accused."[g] In a subsequent case, before the same learned judge, a motion for a new trial, on the ground "that the court refused to the defendants the benefit of several trials, though they had severally pleaded; whereby the defendant C. was deprived of the testimony of A. and N., who, having been acquitted of the charge, would have been competent and important witnesses for defendant C.," was refused; and the distinction thereby clearly marked between a witness, not on record as defendant, excluded by the relations of the parties, and a witness, on the record as defendant, excluded by the necessity of trial.[h]

§ 3194. Though the misjoinder of the defendants, where it appears on record, is subject of demurrer or arrest,[i] and though when it is developed on evidence, it is often only to be reached by a motion for severance, it not unfrequently becomes the ground of a motion for a new trial, and when wrongfully allowed by the court, is a legitimate reason for setting aside the verdict.[j]

§ 3195. In an indictment against several, where the offence is such that it may have been committed by several, they are not of right entitled to be tried separately, but are to be tried in that manner only, when the court, on sufficient cause, may think proper.[k] It seems that where several defendants, entirely disconnected in the transactions through which they are sought to be convicted, are jointly indicted, it would be sound exercise of discretion to grant them separate trials.[l] In all cases of joinder, each defendant has his peremptory challenge.[m]

§ 3196. When the indictment includes several defendants, one of them cannot regularly become a witness for the others; but if no evidence whatever be given against him, he is entitled to his discharge as soon as the case of the prosecutor is closed, and may then be examined on behalf of the other defendants. Where there is any, even the least, evidence against him, he

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[g] Com. *v.* Manson, 2 Ashmead, 30.

[h] Com. *v.* Chauncy, 2 Ashmead, 90.

[i] See ante, § 432.

[j] People *v.* Vermilyea, 7 Cowen, 383; ante, § 3168.

[k] State *v.* Loper, 16 Maine, 293; People *v.* Vermilyea, 7 Cowen, 108, 383; Bixbie *v.* State, 6 Hammond, 86; Com. *v.* Manson, 2 Ashmead, 32; U. S. *v.* Wilson, 1 Bald. 78; U. S. *v.* Gibert, 2 Sumner, 20; Bosleys *v.* Com., 7 J. J. Marshall, 598; State *v.* Smith, 2 Iredell, 402; People *v.* Howell, 4 Johnson, 296; State *v.* Wise, 7 Richards, 412; see, per contra, Campbell *v.* Com., 2 Virg. Cases, 314; U. S. *v.* Sharp, Peters' C. C. 118; see ante, § 433.

[l] People *v.* Vermilyea, 7 Cowen, 108; see ante, § 433.

[m] Bixbie *v.* State, 6 Hammond, 86. The right of peremptory challenges, it is said, being a right to reject, and not to elect, no one defendant can complain of challenges by a co-defendant. (State *v.* Smith, 2 Ired. 402; U. S. *v.* Marchant, 4 Mason, 160; 12 Wheaton, 480.) See ante, § 2974.

cannot be sworn, but the whole must be submitted together to the jury.[q] On the same principle, where one of the defendants, on an indictment for an assault, submits to a small fine, and is discharged, he may be called on the part of others, with whom he was jointly indicted. And where one defendant has actually pleaded misnomer, he may be received as a witness, because the indictment, as against him, is abated.[r] But if he suffers judgment by default, he cannot afterwards become a witness against or in favor of his associates.[s]

9th. ABSENCE, WANT OF NOTICE, MISTAKE, AND SURPRISE.

§ 3197. (*a*) *Absence.*—Where, through necessity or mistake, a defendant and his counsel are absent, and the case goes undefended, there may be a new trial, if it appear that there is a good and sufficient defence.[t] It is the right of one accused of a criminal offence, to be present during his trial, and at the return of the verdict; and if he is prevented by improper means, or by imprisonment, from being present, a new trial will be granted him.[u] Nor is the fact that the counsel of the accused is present during the trial, and at the rendering of the verdict, without making objection to the prisoner's absence, a waiver of his right to be present. On all trials for felony, the defendant must personally be present,[v] and this right is so inherent and inalienable, that a judgment will be reversed where it appears that the defendant was absent at the rendition of the verdict, though his presence was at the time waived by his counsel.[w] In capital cases, the record must show the prisoner's presence at trial, verdict, and sentence, *affirmatively*, or else the error will be fatal.[x] In misdemeanors, the exceptions are very rare where the trial is allowed to go on in his absence. Such a suspension of the ordinary practice could only take place on the defendant's express application, and could, consequently, form no ground for an application for new trial after conviction.

§ 3198. The absence or surprise of counsel, may, perhaps, in accordance with the analogy of civil cases, be sometimes received as a reason for opening a verdict.

On a *sci. fa.* to revive a judgment, where an inquest had been taken, and the defendant had been unable to attend from sickness, upon its being satisfactorily shown to the court, by affidavits, that he had good defence, and lived at a great distance, a new trial was granted.[y]

§ 3199. Where the defendant's attorney had conversed with the partner

[q] Bul. N. P. 285; Peake's Evid. 168; Phil. Evid 36; 1 East, 312, 313; 6 T. R. 627; Com. *v.* Manson, 2 Ashm. 32; 1 Sid. 237; 1 Hale, 303; see ante, § 790–1–2.

[r] R. T. H. 303.

[s] 5 Esp. Rep. 154; 2 Campb. 333, 334, n.; Bul. N. P. 285; Phil. Ev. 36.

[t] R. *v.* Roberts, 2 Strange, 1208; Ten Broeck *v.* Woolsey. 3 Caines, 100; Beasleigh *v.* Shapleigh, 1 Price, 201; Peebles *v.* Ralls, 1 Littell, 24; Sherrard *v.* Olden, 1 Halst. 344; Sayer *v.* Finck, 2 Caines, 336.

[u] Rose *v.* State, 20 Ohio, 31.

[v] 1 Chitty's C. L. 413; Jacobs *v.* Com., 5 Serg. & R. 335; 2 Hale, 216.

[w] Prine *v.* Com., 6 Harris, 103.

[x] Dunn *v.* Com., 6 Barr, 387; Hamilton *v.* Com., 4 Harris, 129.

