BOOK VII.

INCIDENTAL RELATIONS CONNECTED WITH CRIME.

CHAPTER LV.

QUASI CRIME IN REM.

§ 816. **Doctrine of this Chapter.** — When a thing which is the subject of property passes into a situation antagonistic to the law, its owner may lose his ownership in it, whether personally guilty of crime or not, because the thing has offended. The punishment, if such it may be called, falls on the thing, and does not visit the owner's person. Though he loses it, and it lapses to another or the state, the loss is not in the nature of a penalty for personal crime. To explain this doctrine is the object of the present chapter.

§ 817. **Relations of this Subject.** — While, therefore, this is not strictly matter pertaining to crime, it is so connected with the criminal law as to render its introduction here imperative. Indeed, the suffering of one through the loss of his property, to be explained in this chapter, is, though not strictly a punishment, *quasi* such, — to be properly, therefore, viewed in connection with the punishment imposed by the court, and the disabilities which follow by operation of law, on conviction for crime. Yet —

§ 818. **Subject Peculiar.** — The affinities of this subject are not alone with the criminal law. In part, they are with the civil. The popular mind more allies it to the criminal. In fact, it extends its roots into both departments, while its visible branches are its own.

§ 819. **On what Principle.** — Nearly every subject of property is some material thing. As matter, it depends for its existence and relations on the law of nature; but, as property, on the law of the land. If a man owns a bag of coin, and drops it in mid-

ocean where gravitation carries it beyond his reach, he can enjoy it no more, though it continues to be his property; while, if he maintains his material grasp, yet so uses it that forfeiture takes from him, not the material substance, but the legal right to it, he no longer enjoys the property, which has passed from him, though he has in his hand the gold. Law is the creator of property; and the province of a creator is to prescribe to the thing created the conditions of its being. When the conditions are violated, the property falls, — vesting in another, or in the state, or being destroyed.[1] The violation may be either a criminal or a civil wrong; or it may be a thing of which the tribunals take no cognizance, further than simply to recognize the change of proprietorship in the article forfeited when the question comes before them judicially.

§ 820. **Word to express the Idea — ("Forfeiture" — "Fine of Specific Article" — "Destruction by Abatement").** — It is practically difficult to discuss this subject, because our language has neither any single word, nor any convenient phrase, to signify the transmutation of which we are speaking, and nothing else. A word commonly employed, not as denoting every thing within this chapter, but many things, is *forfeiture*. We cannot avoid using it, yet confusion comes from its use. For the doctrine of forfeiture, as just explained, differs from various other things in the law known by the same name. It differs from a mulct, or general fine; also, from a fine of the specific article of property, whereby, under a sentence of a court, in pursuance of a statute, such specific article, in distinction from a sum of money in gross, is transferred to the government, as will be by and by mentioned.[2] And it differs from those forfeitures which in the English law attend corruption of blood, on attainder for treason and felony. But within the sort of forfeiture we are considering is the loss

[1] In a Massachusetts case, not of forfeiture, but involving the same principle, Shaw, C. J., said: "All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious; and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." Commonwealth v. Alger, 7 Cush. 53, 85. See also observations on pages 96, 102, 103, of the report.

[2] Post, § 944.

which one suffers who permits a thing to become a nuisance, and it is abated without appeal to the courts, by private means.

§ 821. **Illustrations of these Forfeitures.** — The forfeitures we are now contemplating may be illustrated as follows: —

Nuisance abated — Taxes not paid — Money bet — Confiscations. — If a man so uses his property that it becomes a nuisance, the nuisance is liable to be abated, to the destruction, if necessary, of the property;[1] if, in some of the States, he declines or omits to pay taxes on his lands, they are forfeited, under statutes, to the State;[2] one who, in some States, bets money on an election, forfeits the money;[3] and, during our revolutionary struggle, confiscation acts were in several of the States passed, under which the lands of persons absenting themselves lapsed in some circumstances to the State.[4] Again, —

Wages for Desertion. — If a seaman deserts the ship, he forfeits his wages.[5] And —

Revenue Laws — Enemy Property — Illicit Trade, &c. — Forfeitures are appointed to enforce revenue and other similar laws.[6] There are also forfeitures of the enemy's property in times of war,

[1] Lancaster Turnpike *v.* Rogers, 2 Barr, 114; Pennsylvania *v.* Wheeling and Belmont Bridge, 13 How. U. S. 518; Meeker *v.* Van Rensselaer, 15 Wend. 397; Mills *v.* Hall, 9 Wend. 315; Penruddock's Case, 5 Co. 100 *b*, Jenk. Cent. 260; Baten's Case, 9 Co. 53 *b*.

[2] Blackwell on Tax Titles, 536 et seq.; Hodgdon *v.* Wight, 36 Maine, 326; Clarke *v.* Strickland, 2 Curt. C. C. 439. See Martin *v.* Snowden, 18 Grat. 100; Harding *v.* Butts, 18 Ill. 502; Lee *v.* Newkirk, 18 Ill. 550.

[3] Doyle *v.* Baltimore, 12 Gill & J. 484; Hickman *v.* Littlepage, 2 Dana, 344. See Hull *v.* Ruggles, 65 Barb. 432; People *v.* Kent, 6 Cal. 89.