[y] Ten Broeck *v.* Woolsey, 3 Caines, 100.

of the plaintiff's attorney, whom he supposed to be also attorney for the plaintiff, and was misled by him as to the time when the case would be called in, a new trial was ordered, on payment of all the costs by the defendant.[z]

§ 3200. Where the defendant was out of the commonwealth, his witnesses absent, and his attorney prevented by sudden indisposition from being present, it was held that a new trial should be granted.[a]

§ 3201. It is no ground, however, for a new trial, that the defendant did not know on what day of the term his case would be tried;[b] nor that the defendant's attorney was absent when the case went to the jury, and the plaintiff's counsel agreed before the recording of the verdict to open the case.[c]

§ 3202. No mere engagement of a business character will be received as an excuse for non-appearance of counsel. Thus, where the counsel for the defendant made an oath that in his capacity as counsel for the Humane Society of New York, he was obliged to visit the jail on the very day that the trial took place, and offered to pay all costs, a new trial was refused.[d]

§ 3203. (*b*) *Want of notice.*—Where the party or his counsel have had no notice of the trial, or such notice has been imperfect, or had a tendency to mislead, or been insufficient for their information, a new trial should be granted;[e] but where the party has gone astray from his own negligence, or appeared and taken defence without notice, the practice is otherwise.[f] In criminal cases, however, a binding over to appear is in itself notice of trial during the whole term.

§ 3204. (*c*) *Mistake.*—Where the cause has been prejudiced from some misconception of the judge, or mistake of the party or his counsel, which could not have been avoided by ordinary prudence and care, a new trial will be allowed. Thus, where the counsel was misled by a positive intimation from the court, and refrained from offering evidence;[g] or where the judge misapprehended a material fact, and misdirected the jury,[h] a new trial has been granted.[i]

§ 3205. A new trial will not be granted because a juror was taken from the panel, on the erroneous supposition that there was good ground to challenge him, when the defendant did not at the time object.[j]

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[z] Sayer *v.* Finck, 2 Caines, 336.

[a] Honone *v.* Murray, 3 Dana, 31; see Turner *v.* Brooker, 2 Ibid. 334; Grimes *v.* Com., 4 Littell, 1.

[b] Brevard *v.* Graham, 2 Bibb, 177; see Greatwood *v.* Sims, 2 Chitty, 269; 2 Salkeld, 645.

[c] Allen *v.* Donely, 1 McCord, 113.

[d] Post *v.* Wright, 1 Caines, 111.

[e] Bingley *v.* Mollison, 3 Douglass, 402; Watson *v.* Cowen, 8 D. & Ryl. 456; Attorney-General *v.* Stevens et al., 3 Price, 72; Yate *v.* Swaine, Barnes, 233; Lisher *v.* Parmellee et al., 1 Wendell, 22.

[f] Wolfe *v.* Horton, 3 Caines, 86; Bander *v.* Covill, 4 Cowen, 60; Doe *v.* Keighley, 7 Term R. 1359.

[g] Le Flemming *v.* Simpson, 1 M. & Ryl, 269; Durham *v.* Baxter, 4 Mass. Rep. 79; though see Beckman *v.* Reemins, 7 Cowen, 29; Jackson *v.* Cody, 9 Cowen, 140.

[h] Jackson *v.* Harth, 1 Bailey, 482; Jones *v.* McNeill, Id. 235; Murden *v.* Ins Com., 1 Rep. Con. Ct. 200.

[i] Handley *v.* Harrison, 3 Bibb, 481.

[j] Com. *v.* Stowell, 9 Metc. 572.

§ 3206. A verdict, in a penal action, however, will not be set aside where given for the defendant, unless it has been procured by mistake of the judge.[k]

§ 3207. Where, in the trial of a case, the fact of the assignment of a judgment to the defendant became of consequence, and the attorney for the commonwealth denied the existence of the judgment, which denial the opposing counsel and the court did not understand him to make, and parol evidence to show that the judgment had become the property of the defendant was rejected by the court; and where it appeared, on application for a new trial, that such judgment was endorsed and made payable to bearer, and that time would have been allowed by the court for the production of such judgment, if the attorney for the commonwealth had been understood to deny its existence, a new trial was granted.[l]

§ 3208. Ignorance of law will be no excuse, if counsel neglect to object to testimony when offered, which might have been excluded.[m] But if objection is made to the introduction of testimony at the proper time, no objection to the judge's charge upon that evidence is afterwards necessary.[n] If an objection to evidence, which objection could have been obviated by further proof, be not made, it will not be received as the ground of a motion for a new trial.[o] Where, however, evidence is not sufficient in law to authorize a verdict, a new trial will be granted, even though no objection be made at the trial.[p]

§ 3209. As has been already seen, a new trial will not be granted, because the district attorney, by mistake, withholds important papers, unless the defendant uses due diligence to obtain them. Where the district attorney told him, by mistake, that they were in the hands of C.; who, on being applied to, answered they were with the district attorney, but the

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[k] Clay *v.* Sweet, 4 Bibb, 255.

[l] Com. *v.* Randall, Thacher's C. C. 500. Where it appears that the case was lost by mistake of counsel, as to the law, there may be a few rare cases where a new trial may be granted; (Edwards *v.* Lambert, 2 Root, 430; Riley *v.* Emerson, 5 New Hamp. 531; Winn *v.* Young, 1 J. J. Marsh, 52; D'Aguillar *v.* Taben, 2 Marsh. 265; though, if the mistake was not entirely free from blame, the rule does not exist; Wits *v.* Palehampton, 2 Salk. 647; McNeish *v.* Stewart, 7 Cowen, 474; Gongenal *v.* McCarty, 1 Yeates, 253; Hutcher *v.* Reed, Hardin, 515; Bateman *v.* Wiloe, 1 Sch. & Lef. 201; McDermot *v.* U. S. Ins. Co., 3 S. & R. 604; Barrows *v.* Jones, 1 J. J. Marsh. 470; McAllister *v.* Barry, 2 Hayw. 290; Thompson *v.* Thompson, Id. 405.)

[m] Abbott *v.* Parsons, 7 Bing. 563; Sherman *v.* Crosby, 11 Johns. 70; Jackson *v.* Jackson, 5 Cowen, 173; Jackson *v.* Condy, 9 Cowen, 140; Outen *v.* Merrill, 2 Lit. 305; Dane *v.* Moore, Coxe, 94; Wait *v.* Maxwell, 5 Pick. 217; Russell *v.* Union Ins. Co., 1 Wash. C. C. R. 449; Peters *v.* Phœnix Ins. Co., 3 S. & R. 25; Den. *v.* Geiger, 4 Halst. 225.

[n] People *v.* Holmes, 5 Wend. 192.

[o] Jackson *v.* Davis, 5 Cowen, 123.