[4] Gilbert *v.* Bell, 15 Mass. 44; Borland *v.* Dean, 4 Mason, 174; Cooper *v.* Telfair, 4 Dall. 14; Atherton *v.* Johnson, 2 N. H. 31; Thompson *v.* Carr, 5 N. H. 510; Dunham *v.* Drake, Coxe, 315; Martin *v.* Commonwealth, 1 Mass. 347; Conyngham *v.* Commonwealth, 3 Yeates, 471; Hinchman *v.* Clark, Coxe, 340; Chews *v.* Sparks, Coxe, 56; Boyd *v.* Banta, Coxe, 266; Cutts *v.* Commonwealth, 2 Mass. 284; Hylton *v.* Brown, 1 Wash. C. C. 298, 307; Beach *v.* Woodhull, Pet. C. C. 2; Gratz *v.* Catlin, 2 Johns. 248; Catlin *v.* Gratz, 8 Johns. 520; Williams *v.* Stokes, 8 Johns. 151; Sleght *v.* Kane, 2 Johns. Cas. 236; Robinson *v.* Munson, 1 Johns. 277; St. Croix *v.* Sands, 2 Johns. Cas. 267; Palmer *v.* Horton, 1 Johns. Cas. 27; Pell *v.* Prevost, 2 Caines, 164; McGregor *v.* Comstock, 16 Barb. 427; Bare *v.* Rhine, 2 Yeates, 286; Dietrick *v.* Mateer, 10 S. & R. 151; Maclay *v.* Work, 5 Binn. 154.

[5] The Rovena, Ware, 369; Spencer *v.* Eustis, 21 Maine, 519; Sherwood *v.* McIntosh, Ware, 109.

[6] McLane *v.* United States, 6 Pet. 404; Douglass *v.* Roan, 4 Call, 353; Bentley *v.* Roan, 4 Call, 153; Brewster *v.* Gelston, 11 Johns. 390; Wood *v.* United States, 16 Pet. 342; The Ploughboy, 1 Gallis. 41; Phile *v.* The Anna, 1 Dall. 197; United States *v.* Package of Lace, Gilpin, 338; Bottomley *v.* United States, 1 Story, 135; United States *v.* Barrels of Whiskey, 1 Bond, 587; United States *v.* The Queen, 4 Ben. 287; United States *v.* Rectified Spirits, 8 Blatch. 480; The

of property employed by our own people in illicit trade, in violations of embargo laws, and the like.[1]

Under Common Law — Statutory. — The reader perceives, that some of the foregoing forfeitures spring from the unwritten law, others from statutes. A forfeiture of the sort now contemplated, therefore, may be either statutory[2] or under the unwritten law.

§ 822. **Judicial Sentence or not — (Effect of Sentence).** — The forfeiture may be instant on the violation taking place which produces it,[3] or it may come only when pronounced by judicial sentence.[4] If the latter, it will, by legal implication, relate back to the time of the violation; but, in some circumstances, not in all, the intervening interests of innocent purchasers will be protected.[5]

Harriet, 1 Ware, 848; Boat Swallow, 1 Ware, 21; The Nymph, 1 Ware, 257; United States *v.* Stereoscopic Slides, 1 Sprague, 467.

[1] Atherton *v.* Johnson, 2 N. H. 31; Church *v.* Hubbart, 2 Cranch, 187; The Emulous, 1 Gallis. 563; The Joseph, 1 Gallis. 545; The Alexander, 1 Gallis. 532; The Rapid, 1 Gallis. 295; The Eliza, 2 Gallis. 4; The Rugen, 1 Wheat. 62; The Rapid, 8 Cranch, 155; The Lord Wellington, 2 Gallis. 103; The Sally, 8 Cranch, 382; The St. Lawrence, 8 Cranch, 434; Darby *v.* The Brig Eastern, 2 Dall. 34; United States *v.* Brig James Wells, 3 Day, 296; The William Gray, 1 Paine, 16; Amory *v.* McGregor, 15 Johns. 24; United States *v.* La Jeune Eugénie, 2 Mason, 409; Maisonnaire *v.* Keating, 2 Gallis. 325; Harmony *v.* Mitchell, 1 Blatch. 549, 13 How. U. S. 115; United States *v.* Little Charles, 1 Brock. 347; The Caledonian, 4 Wheat. 100; The Langdon Cheves, 4 Wheat. 103; Jecker *v.* Montgomery, 18 How. U. S. 110; United States *v.* One thousand nine hundred and sixty Bags of Coffee, 8 Cranch, 398.

[2] Campbell *v.* Evans, 45 N. Y. 356; The State *v.* Rum, 51 N. H. 373; The State *v.* Intoxicating Liquors, 44 Vt. 208; The State *v.* Burrows's Liquors, 37 Conn. 425; The State *v.* Vaughan, 1 Bay, 282; The State *v.* Symonds, 57 Maine, 148; Luther *v.* Fowler, 1 Grant, Pa. 176; Thompson *v.* Carr, 5 N. H. 510. See Jackson *v.* Babcock, 16 N. Y. 246; Reynolds *v.* Schultz, 4 Rob. N. Y. 282; Wilkinson *v.* Cook, 44 Missis. 867.

[3] McLane *v.* United States, 6 Pet. 404; Amory *v.* McGregor, 15 Johns. 24; United States *v.* One thousand nine hundred and sixty Bags of Coffee, 8 Cranch, 398; United States *v.* Brigantine Mars, 8 Cranch, 417; Reg. *v.* Whitehead, 9 Car. & P. 429; Ash *v.* Ashton, 3 Watts & S. 510; Doyle *v.* Baltimore, 12 Gill & J. 484.

[4] Fire Department *v.* Kip, 10 Wend. 266; The Thomas Gibbons, 8 Cranch, 421; The Mars, 1 Gallis. 192; The Caledonian, 4 Wheat. 100; Rex *v.* Van Muyen, Russ. & Ry. 118; Parker *v.* United States, 2 Wash. C. C. 361; Hobson *v.* Perry, 1 Hill, S. C. 277; United States *v.* Grundy, 3 Cranch, 337; Hodgson *v.* Millward, 3 Grant, Pa. 406; Hunter *v.* Routlege, 6 Jones, N. C. 216; United States *v.* Brig Neurea, 19 How. U. S. 92; United States *v.* Rectified Spirits, 8 Blatch. 480.

[5] Bukley *v.* Orms, Brayt. 124; The Mars, 1 Gallis. 192; Clark *v.* Protection Insurance Company, 1 Story, 109; The Ploughboy, 1 Gallis. 41; United States *v.* Stevenson, 3 Ben. 119; United States *v.* Barrels of Whiskey, 1 Abb. U. S. 93; Dean *v.* Chapin, 22 Mich. 275. In Henderson's Distilled Spirits, 14 Wal. 44, a case in which the claimant was an inno-

§ 823. **Further of the Principle.** — In these cases of forfeiture, the property is supposed so to act, through its possessor, as, losing its resting-place on the law, to fall. Now, —

Intent — Attempt to alien — Erecting Nuisance. — A mere intent in a man's mind cannot be deemed an act of his property. Therefore neither an intent,[1] nor ordinarily an attempt,[2] will work a forfeiture. For which reason, among others, a condition in a devise that it shall be void if the devisee *attempts to aliene* the estate is a nullity;[3] and, "if one see his neighbor erecting a thing which will be a nuisance, he cannot abate it till it become an actual nuisance."[4] Yet this principle should be received cautiously, and as illumined by doctrines about to be stated.

§ 824. **Forfeiture as Punishment.** — In another chapter we shall see,[5] that forfeiture is sometimes a punishment for crime. It is then, as already observed, a different thing from the forfeiture discussed in this chapter.[6] It may fall as well upon a criminal attempt as a substantive offence. But —

Non-concurrence of Intent. — Even the forfeitures of this chapter are, in some circumstances, not in others, arrested if

cent purchaser, the doctrine was laid down, that, where the statute makes a forfeiture absolute, the decree of condemnation relates back to the time when the wrongful act was committed, and takes effect then. Applying this rule to the particular case, Clifford, J., said: "Henderson, the claimant, purchased the spirits while they were in the bonded warehouse and after they had been deposited therein by the owner of the distillery where the spirits were manufactured, and having made the purchase without notice that any fraud had been practised by the distiller, and having paid the tax before the spirits were removed from the bonded warehouse, it is insisted by his counsel, in every possible form of argument, that his title is perfect and that the spirits are not liable to forfeiture. But the decisive answer to all that is the one already given, that the ferfeiture relates back to the unlawful or wrongful acts of the antecedent owner, and that he cannot by any subsequent transfer of the property defeat the title of the United States, as settled by a series of decisions which, if traced to their source, have their origin in the early history of the common law." p. 61. Yet, for the statute to have this effect, as against purchasers in good faith, the intention of its makers must be plain, that the forfeiture shall be absolute and instantaneous on the commission of the offence. United States *v.* Barrels of Spirits, 1 Dillon, 49, 2 Abb. U. S. 305. And if, for example, the government has by the statute an election to proceed against either the goods or the person, the rights of one who innocently purchases them before the election is made, will be respected. United States *v.* The Reindeer, 2 Cliff. 57, 68.

[1] Case of Le Tigre, 3 Wash. C. C. 567, 572.

[2] McQueen Hus. & Wife, 271.

[3] Pierce *v.* Win, 1 Vent. 321; Foy *v.* Hynde, Cro. Jac. 697. And see Mildmay's Case, 6 Co., 40, 42 *b*; Stephens *v.* James, 4 Sim. 499.

[4] Rex *v.* Wharton, 12 Mod. 510, by Holt, C. J.

[5] Post, § 944.