[p] Davis *v.* Morgan, 1 Crompt. & Jervis, 587. Where counsel thought it prudent to keep back evidence, the court refused to give him, by a new trial, an opportunity to introduce it. (Spong *v.* Hag, 2 W. Black. 802; Pickering *v.* Dawson, 4 Taunt. 779; Hall *v.* Stathand, 2 Chitty, 257; 20 Marsh. Louis. Rep. 187.) And so where the party, under advice of counsel, neglects to procure testimony which he might have obtained. (Price *v.* Fuqua, 4 Munf. 68; 5 Wend. 127; Cooke *v.* Berry, 1 Wills. 89; Gist *v.* Mason, 1 T. R. 84; Price *v.* Brown, 1 Str. 691; Gordon *v.* Harvey, 4 Call, 450.)

defendant did not explain the mistake, and apply to the district attorney again, it was held that there was a want of due diligence.[q]

§ 3210. Where, as sometimes occurs, witnesses are mistaken in their testimony from temporary incapacity, new trials have been granted.[r] Where a witness, through some unaccountable cause, was so confused in his evidence that neither court nor jury could understand him, a new trial was granted, although it was said that in such cases the court should be extremely cautious;[s] and, although inclined to relieve, whenever a mistake is made by the witness, unaccompanied by suspicion, and where the merits are with the applicants, yet where the circumstances of the application are suspicious, a new trial should be refused.[t] Relief will only be afforded where the witness was mistaken, not where the party was in error as to what the witness would prove;[u] nor will the court hear evidence admissible to show that a witness used expressions after trial contradicting his testimony in court.[v] On the same principle, as has been seen, mistakes made by witnesses when giving their testimony may be corrected.[w]

§ 3211. (*d*) *Surprise.*—Where a party, or his counsel, has been taken by surprise, in the course of a cause, by some accidental circumstance, which could not have been foreseen, in which no laches could be ascribed to either of them, a new trial will be awarded,[x] particularly if the court think the verdict against the weight of evidence.[y] Thus, a new trial has been granted where the plaintiff is surprised by the testimony of two witnesses who appeared to have been tampered with;[z] where a witness has been so much disconcerted as to be unable to testify at the trial;[a] where the jury gave a verdict against the plaintiff's claim, on a bill endorsed without the words, "or order," apprehending, that by the usage of merchants, it was not assignable, which usage the plaintiff did not expect to have to prove;[b] and where a material witness, regularly subpœnaed and in attendance, absented himself shortly before the case was called.[c] In a case of seduction, where the principal witness laid the seduction on a day which the defendant had no reason to anticipate, being at a time when he was absent from the place, and could easily prove an alibi, a new trial was granted.[d]

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[q] People *v.* Vermilyea, 7 Cow. 369.

[r] Richardson *v.* Fisher, 1 Bing. 145; Inhabitants of Warren *v.* Inhabitants of Hope, 6 Greenl. 479; De Gion *v.* Diver, 2 Anst. 517.

[s] Ainsworth *v.* Sessions, 1 Root, 175; *sed contra*, Mellin *v.* Taylor, 3 Bing. 110.

[t] Keller *v.* Bennett, 4 Bing. 171; Depeyster *v.* Col. Ins. Co., 2 Caines, 85.

[u] Hewlett *v.* Cruchley, 3 Taunt. 277; Smith *v.* Morrison, 3 Marsh. Kent. R. 85.

[v] R. *v.* Whitehouse, 18 Eng. Rep. 105; 1 Pearce C. C. 1; Com. *v.* Randall, Thacher's C. C. 500.

[w] See ante, § 3180–90.

[x] Guthrie *v.* Bogart, 1 A. K. Marsh. 334; Blythe *v.* Sutherland, 3 M'Cord, 288; Liehenintz *v.* Greenland, 2 Ib. 315; Comply *v.* Brown, Const. Rep. 100; see State *v.* Williams, 1 Williams, (Vt.) 724.

[y] Hughes *v.* M'Gee, 1 A. K. Marsh. 28.

[z] Peterson *v.* Barry, 4 Binn. 481.

[a] Ainsworth *v.* Sessions, 1 Root, 175.

[b] Edie *v.* East India Company, 1 Wm. Black, 295.

[c] Ruggles *v.* Hall, 14 Johns. 112.

[d] Sargent *v.* ———, 5 Cowen, 106. See ante, § 3179–90, as to what cases the defendant can be relieved in, on the ground of after-discovered evidence of the incompetency or bias of witnesses.

An indictment was found November 21, for a murder committed on the 11th of October previous. The defendant was put upon trial immediately and convicted and sentenced for murder in the second degree. The case did not appear to be an aggravated one. The defendant made affidavit that he had been surprised by the evidence, and had had no time for a proper defence. It was held, in Indiana, that under these and other circumstances of the case, a new trial should have been granted.[dd]

§ 3212. Sudden sickness, and consequent absence of a material witness, is no ground for a new trial when the testimony to be established by such witness was proved by other parties.[e]

§ 3213. The mere fact of a party being surprised by the introduction of unexpected evidence, however, is no ground for a new trial;[f] nor can surprise be alleged as a sufficient reason, if the declaration and exhibits give notice.

Where a material witness for the government had declared that he would hang the prisoner by his testimony, if he could, which declaration the prisoner did not hear until after the trial, the court refused a new trial.[h] In general, as has been seen, the production of unexpected evidence impeaching the character of a witness, is no reason to set aside the verdict.[i]

§ 3214. There are but few cases in which the verdict will be set aside, where neglect is ascribable to the party or his attorney, or if a good reason for a new trial on the merits is not shown.[j] There is an exception, however, which is sometimes made, where the case is strong on the merits, and has been lost, owing to the culpable negligence of the counsel employed. In such case a new trial will be granted, accompanied by the condition that the counsel be compelled to pay the costs.[k]

A prisoner, advised by his counsel that certain evidence which was admitted, was not admissible against him, and so taken by surprise, was allowed in Vermont a new trial, to produce rebutting evidence.[kk]

§ 3215. Surprise cannot be set up as a cause for a new trial, where the cause was tried at a day of the term subsequent to that at which the party expected it to come on;[l] and if a party knowing a witness to be absent, hazards a trial, no new trial can be granted on account of alleged surprise arising from the absence of such witness;[m] nor is it good ground for a

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[dd] Rosencrantz *v.* State, 6 Ind. 407.

[e] Young *v.* Com., 4 Grat. 550.

[f] Willard *v.* Wetherbee, 4 N. Hamp. 118; Bell *v.* Howard, 4 Litt. 117; Wholford *v.* Com., 4 Grattan, 553.

[g] Harrison *v.* Wilson, 2 A. K. Marsh. 547; Dodge *v.* Kendall, 4 Verm. 31; Bitting *v.* Mowry, 1 Miles, 216; Smith *v.* Morrison, 3 A. K. Marsh. 81.

[h] Com. *v.* Drew, 4 Mass. 391.