[6] Ante, § 820.

the owner's intent did not concur with the property's act. Thus, —

Overwhelming Necessity — Mistake — Owner's Agent — (Revenue Laws, &c.). — The violation of revenue laws (not of the criminal department, being merely for the collection of duties[1]) is excused, and the forfeiture avoided, by overwhelming necessity,[2] and by accident and mistake;[3] and the same doctrine is applied to the breach of embargo acts,[4] and to many other things.[5] But in these cases it is of no avail to the owner of the property, that he is free from blame, unless those to whom he had voluntarily intrusted it are so likewise.[6]

§ 825. **Owner's Motive generally Immaterial.** — In these cases, however, the motive of the owner, or whether he committed a crime or not, is generally unimportant. If the forfeiture is purely of the sort treated of in this chapter, it falls whenever the property is found within the required circumstances, be the owner's motives or purposes what they may.[7] But still, the practitioner should remember, if the forfeiture is created by a statute, the statutory terms must not be disregarded, and they may be such as to produce a result quite different from what is thus indicated.[8] To illustrate, —

§ 826. **Owner and Master — (Piratical Aggressions).** — When the master of a vessel undertakes piratical aggressions upon the high seas, contrary to the act of Congress, the owner of the vessel forfeits it, though himself innocent in the transaction.[9] So —

[1] Stat. Crimes, § 195.

[2] Stratton *v.* Hague, 4 Call, 564; The Gertrude, 3 Story, 68; ante, § 351.

[3] United States *v.* Nine Packages of Linen, 1 Paine, 129; Fairclough *v.* Gatewood, 4 Call, 158; United States *v.* Fourteen Packages, Gilpin, 235, 244. But see United States *v.* Package of Lace, Gilpin, 338, 342.

[4] Brig James Wells *v.* United States, 7 Cranch, 22; The New York, 3 Wheat. 59; The William Gray, 1 Paine, 16; United States *v.* Brig James Wells, 3 Day, 296; United States *v.* Guillem, 11 How. U. S. 47.

[5] The Marianna Flora, 11 Wheat. 1; Peisch *v.* Ware, 4 Cranch, 347; Martin *v.* Commonwealth, 1 Mass. 347. And see Sturgess *v.* Maitland, Anthon, 153; The Palmyra, 12 Wheat. 1.

[6] Phile *v.* The Anna, 1 Dall. 197; The Bello Corrunes, 6 Wheat. 152. But see The State *v.* Intoxicating Liquors, 63 Maine, 121. And see The Porpoise, 2 Curt. C. C. 307.

[7] And see The Palmyra, 12 Wheat. 1, and particularly the observations of Story, J., p. 14, 15.

[8] And see Commonwealth *v.* Intoxicating Liquors, 115 Mass. 142; United States *v.* Cook, 1 Sprague, 213; The State *v.* Burrows's Liquors, 37 Conn. 425; Attorney-General *v.* Municipal Court, 103 Mass. 456; The State *v.* Rum, 51 N. H. 373; United States *v.* Barrels of Whiskey, 1 Bond, 587; United States *v.* The Queen, 4 Ben. 237; United States *v.* Distilled Spirits, 10 Blatch. 428.

[9] United States *v.* The Malek Adhel, 2 How. U. S. 210. In this case, Story,

Neutral's Interest. — A neutral's share in a belligerent ship is subject to condemnation.[1] Likewise —

Embargo Laws. — If a vessel violates an embargo act, without the owner's concurrence, she is forfeited, the same as if he concurred; for she excavates from beneath her the place of rest on the law, equally whether she acts through her master and crew, or through her owner.[2]

§ 827. **Deodands.** — Another illustration may be drawn from the common-law doctrine of *deodands*, — a branch of the English system not generally, if at all, received in this country.[3] A deodand, in the English law, is any thing — as a cart, a horse, a wheel, or other like object — which occasions the death of a human being; and all the owner's property in "the unhappy instrument," as Hawkins terms it, is "forfeited to the king, in order to be disposed of in pious uses by the king's almoner."[4] Now, the law leaves it quite immaterial whether the death were accidental or intended; or whether the person whose property is forfeited participated in the act or not.[5]

§ 828. **Abatable Nuisances.** — One further illustration is in the

J., delivering the opinion of the Supreme Court of the United States, said: "It was fully admitted in the court below, that the owners of the brig and cargo never contemplated or authorized the acts complained of; that the brig was bound on an innocent commercial voyage from New York to Guayamas, in California; and that the equipments on board were the usual equipments for such a voyage. . . . The act [of Congress] makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs."

[1] The Primus, 29 Eng. L. & Eq. 589.

[2] United States *v.* Little Charles, 1 Brock. 347, 354.

[3] See post, § 968 and note, 970.

[4] 1 Hawk. P. C. Curw. ed. p. 74, § 3, 6.

[5] Ib.; 3 Inst. 57; Foster, 287, 288; 1 Hale P. C. 419 et seq. And see Hampstead's Case, 1 Salk. 220; Rex *v.* Brown, T. Raym. 208; Chandois's Case, Cro. Jac. 483; Reg. *v.* Wheeler, 6 Mod. 187 Anonymous, T. Raym. 97.

law of abatable nuisances. Whenever a subject of property comes, whether through the fault of its owner or not, into a situation to be a nuisance, it is not strictly forfeited; but the nuisance may be abated, to the destruction, if necessary, of the property.[1] If the nuisance is a private one, persons whose interests are prejudiced by it may, without resorting to legal proceedings, go upon the ground and abate it;[2] if a public, it may be abated by any individual of the public, that is, by anybody.[3] Yet, as we have seen,[4] it must be in actual existence, not merely prospective. So the person abating must do no needless damage:[5] as, if a house is used for purposes publicly injurious, he may pull it down, when the injury cannot otherwise be arrested;[6] but, when it can, he must not proceed so far. He is not authorized, for example, to destroy a building occupied as a house of ill-fame.[7] In other words, he may simply abate the nuisance, no more.[8]

§ 829. **Continued — (Crime or not).** — In the case of the private nuisance, no crime is committed; in that of the public one, there is a crime or not, according as the intent of the producer of it concurs criminally therein or not. Thus, —

In Way — River. — An indictment ordinarily lies against one who obstructs a public way;[9] but, if by misfortune or accident the owner of a vessel sinks it in a navigable river, he is not indictable;[10] though the nuisance may, like any other obstruction of a public way, be abated.[11] Yet even where a nuisance is cre-

[1] Ante, § 821.

[2] Gates *v.* Blincoe, 2 Dana, 158; Moffett *v.* Brewer, 1 Greene, Iowa, 348; Lancaster Turnpike *v.* Rogers, 2 Barr, 114; Great Falls Co. *v.* Worster, 15 N. H. 412; Rex *v.* Rosewell, 2 Salk. 459.

[3] Renwick *v.* Morris, 7 Hill, N. Y. 575; Arundel *v.* McCulloch, 10 Mass. 70; Wetmore *v.* Tracy, 14 Wend. 250; Hall's Case, 1 Mod. 76; Low *v.* Knowlton, 26 Maine, 128; Manhattan Manuf. &c. Co. *v.* Van Keuren, 8 C. E. Green, 255; Reg. *v.* Mathias, 2 Fost. & F. 570; Reg. *v.* Patton, 13 L. Canada, 811; Adams *v.* Beach, 6 Hill, N. Y. 271; ante, § 490. There are some late American cases in which the proposition is in part or wholly denied. See, and for further discussions, post, § 1080, 1081, and notes.

[4] Ante, § 823.

[5] Arundel *v.* McCulloch, 10 Mass. 70; The State *v.* Moffett, 1 Greene, Iowa, 247; Moffett *v.* Brewer, 1 Greene, Iowa, 348; James *v.* Hayward, W. Jones, 221, 223; Reg. *v.* Mathias, supra.

[6] Meeker *v.* Van Rensselaer, 15 Wend. 397.

[7] Ely *v.* Niagara, 36 N. Y. 297. And see Miller *v.* Burch, 32 Texas, 208.

[8] Welch *v.* Stowell, 2 Doug. Mich. 332; Barclay *v.* Commonwealth, 1 Casey, 503.

[9] The State *v.* Knotts, 2 Speers, 692; Freeman *v.* The State, 6 Port. 372; Kelley *v.* Commonwealth, 11 S. & R. 345.

[10] Rex *v.* Watts, 2 Esp. 675; Cummins *v.* Spruance, 4 Harring. Del. 315.

[11] Dimmett *v.* Eskridge, 6 Munf. 308; Hopkins *v.* Crombie, 4 N. H. 520; Rung *v.* Shoneberger, 2 Watts, 28.

ated by the commission of a crime, its abatement without judicial proceedings is not punishment, which can follow only the conviction of the offender. On such conviction, the court usually perhaps,[1] not always,[2] orders the abatement of the nuisance; yet even this is not properly a part of the punishment. Again, —

Pardon. — A pardon of the offence, whereby all punishment is taken away, does not free the nuisance from being abated.[3]

§ 830. **Other Forfeitures.** — Many other illustrations of the foregoing doctrines might be given, but these will suffice.[4]

§ 831. **Legislative Forfeitures — (Constitutional).** — The creation of forfeitures unknown to the common law is a legitimate exercise of the legislative power; but this, like any other, may be restrained by the constitution of the State. The State constitutions differ, the adjudications on the subject are not numerous, and we should traverse a wide field and gather little fruit, if we were to carry our investigations far in this direction. In general, our constitutions have few, if any, direct restrictions under this head; such as exist, if any, resulting from provisions introduced with a primary regard to other objects.[5] Thus there are, in most of the constitutions, guaranties for the protection of persons charged with crime; but the reader has observed, that the forfeitures of this chapter are not, even where a crime is committed, a part of the punishment.

§ 832. **Hogs at Large — (By-laws — Constitutional).** — The general powers of a municipal corporation to make by-laws do not extend to the creation of forfeitures.[6] Still a charter may be in

[1] Anonymous, Comb. 10.

[2] Rex *v.* Incledon, 13 East, 164; Rex *v.* West Riding of Yorkshire, 7 T. R. 467; The State *v.* Haines, 30 Maine, 65; Rex *v.* Pappineau, 1 Stra. 686; The State *v.* Noyes, 10 Fost. N. H. 279.

[3] Rex *v.* Wilcox, 2 Salk. 458. And see Case of Pardons, 12 Co. 29.