[i] Ball *v.* Howard, 4 Litt. 117; Den *v.* Geiger, 4 Halst. 225; Shummay *v.* Fowler, 4 Johns. 425; Com. *v.* Green, 17 Mass. 515; see ante, § 3184-9.

[j] Com. *v.* Benesh, Thacher's C. C. 684; Patterson *v.* Matthews, 3 Bibb. 80; Barry *v.* Wilbourne, 2 Bailey, 91; Leeden *v.* Pancake, 4 Yeates, 183; Hawley *v.* Blanton, 1 Miss. 49; M'Lane *v.* Harris, Ib. 700; M'Lane *v.* Com., 2 Bibb, 17; Smith *v.* Morrison, 3 A. K. Marsh. 81; Blackhurst *v.* Bremer, 1 Dowl. & Ry. 553; Blake *v.* How, 1 Aik. 306; Jackson *v.* Roe, 9 Johns. 77; Cockerill *v.* Calhoun, 1 Nott & M'Cord, 285; Steinbech *v.* Col. Ins. Co., 2 Caines, 126; Jackson *v.* Van Antwerp, 8 Cowen, 273.

[k] Martin *v.* Podger, 5 Burr. 2631; *sed contra*, De Roufigny *v.* Peale, 3 Taunt. 484.

[kk] State *v.* Williams, 1 Williams, (Vt.) 724.

[l] Cotton *v.* Brashiers, 2 A. K. Marsh. 153.

[m] Gill *v.* Warren, 1 J. J. Marsh, 590.

new trial, that the party failed to summon material witnesses at the trial under advice of counsel, that their attendance was unnecessary.[n]

10th. Irregularity in empanneling the jury.

§ 3216. Generally speaking, under the statutes, the mistake or informality of the officers charged with summoning, returning, and empanneling the jury, will be no ground for a new trial, unless there has been fraud or collusion, or material injury to the defendant.[o]

§ 3217. In Pennsylvania, by the act of 21st Feb., 1814, no verdict can be set aside, nor shall any judgment be arrested for any defect or error in the jury process, "but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue, shall be a waiver of all errors and defects in or relative and appertaining to the said precept, venire, drawing and summoning of jurors."[p] It has been held under this act, that standing mute is as much a waiver as pleading to the issue.[q]

§ 3218. In New York, no verdict shall be affected for any imperfect or insufficient return of any sheriff or other officer, nor because the name of such officer is not set to any return actually made by him;[r] nor for any other default or negligence of any clerk or officer of the court, or of the parties, or their counsellors or attorneys, by which neither party shall have been prejudiced.[s] All such omissions and defects, and all others of the like nature, shall be supplied and amended by the court.[t] A non-compliance of the clerk to put the names of all the persons returned as jurors in a box, from which juries are to be drawn, is cured by this act.[u]

§ 3219. A new trial will be granted at common law, where it appears after verdict, that some one of the jurors should not have been permitted to sit upon the trial, on account of an entire legal incapacity; as where it is discovered that one of the jurors is not a freeholder;[v] or had been taken from the debtor's prison for the purpose,[w] or was an infant.[x]

§ 3220. That which is cause for challenge to a juror, is not always ground for a new trial;[y] for instance, the fact that one of the jurors was an alien;[z] or a non-resident;[zz] or had been on the grand jury who found the bill;[a] or was the relative of a party.[b]

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[n] Pleasants *v.* Clements, 2 Leigh, 174.

[o] R. *v.* Hunt, 4 Barn. & Ald. 430; Com. *v.* Chauncey, 2 Ashm. 90; Amherst *v.* Hadley, 1 Pick. 38; Cole *v.* Perry, 6 Cowen, 584; People *v.* Ransom, 7 Wend. 417; Dewar *v.* Spencer, 2 Wharton, 211; Com. *v.* Gallagher, 4 Pa. Law Jour. 511; see ante, § 467, &c.

[p] See Com. *v.* Chauncey, 2 Ashmead, 90; Com. *v.* Gallagher, 4 Pa. Law Jour. 511.

[q] Com. *v.* Dyott, 5 Wharton, 67.

[r] 2 R. S. 425, s. 7. [s] 2 R. S. 425, s. 7. [t] Ibid. s. 8.

[u] People *v.* Ransom, 7 Wend. 417; see Mix *v.* Woodward, 12 Connect. 262; Cole *v.* Perry, 6 Cowen, 584.

[v] State *v.* Babcock, 1 Conn. 401; Dowdy *v.* Com., 9 Gratt. 727; ante, §§ 467–8–9.

[w] Stanton *v.* Beadle, 4 T. R. 473.

[x] Russell *v.* Ball, Barnes, 455; King *v.* Tremayne, 7 Dowl. & Ryl. 684.

[y] State *v.* Fisher, 2 N. & M. 261.

[z] State *v.* Quarrel, 2 Bay. 150; Hollingsworth *v.* Dnane, 4 Dall. 353.

[zz] Costly *v.* State, 19 Georg. 614.

[a] State *v.* O'Driswell, 1b. 153; Barlow *v.* State, 2 Black, 114.

[b] Eggleton *v.* Smiley, 17 Johns. 133; M'Lellan *v.* Crafton, 6 Green, 307.

§ 3221. Although prejudice or preconceived opinion, as has been seen,[c] is good cause for a challenge, yet if the party is aware of this, and does not except when the jury is empanneled, he is deemed to have waived his challenge ;[d] and if he learns before the rendering of the verdict, that one of the jury had declared that he had made up his mind against him before he was empanneled, he must object at once, without waiting for the verdict.[e] After verdict, however, this objection may be taken if accompanied by affidavit of the party that the fact was not known before the trial.[f]

§ 3222. In Massachusetts where a trial had been commenced, and it was then discovered that the indictment was not signed by the foreman of the grand jury, it was held, that no further proceedings could be had on it, although the counsel were willing to proceed.[g]

§ 3223. But after the verdict, irregularities in the summoning of the grand jury, or in the finding of the bill, not appearing on the record, cannot be noticed on a motion for a new trial.[h]

§ 3224. It is a good ground of objection, at common law, to the jury, that they have been improperly chosen, or chosen by an unauthorized officer, or that the officers in attendance had permitted irregularities. Where one who had been challenged on the principal panel, was afterwards sworn in under another name as a talesman ;[i] and where talesmen were summoned and returned, and set on the trial, who had not been drawn according to the statute, a new trial was ordered.[j] If the party, however, is aware of the objections to talesman, and neglects his challenge, no new trial will be granted ;[k] as the objection that the juror had not been drawn and returned according to law, comes too late after the verdict.[l] Thus, where one of the jury had been drawn more than twenty days before the time when the venire was made returnable, exception not having been made until after verdict, a new trial was refused.[m] A new trial will not be granted because the clerk, in calling over the jury, pursued the order in which they were empanneled, instead of that in which their names appeared in the venire.[n]

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[c] See ante, § 2981, 3013, 3152.