[4] The reader who is curious to follow this subject further into detail may profitably consult the cases below; namely, — Barnicoat *v.* Six Quarter Casks of Gunpowder, Thacher Crim. Cas. 596; Trueman *v.* Casks of Gunpowder, Thacher Crim. Cas. 14; American Print Works *v.* Lawrence, 3 Zab. 9; Hale *v.* Lawrence, 3 Zab. 590; Smith *v.* Maryland, 18 How. U. S. 71; Griffin *v.* Potter, 14 Wend. 209; Stump *v.* Findlay, 2 Rawle, 168; Harrisburg Bank *v.* Commonwealth, 2 Casey, 451; French *v.* Rollins, 21 Maine, 372.

[5] The reader may consult Hickman *v.* Littlepage, 2 Dana, 344; Violett *v.* Violett, 2 Dana, 323; Shepherd *v.* McIntire, 5 Dana, 574; Cooper *v.* Telfair, 4 Dall. 14; Atherton *v.* Johnson, 2 N. H. 31; The Apollon, 9 Wheat. 362; Commonwealth *v.* Dana, 2 Met. 329; The State *v.* Allen, 2 McCord, 55; Wooldridge *v.* Lucas, 7 B. Monr. 49; The Palmyra, 12 Wheat. 1; Boles *v.* Lynde, 1 Root, 195; Whitfield *v.* Longest, 6 Ire. 268; Miller *v.* The State, 3 Ohio State, 475.

[6] Stat. Crimes, § 22.

such express terms as to carry the power. But, with no such terms in the charter, an ordinance of the city of Vicksburg directed the city marshal to seize and sell all hogs found running at large in the city, and to pay over half the proceeds to the use of the city hospital, and to retain the other half for his services. And, in accordance with universal doctrine, this ordinance was held to be void. But the court, by Handy, J., added: "If such a power had been expressly conferred by the act of the legislature incorporating the city, it would have been obnoxious to the provisions of the constitution, and void; and much less can it be justified under any general powers conferred upon the corporation by their charter." The ordinance was deemed to be in violation of the provision which declares, that no person "can be deprived of his life, liberty, or property, but by due course of law," and of the provision that "the right of trial by jury shall remain inviolate."[1] Now, this, which is thus laid down *obiter*, is, it is believed, not in accordance with the general and better doctrine. It is competent, on general principles, for the law-making power to declare what shall be a public nuisance, and to provide for the forfeiture of the thing which shall become such. The forfeiture may be as well without judicial proceedings as with, and the case is entirely outside such constitutional provisions as those referred to by the learned judges.[2] Thus, —

Dogs at Large — (Hogs, again). — Under a statute duly framed for the purpose, a person who finds a dog at large on his premises, without its owner or keeper, may rightfully kill it, no matter what temptation enticed it from home;[3] and a doctrine like this, contrary to the Mississippi doctrine, appears to be held elsewhere regarding hogs at large.[4]

§ 833. **These Forfeitures and those for Crime further distinguished.** — Our differing statutes, the differing views of judges, and the diverse provisions of the constitutions of our States create complications rendering it impossible to distinguish, by any single rule, the circumstances and statutory words under which a for-

[1] Donovan *v.* Vicksburg, 29 Missis. 247, 250.

[2] **Yet, Stray Animals.** — Something like this Mississippi doctrine is held in New York on the subject of Estrays. Campbell *v.* Evans, 45 N. Y. 356, 54 Barb. 566; Squares *v.* Campbell, 41 How. Pr. 193. As to Pennsylvania, see Patterson *v.* McVay, 7 Watts, 482; Henry *v.* Richardson, 7 Watts, 557.

[3] Bradford *v.* McKibben, 4 Bush, 545; Blair *v.* Forehand, 100 Mass. 136. And see Brown *v.* Hoburger, 52 Barb. 15; post, § 1080 and note.

[4] Gosselink *v.* Campbell, 4 Iowa, 296; McKee *v.* McKee, 8 B. Monr. 433.

feiture should be deemed a punishment for crime,[1] from those in which it should not. But the reader will ordinarily not find it difficult to apply the foregoing principles to new cases as they arise. There have been some nice questions under —

Modern Liquor Laws. — In Massachusetts, a statute which directed the forfeiture of intoxicating liquors kept with the intent to sell them contrary to its provisions was adjudged void, because the proceedings it established to enforce the forfeiture were obnoxious to constitutional guaranties for the protection of persons accused of crime.[2] Under a Connecticut statute, the proceeding to enforce a forfeiture of liquor is held to be purely *in rem*, and to charge no personal offence against the owner or keeper.[3] It is plain, therefore, that the forfeiture of liquor, provided for by a statute, is a punishment or not according to the nature and terms of the provision.

§ 834. **General Views.** — In the Massachusetts case, the forfeiture of the property was by the statute itself made to depend upon an intent in the mind of its owner; that is, it was to be forfeited when kept for sale contrary to law. And, disguise the real fact as we may, under whatever form of words, if the intent (located in the owner's breast, not attached to the thing to be forfeited) is the pivot on which the forfeiture turns, then the question is one of criminal law, and the forfeiture is a penalty for crime, instead of being the kind of forfeiture discussed in this chapter. If the statute had provided for the destruction or other forfeiture of the liquor on its being in particular circumstances, or in a particular locality, or in approximation to some particular thing, the question would have been different. And perhaps the distinction thus indicated may show us when a forfeiture ordained in a statute is of the one kind and when of the other kind. Yet, if the intent of the person possessing the thing to be forfeited is a mere secondary element, its introduction into the case will not alone make the forfeiture a penalty for crime. But this entire question is a nice one, on principle, and little illumined by authority.

[1] Ante, § 820, 824.

[2] Fisher *v.* McGirr, 1 Gray, 1, 22, 26, 27, 36, 37. On the general subject of statutes similar to that of Massachusetts, see The State *v.* Gurney, 33 Maine, 527; Barnett *v.* The State, 36 Maine, 198; The State *v.* Gurney, 37 Maine, 156; Darst *v.* People, 51 Ill. 286; The State *v.* Rum, 51 N. H. 373; Commonwealth *v.* Intoxicating Liquors, 115 Mass. 142.

[3] The State *v.* Burrows's Liquors, 37 Conn. 425.

§ 835. **Continued.** — The views thus suggested by the Massachusetts case were not considered by the court. And, looking at the question purely in the light of principle, we have the following: Whenever the law, statutory or common, creates a forfeiture of property by reason of particular circumstances attending it, or of its being dangerous to the community, or of any form or position which it assumes, — this forfeiture is not to be deemed a punishment inflicted on its owner in the criminal-law sense. It is not, therefore, within constitutional guaranties protecting persons accused of crime. Thence it follows, that, if the law, in its clemency, permits the owner still to retain his property and avoid the forfeiture on showing himself innocent of any wrong in the transaction, there is no more a punishment than before. But if the provision is, that a person shall forfeit property A for what property B does, or for what the owner does in a matter not connected with the property, or for a bare intent which does not enter into the situation and conduct of the property, the forfeiture is a punishment which can be inflicted only on conviction of the owner, for his act or intent, viewed as a crime.[1] Difficulties will arise in applying these principles, but the principles themselves seem to be fundamental in our jurisprudence.

[1] In United States *v.* Three Tons of Coal, 6 Bis. 379, Dyer, J., after approving of this passage, adds: "The true test, I think, lies here. When the judgment of forfeiture necessarily carries with it and as part of it a conviction and judgment against the person for the crime, the case is of criminal character. But when the forfeiture does not necessarily involve personal conviction and judgment for the offence, and such conviction and judgment must be obtained, if at all, in another and independent proceeding, there the remedy by way of forfeiture is of civil and not criminal nature." p. 391-393. In this case it was held, that a proceeding against a distillery for forfeiture under the revenue laws is not criminal within the Constitution of the United States. I presume the learned judge does not mean, that the case is civil whenever there is no *separate* judgment for a *penalty in addition to the forfeiture*; for that would contradict the proposition he had approved. A specific forfeiture may be a punishment, and the only punishment, for a particular offence. Ante, § 820, 824; post, § 944. But the idea appears to be, that it is civil or criminal according as the forfeiture is in the nature of punishment for a personal crime or not. And see Distilled Spirits, 2 Ben. 486; United States *v.* Barrels of Distilled Oil, 6 Blatch. 174; United States *v.* Distillery, 11 Blatch. 255; United States *v.* The Queen, 11 Blatch. 416; Commonwealth *v.* Intoxicating Liquors, 107 Mass. 396.

CHAPTER LVI.

DEFENCE OF PERSON AND PROPERTY.[1]

§ 836. **Purpose and Scope of this Chapter.** — The law of self-defence, and of the defence by private persons of one another and of their property, comes into frequent discussion in criminal cases. Especially in the title Homicide, it, of itself, constitutes a considerable head. But it is not limited to cases of homicide, therefore it is better discussed by itself.

§ 837. **How the Chapter divided.** — We shall consider, I. Some General Views; II. Distinction between Perfect and Imperfect Defence; III. The Perfect Defence; IV. The Imperfect Defence; V. Summary showing the Right to defend one's Person; VI. Summary showing the Right to defend one's Property; VII. The Right to assist others in Defence of Person and Property.

I. *Some General Views.*

§ 838. **Subject Difficult, and why.** — The question of the rights of private persons to defend themselves, their property, and one another against aggressors, appears obscure in the books; because, though it has often been before the courts and legal authors, they have failed to draw certain distinctions of the utmost importance. Let us, while discussing the general subject,

[1] There is a volume of "Select American Cases on Self Defence," by Horrigan & Thompson, embodying many notes. I recommend its consultation in connection with this chapter.

look for these also; and, in doing this, descend more into detail, and divide, as already proposed, the matter into minuter parts, than those who have gone before have done.

§ 839. **Preliminary Considerations.** — It is plain, in natural reason, that one may carry the defence of himself further than that of his property; because personal rights rank higher than those of property. It is plain, also, that, when the defence of one's person or property involves the taking of life, the right to make it may not, in all cases, be perfect. The law may, and, in natural reason, should, in various circumstances, forbid the individual to protect even his undoubted rights in so extreme a way, when the courts are ready to give him redress. And even where the defence may be effectual without the taking of life, still it may be such a disturbance of the peace that the law will forbid it, except under judicial mandate. Other distinctions, founded on natural reason, will occur to the reader; and it is important he should bear all in mind while we proceed with the discussion.