[d] Fox *v.* Hazleton, 10 Pick. 275 ; Lisle *v.* State, 6 Miss. 426 ; State *v.* Patrick, 3 Jones' Law (N. C.), 443; Keener *v.* State, 18 Geo. 194 ; Parks *v.* State, 4 Ohio (N. S.), 234 ; Romaine *v.* State, 7 Ind. 63.

[e] M'Corkle *v.* Binns, 5 Binn. 340 ; M'Kinley *v.* Smith, Hardin, 167.

[f] Pierce *v.* Bush, 3 Bibb, 347 ; Deming *v.* Hulburt, 2 Chip. 45 ; Handon *v.* Bradshaw, 4 Bibb, 45 ; Craig *v.* Elliott, Ib. 272 ; Wade *v.* State, 12 Georg. 25 ; see ante, § 3152.

[g] Com *v.* Sargent, Thacher's Crim. Cases, 116 ; see ante, § 497, 507.

[h] Ante, § 473.

[i] Parker *v.* Thornton, 2 Lord Raymond, 1410.

[j] Kennedy *v.* Williams, 2 Nott & M'Cord, 79 ; see Com. *v.* Gallagher, 4 Pa. Law Jour. 520.

[k] Jordan *v.* Meredith, 3 Yeates, 318 ; Howland *v.* Gifford, 1 Pick. 38 ; 2 Bay. 150.

[l] Amherst *v.* Hadley, 1 Pick. 38.

[m] State *v* Hascall, 6 N. Hamp. 352.

[n] State *v.* Slack, 1 Bailey, 330.

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

1st. At what time.

§ 3225. An application for new trial cannot, in general, be made after an application for arresting the judgment;[o] though there are cases in which, if it appear that manifest injustice will ensue from a strict observance of the rule, the court will waive the formality, and admit the defendant to a rehearing;[p] and now the Court of Queen's Bench, in its discretion, hears motions in arrest of judgment before applications for a new trial.[q] It is said that a new trial may be granted even after arrest of judgment, on the application of the defendant.[r]

§ 3226. Where a verdict has been set aside in a criminal case as imperfect, a *venire facias de novo* may at once be awarded, and a new trial had, either on the same indictment or another.[s]

§ 3227. On conviction for a misdemeanor, a new trial may be granted, although the motion be not made until the second term after the verdict was rendered.[t]

2d. By whom.

§ 3228. Any defendant, within the proper time, may apply for a new trial. The defendant must be personally in court at the application;[u] and where there are several defendants, all of them who have been convicted must be actually present, unless a special ground be laid for dispensing with the general rule.[v]

§ 3229. Where some of the defendants have been convicted, and others acquitted, a new trial may be granted to the former, without impeaching the verdict so far as it relates to the latter.[w]

§ 3230. When there has been an acquittal on one count and a conviction on another, a new trial can only be granted on the count on which there has been a conviction; and it is error, on a second trial, to put the defendant on trial on the former.[x]

Where one count includes burglary and larceny, and after acquittal of the greater offence but conviction of the less, a new trial is obtained, it has

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[o] Tubervil *v.* Stamp, 2 Salk. 647; 1 Burr, 434; 1 Ch. C. L. 658; Resp *v.* Lacare, 2 Dall. 118.

[p] R. *v.* Gough, 2 Dougl. 797; 2 Com. Rep. 525; Bac. Abr. Trial, (L.) 1; Chitty C L. 658.

[q] R. *v.* Rowlands, 2 Den. C. C. 386; see 6 T. R. 627; Bac. Abr. Trial, (L.) 1.

[r] People *v.* M'Kay, 18 Johns. 212.

[s] Com. *v.* Gibson, 2 Virg. Cas. 70. [t] Com. *v.* Crump, 1 Virg. Cases, 172.

[u] 2 Burr, 930; 2 Stra. 844, 1227; 1 W. Bla. R. 209.

[v] R. *v.* Teal et al., 11 East, 307; 1 Sess. Cas. 428; Com. Dig. Indictment, N.; 1 Chit. C. L. 659; R. *v.* Fielder et al., 2 D. & R. 46.

[w] R. *v.* Mawbey, 6 T. R. 638; Com. *v.* Roby, 12 Pick. 496.

[x] Campbell *v.* State, 9 Yerger, 333; Morris *v.* State, 8 S. & M. 762; Esmon *v.* State, 1 Swan, (Tenn.) 14; see ante, § 252. The rule as to manslaughter has been held otherwise in Tennessee and Mississippi; ante, § 550.

been ruled that the whole case is re-opened, and the defendant exposed on the second trial to the double charge.[y]

The law in reference to new trials after convictions for manslaughter has already been stated,[z]

§ 3231. A defendant convicted on the merits, but not sentenced, on account of informality, is liable to a second trial;[a] though if the proceedings be regular the case is different.[b]

3d. To whom.

§ 3232. At common law the court trying the case is the sole tribunal by whom a new trial can be granted; and its refusal so to do, being matter of discretion, is no ground for a writ of error.[c] In most of the states, however, provision is made for obtaining revision.

§ 3233. On motion for a new trial, in a capital case, on the ground that the verdict is not warranted by the evidence, the court is not bound to re-examine the witness and state the evidence *verbatim*, but may state the material facts proved, and the evidence adduced at the trial, from the judge's own notes, aided by those of the counsel on both sides.[d]

§ 3234. Where the judge trying the case died pending the motion, his successor declined hearing the case, and granted a new trial.[e]

A justice of the peace cannot grant a new trial.[f]

4th. In what form.

§ 3235. Upon ground *prima facie* sufficient, the court, on application, will award a rule to show cause why a new trial should not be granted.[g] On this the puisne judge of the court applies to the judge who tried the case, unless he be one of the judges of the court, for a report of the trial, and a statement of his opinion respecting its merits.[h] If he signify his dissatisfaction, (remarks Mr. Chitty,) the remedy prayed for is usually allowed; if he declare his concurrence with the verdict, it is commonly refused; but if he merely report the evidence, without giving any decided and satisfactory opinion, the court will admit the question to be argued before them.[i] If they find there is no ground for the application, they will discharge the rule; but if solid ground be shown, they make it absolute.[j]

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[y] State *v.* Morris, 1 Blackf. 37; see ante, § 550.

[z] Ante, § 550.

[a] Penn. *v.* Huffman, Addison, 140.

[b] State *v.* Norvell, 2 Yerger, 24.

[c] Brooklyn *v.* Patchen, 8 Wend. 47; Chase *v.* Davis, 7 Ver. 476; Durant *v.* Atkinson, 2 Bailey, 18; M'Lanahan *v.* Universal Ins. Co., 1 Peters, 170; Gray *v.* Bridge, 11 Pick. 189; Hudson *v.* Williamson, Const. Rep. 360; Lester *v.* State, 11 Conn. 415; White *v.* Trinity Church, 5 Conn. 187; Calhoun *v.* M'Means, 1 N. & M. 422; Fennell *v.* Patrick, 3 Stew. & Port. 244; Barr *v.* White, 2 Port. 342; Sawyer *v.* Stevenson, Breese, 6; Cornelius *v.* Boucher, Breese, 12.

[d] Jones' case, 1 Leigh, 598.

[e] U. S. *v.* Harding, 1 Wal. J. 127; ante, § 550.

[f] Page *v.* Camp, Kirby, 7.

[g] Bul. N. P. 327; Tidd. 884; Hand. Prac. 12.

[h] Bul. N. P. 327; Tidd, 884.

[i] R. T. H. 23; Barnes, 439.

[j] 1 Chitty's C. L. 660.

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Bees are *ferœ naturæ*, 1754.
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Swans, though at large, if properly marked, are subjects of larceny, 1755.
So doves and pigeons in a dove-cote, 1755.
So all valuable domestic animals, and all animals *domitæ naturæ*, serviceable for food, may be subjects of larceny, 1755.
The flesh of such as are *ferœ naturæ* may also be subjects of larceny, 1755.
But all other animals not serving for food, though tame and saleable, and other creatures kept for whim and pleasure, are not subjects of larceny at common law, 1755.
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Bank Bills redeemed by the bank, are the subject of larceny, 1757.
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Bonds, notes and bills, being mere choses in action, were not held the subjects of larceny at the common law, 1758.
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To render bonds, notes, &c., the subjects of larceny in Alabama, they must be, at the time, legally valid, 1758.

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In indictment for larceny of bank notes, the practice obtains of introducing a count for the larceny of "one piece of paper of the value of one penny," 1759.

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Bank bills not issued are the property of the bank, 1759.

Promissory note, under 7 Geo. 3, c. 50, held to be a valuable security to the owner, after payment to the holder, 1760.

What an insufficient indictment for stealing money in Tennessee, 1761.

Where it is necessary to prove genuineness of bank-notes, and where not, 1761.

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The halves of notes, if stolen, should be described as goods and chattels, 1763.

An improper description of the instrument stolen will be fatal, 1764.

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Bank-notes considered and treated as money, and the rule as to their value, is the sum which upon their face they promise to pay, 1765.

Where note is in possession of the defendant, parol evidence of contents is admissible, without notice to produce, 1766.

Slaves are the subjects of larceny, 1767.

Husband may commit larceny of his wife, she being a slave, 1767.

In Mississippi a negro is *prima facie* a slave, 1767.

A runaway slave may be the subject of larceny, 1767.

Fraudulently getting a receipt, without payment of the debt, is no larceny, 1768.

What a good indictment under the Iowa statute, 1768.

Felonious Intent.

To constitute larceny, the intent must be felonious, 1769.

To distrain, under colour of arrear of rent, may be a trespass, but is no felony, 1770.

To secrete a slave, to further her escape, but with no intent to convert the property to the use of the defendant, is no larceny, 1771.

There must be an intent to convert it to the permament use of defendant, 1772.

Returning goods can only be evidence of intention; if the original intent was to convert them to his own use, the returning them afterwards will not purge the offence, 1772.

Intent at the time of taking, is the criterion, 1772.

Taking horse by slave, to assist merely in escape, no larceny, 1773.

Seizing a gun of the prosecutor, under the impression that it might be used against him, with no intent to convert it to his own use, no larceny, though defendant afterwards determined to sell it, 1775.

Secreting part of cargo, and removing it for the benefit of the owners, no larceny, 1776.

Otherwise, if for defendant's own benefit, 1776.

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Taking goods of another, to induce that other to call for them, no larceny, 1776.

Possession of property recently stolen, *prima facie* evidence of guilt, but may be explained, 1777.

To force a man to sell, is trespass or felony, according to circumstances, 1778.

A taking by accident, mistake, or in joke, is no offence, 1779.

Must be against the will of the owner, 1779.

If a man, says Lord Hale, take another's corn or hay, and mix it with his own, such other may retake the whole heap of corn or cock of hay, 1780.

Where there is any mark upon property found, by which the owner may be found, the conversion of such property by the finder will be larceny, 1780.

If the taking be fraudulent, not necessary that it should be *lucri causa*, 1781.

Not necessary that intent should be to convert the property in same county where taken, 1684.

If a man by mistake take a letter, and *afterwards* appropriate to himself its contents, it is no larceny, there being no *animus furandi* at the original taking, 1785.

When taking is but trespass, 1786.

The taking another's goods openly, before him or others, otherwise than by apparent robbery, is but a trespass, 1786.

But when taken with the pretence of looking at them, and then stolen, it is larceny, 1787.

The goods must have been wrongfully or fraudulently taken, and carried away, with intent to convert them to the owner's use, and make them his own property, 1788.

Selling goods of another after a knowledge of their not belonging to the seller, though the original taking be not felonious, was held to be larceny, 1788.

The question of intent is one for a jury, 1788.

It is sufficient if the intent be to appropriate the value of the chattel, and not the chattel itself, 1789.

The intention must exist at the time of the taking, and no subsequent felonious intent will render the previous taking felonious, 1790.

Lost Goods. Where the goods of a party are left, by inadvertence, in the possession of another, and the latter, *animo furandi*, conceals them, he is guilty of larceny, 1790.

So of goods found with marks whereby the owner may be found, 1792.

But a *bona fide* finder of an article lost, is not guilty of any subsequent act, 1792.

So the finder of bank notes, which being negotiable, are not supposed to bring home to the finder the guilty knowledge, 1792.

Where the finder knows, or has the means of knowing, who is the owner, and converts the goods to his own use, he will be guilty of the offence, 1792.

Reasonable diligence to find the owner should be shown by the party finding, 1795.

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Any mark pointing to the true ownership, affects the finder with felony, if he neglect to notice it, 1795.

If a finder of goods take them away with the intention of converting them to his own use, and only restore them because a reward is offered, he is guilty of larceny, 1796.

The only cases where a finder can appropriate the goods found, are where the owner has fairly abandoned them, or no owner can be found, 1796–7.

The subsequent return does not purge the offence, 1797.

Where goods are actually lost, and the finder takes them to his own use, really believing at the time of taking that the owner cannot be found, it is not larceny, 1798.

It is larceny if he believe the owner can be found, 1799.

Two things must concur: 1st. The intention at the time of finding, to feloniously convert the property to his own use: and, 2dly. He must, at the time, know the owner, or believe he may be found, 1800.

Servant of a railway company finding property in a railway carriage, 1801.

Taking and carrying away.

Taking is a material part, but may be presumed from possession, 1802.

Where there is no trespass in taking, there can be no felony in carrying away, 1802.

Wife cannot commit larceny, of husband's goods, 1802.

But third party may jointly with the wife, 1803.

An adulterer cannot be convicted of larceny of goods brought by wife alone to his lodgings, merely upon evidence of their being found there, 1804.

The consent of a *slave* to part with his master's goods is a nullity, 1805.

An actual taking and removing, essential to the larceny of a slave, persuasion not sufficient to form the offence, 1806.

Even assisting a slave to escape to regain his freedom, is not larceny, 1806.

Taking one's own goods in hands of bailee or assignee, 1806.

The rule in New Yorn, where the intent is to charge bailee, 1808.

Where one got staves upon the land of another upon contract to have one half, larceny may be committed by the party getting them, while they remained on the land undivided, 1808.

Disposal of a chattel by joint tenant, no larceny, 1809.

But if he take it out of the possession of bailee, to charge him therewith, it is otherwise, 1809.

The taking of another's goods though the taker be detected before they are actually carried away, is larceny, 1810.

In North Carolina, it has been said that the taking must be forcible and violent, but *quære,* 1810.

What severance and asportation are sufficient to support larceny, 1810.

The omission of the word "Steal" not fatal, if the taking and carrying away be sufficiently averred, 1811.

Presence. There must be actual or constructive presence to make a party principal in larceny, 1811.

Asportation, where the larceny is committed in one county and the goods at any time afterwards removed into another county, the thief is guilty of larceny in every county into which they may be carried, 1812.

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Where there is one continuing transaction, the thief may be indicted for the final carrying away, 1814.
And all who concur, though not privy to the first or immediate acts, are guilty, 1814.
One aiding or abetting a larceny in one county and afterwards concerned in the possession or disposal of the stolen property in another county, may be convicted in the latter, 1815.
By statute in New York and Alabama, when the larceny is committed in one State and the goods taken to another, the defendant may be committed in the latter, 1816.
The same rule exists at common law in Massachusetts, Connecticut, North Carolina, Maryland, and Ohio, 1817.
The law is otherwise held in Pennsylvania and Kentucky, 1817.
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Ownership, either absolute or special, must be proven, 1818.
There must be possession in the prosecutor, either actual or constructive, to enable larceny to exist, 657.
What evidence admissible to prove ownership, 1819.
The property must be averred to be in the right owner, if known, or in some person unknown, 1820.
If the owner be misnamed, it is a fatal variance, 1821.
What not sufficient proof of ownership, 1822.
Averment of name by which party is usually known, 1821.
Any substantial variance, however, is fatal, 1821.
Misspelling, if the sound be preserved, is not fatal, 1821.
Joint tenants, or tenants in common, have not an ownership as against each other, 1822.
The shroud of a dead person must be laid as the goods and chattels of the executor or administrator, 1823.
Special property may be laid either in the custodian or the owner, 1824.
Married woman's property under the recent statute, must be laid as her own, 1827.
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Not necessary to aver the political existence of a corporation, 1835.
A slave's property is his master's property, 1836.
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Some value must be averred, 1837.
Of paper of the value of one cent, 1837.
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It is larceny in a servant having a mere oversight to steal the goods committed to him, 1840.
And so of a person having mere care, charge, or custody, 1841.
And so of agents, salesmen, and clerks, 1846.
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Taking when the possession of the goods has been acquired animo furandi, 1847.
Hiring for the purpose of selling is larceny, 1847.
When the intent was originally to steal, it is no defence that the property was voluntarily bailed, 1847.
Where the property is obtained by false pretences, the original intent being felonious, 1847.
Where the possession was never voluntarily parted with by the owner, larceny exists, 1852.
Otherwise the owner intends to part with the property, 1853.
So where there is a sale, 1854.
But not when there is a breach of conditions of sale, and an original felonious intent, 1855.
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Ring-dropping is larceny when consummated, 1856.
So of sham exchanges, 1857.
And of money obtained by pretended bet, 1857.
And by fraudulent replevin, 1858.
No defence that the larceny was a trap of the owner, 1859.
Taking where possession was obtained without any fraudulent intention in the first instance, 1860.
In this case there is no larceny unless by severance, 1860.
Breaking a package constitutes this, 1860.
Where goods were taken from a fire without felonious intent, subsequent stealing no larceny, 1861.
Where packages are broken, or bags opened, when articles are *bona fide* received on bailment, there is no larceny, 1862.
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Indictments will lie for words spoken, if they impute the commission of crime punishable by law, 2527.
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Design of the publication must be charged in indictment, 2528.
To publish any thing which renders a man ridiculous or contemptible, is indictable, 2528.
So words which will have the effect of excluding him from society, 2529.
In Connecticut, charging a woman with libidinous habits, and tempting another to commit adultery, 2530.
So to charge a man with insanity, or a woman with being an hermaphrodite, 2531.
So to publish what may hurt a man in his trade or livelihood, 2531.
So to say of a juror that he agreed with another juror to stake the decision in a game of chance, 2532.
Whatever, if made the subject of civil action, would be considered libellous without laying special damage, is indictable in a criminal court, 2533.
An indictment will however lie in some cases where an action is not maintainable, 2533.
No indictment will lie for words spoken unless they are seditious, blasphemous, grossly immoral, or uttered to a magistrate in execution of his office, or to provoke the other party to send a challenge, 2534.
Where a publication is malicious, and its obvious tendency is to bring the object of it into contempt and ridicule, it will be a libel, although it imputes no crime, 2535.
Libels affecting the public, public officers, &c., 2536.
Blasphemous libels, 2536.
Maliciously to revile Christianity is indictable, 2536.
Blasphemy against God, and profane ridicule of Christ and the Holy Scriptures are offences at common law, whether spoken or written, 2536.
To revile the Scriptures was held indictable in Pennsylvania, 2536.
The same position was taken in Delaware, 2536.
In Massachusetts, under statute 1782, it is blasphemy to deny the existence of God, 2537.
The same doctrine obtains in England, 2537.
Justice Story's opinion in the case of the Girard will, 2537.
It is not necessary to prove every allegation of blasphemy, if one is proved it is sufficient, 2537.

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The disputes of learned men cannot, unless a malicious intent be shown, be charged as blasphemy, 2538.
How far Christianity is part of the common law, 2539.
The spiritual relation, 2540, 2542.
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The family and social relation, 2544.
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Obscene Libels.
It is indictable at common law to publish an obscene book or print, or to procure the same for sale, or to publicly utter obscene language, or any thing corrupting the morals of the people, 2547.
Not necessary to aver nuisance, 2547.
So of any public show *contra bonos mores*, 2547.
Where the words are spoken, a general conformity between the words laid, and those proved, is sufficient, 2548.
Not necessary to set out the obscene language in full, 2548.
An indictment charging defendant with having possession of indecent prints, with intent afterwards to sell them, is bad, but to charge him with procuring them to sell, is good, 2548.
Seditious libels on the government are indictable, 2550.
And so of those which disturb the peace of families and the quiet of society, 2550.
What is held to be "seditious" in England, 2551.
To bring the government into disesteem, by either ridicule or obloquy, is punishable, 2551.
Whether defendant intended to alienate the affections of the people is immaterial, 2551.
Libels on the legislature are indictable, 2255.
Intemperate reflections on courts of justice, 2552.
It is libellous to publish correct accounts of judicial proceedings, if accompanied with comments tending to asperse a man's character, 2553.
Seditious words, not in writing, are indictable, 2553.
Great particularity, however, is requisite, 2553.
Where the libel is against a public officer or a professional man, what it is necessary to prove, 2554.
Slanderous words spoken to a magistrate, 2555.
What is evidence of publication, 2556.
To send a sealed letter by mail, containing libellous matter, is indictable, 2556.
Where the sender may be indicted, 2556.
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The post-mark no evidence of publication within a particular county, 2556.
Post-mark is *prima facie* evidence of date, 2556.
And that it was received by the person to whom it was sent, 2556.
Possession of a published libel is evidence against the possessor, but no one else, 2557.
To send a libellous letter to the party libelled is a sufficient publication, 2558.

LIBELS—Publication—*Continued.*

A sale of a libel by a servant, in the course of the business of the master, will support a charge against the master, although not privy to it, 2559.

And so of delivery of a newspaper containing a libel to the officer of the stamp office, 2559.

Admission of the defendant, is abundant, 2560.

Privileged communications, 2561.

Publications made bona fide, or in confidence, 2561.

And so of investigations, where the party is interested, 2561.

A person has a right to communicate to any other any information in which they have a mutual interest, 2562.

Perfectly legal to induce another to become a party to a suit, in which both are interested, 2562.

The communication, to be libellous, must be malicious, 2562.

A letter vindicating oneself, though imputing dishonesty in another, if done bona fide, is a privileged communication, 2563.

Unsolicited remarks injurious to credit of a tradesman, are not privileged, 2563.

But if solicited, otherwise, 2563.

Charges injurious to a man's professional character, if without malice, and *bona fide*, are not held to be libellous, 2564.

So where master gives a correct character of a servant, upon inquiry, 3565.

If done maliciously, however, it is otherwise, 2566.

Very strong expressions concerning third persons engaged in mercantile transactions, will often take away the privilege of such communications, 2569.

To originate false reports injurious to a tradesman is libellous, 2568.

Communications relative to a minister about to be appointed over a congregation, if without malice, are privileged, 2569.

Communications by one member of a charitable association to another, reflecting on the conduct of a medical attendant, are not privileged, 2569.

A circular letter sent by the secretary to the members of a society, furnishing information concerning certain bill transactions, is not a privileged communication, 2570.

Reward for information not necessarily a libel, 2571.

Duty of all persons to give information of abuses, yet such notice, if false, is libellous, 2571.

Privilege from public policy.

Defendant may show that the alleged libel was spoken by him as a member of parliament, 2572.

Yet if such libel be published, it destroys the privilege, 2572.

Petitions to the legislature, published to its members only, are privileged, 2572.

Communications to a governor concerning an officer, if without malice or probable cause, are within the privilege, 2573.

A petition to the proper authorities against the appointment of one on the ground of his bad character, is not actionable as a libel, 2573.

A libellous communication to the council of appointments against a public officer, is not actionable unless express malice be proved, 2573.

LIBELS—Privileged communications—*Continued.*

An officer has no right to communicate information of an injurious character, with which he becomes acquainted in his professional capacity, except to government, 2574.

The delivery of a libellous pamphlet by a governor to his attorney-general, not for any public purpose, but that he might peruse it, will make him responsible, 2575.

Counsel, in the discharge of their duty, may make observations injurious to individuals, 2576.

But the publication of such slanderous matter is not justifiable, 2576.

It is lawful to publish the history of a trial, consisting of the facts, and of the law as applied to those facts, 2577.

But the right is restricted to publication of facts, 2277.

The fairness of the report is a question for the jury, 2578.

The law secures the right of free discussion of public matters, 2578.

It must be done peaceably, and without exciting tumult, 2578.

And so of the publication of any such matter, 2578.

Where a member of church consents that the church may investigate any charges made against him in writing, malice in the charges must be proved, 2579.

Object of defendant, how far admissible to rebut the presumption of malice, 2580.

For a person to comment upon the testimony of a witness in an investigation concerning his own conduct, imputing to witness improper motives and dishonorable conduct, is libellous, 2581.

It is not lawful, under pretence of publishing a trial, to re-utter or circulate matter of scandalous or indecent nature, 2582.

Truth, when admissible.

In Massachusetts, truth is a good defence, if the motives be good, and the end justifiable, 2583.

The burden is on the defendant to prove both the truth of the matter charged and the goodness of the motives, 2583.

In New York no editor or proprietor of a newspaper is liable for a true report of any proceeding, except upon actual proof of malice, 2584.

By the constitution of New York, the truth of a libel may be given in evidence to the jury, 2585.

Similar provisions exist in the constitutions of Mississippi and Michigan, 2585.

So in Pennsylvania where the official conduct of officers is under investigation, 2586.

The truth of the matter charged as libellous may be given in evidence, 2587.

So in Maine, Kentucky, Illinois, Delaware, Ohio, Indiana, and Arkansas, 2586.

At common law, truth inadmissible as a defence in a criminal prosecution for libel, 2588.

Malice or intent to defame, is the essence of the offence, 2588.

It must first be shown that the publication was for a justifiable purpose and not malicious, before the truth of the libel can be offered to rebut the presumption of malice, 2588.

LIBEL—Truth, when admissible—*Continued.*
Truth of matter charged may, generally speaking, be received as a defence when the *motive* is good, and truth may sometimes be admitted to explain motive, 2588.
Justification must be as broad as the charge, 2591, 2592, 2593.
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Jury have a right to decide whether the matter charged be libellous or not, 2595.
Evidence of other libels is admissible in order to prove intent, 2595.
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