II. *Distinction between Perfect and Imperfect Defence.*

§ 840. **What the Distinction.** — There are two kinds of permissible defence of person or property. The one extends, when necessary, to the taking of the aggressor's life; and this we shall call the perfect defence. The other does not permit him who employs it to go so far; but he may resist trespasses on his person or property to an extent not exactly the same in all circumstances, yet not involving the life of the trespasser; and this we shall call the imperfect defence.

§ 841. **Reason for the Distinction.** — The reason for the distinction appears, in a good measure, already.[1] There are circumstances in which, if men were to make no resistance, a wrong would be done beyond the power of the law to redress. Then, if this wrong is of a certain standard magnitude, it ought to be, and it is, lawful for him who is threatened with it to resist to all lengths, without measuring consequences. But, where the menaced injury is slight, especially if of a sort which a proceeding in court can correct, the defence by the individual should not be carried so far, though still he may make some defence.

[1] Ante, § 839.

III. *The Perfect Defence.*

§ 842. **Limited by Necessity.** — The right to defend one's person or property proceeds from necessity. And, however complete this right may be, or however far the law permits it to be carried, it stops where necessity ends. The party making the defence may use no instrument and no power beyond what will simply prove effectual.[1] Thus, —

§ 843. **Shooting Person committing Felony.** — Though it is lawful for one to oppose another who is committing felony, even to the taking of his life,[2] yet, if there is no obstacle to his arrest, the shooting of him in the felonious act, instead of having him arrested, is a felonious homicide.[3] And, —

Needless Killing in Self-defence. — While it is lawful to kill a man in self-defence, still his mere assault with the fist will not justify the instant taking of his life by a stab; and to thus resort to a defence wholly unnecessary is murder.[4] It is not lawful to kill another who even meditates the taking of one's life, till some overt act is done in pursuance of the meditation; in other words, till the danger becomes immediate.[5] The steps necessary may be taken, and no more. Thus, again, —

§ 844. **Expecting Assault.** — A man who expects to be attacked

[1] I have not seen this doctrine laid down in words, but it embodies a principle on which many of the cases proceed; as, People *v.* Doe, 1 Mich. 451; People *v.* McLeod, 1 Hill, N. Y. 377; Carroll *v.* The State, 23 Ala. 28; Rex *v.* Thomas, 1 Russ. Crimes, 3d Eng. ed. 614; Grainger *v.* The State, 5 Yerg. 459; Shorter *v.* People, 2 Comst. 193; Dill *v.* The State, 25 Ala. 15; The State *v.* Wells, Coxe, 424; The State *v.* Smith, 3 Dev. & Bat. 117; Commonwealth *v.* Drew, 4 Mass. 391; Monroe *v.* The State, 5 Ga. 85; Oliver *v.* The State, 17 Ala. 587; Mitchell *v.* The State, 22 Ga. 211; Noles *v.* The State, 26 Ala. 31; People *v.* Barry, 31 Cal. 357; The State *v.* Burke, 30 Iowa, 331; Commonwealth *v.* Mann, 116 Mass. 58; Ruloff *v.* People, 45 N. Y. 213; The State *v.* Shippey, 10 Minn. 223; Bohannon *v.* Commonwealth, 8 Bush, 481; The State *v.* Benham, 23 Iowa, 154; Hinch *v.* The State, 25 Ga. 699; Burden *v.* People, 26 Mich. 162; Harrison *v.* Harrison, 43 Vt. 417.

[2] Post, § 849, 853–855, 867, 874.

[3] Rex *v.* Scully, 1 Car. & P. 319. See Halloway's Case, W. Jones, 198, Cro. Car. 131.

[4] Stewart *v.* The State, 1 Ohio State, 66, 71. And see The State *v.* Yarbrough, 1 Hawks, 78; The State *v.* Tackett, 1 Hawks, 210; Mooney *v.* The State, 33 Ala. 419; post, § 850. When one is assaulted, it depends on the nature and violence of the assault whether it may be lawfully repelled by stabbing the assailant, Floyd *v.* The State, 36 Ga. 91; The State *v.* Neeley, 20 Iowa, 108; The State *v.* Kennedy, 20 Iowa, 569.

[5] Dyson *v.* The State, 26 Missis. 362; 2 East P. C. 272; The State *v.* O'Connor, 31 Misso. 389; Lander *v.* The State, 12 Texas, 462; Hinton *v.* The State, 24 Texas, 454; People *v.* Scoggins, 37 Cal. 676; post, § 872.

should first employ the means in his power to avert the necessity of self-defence; and, until he has done this, his right of self-defence does not arise.[1] Nor can a person avail himself of a necessity which he has knowingly and wilfully brought upon himself.[2] Yet one assaulted by another who has threatened to kill him is not bound to run in the particular instance, thus increasing his danger by encouraging the assailant to repeat the attempt when he will be less prepared to resist.[3]

§ 845. **Preferring one's own Life to Another's.** — The cases in which a man is clearly justified in taking another's life to save his own are where the other has voluntarily placed himself in the wrong. And probably, as we have seen,[4] it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it would seem, circumstances in which one is bound even to die for another. What are these circumstances is a question which cannot often arise in a judicial tribunal; but —

Mariner and Passenger. — The opinion has been expressed, that a mariner at sea should sacrifice himself to a passenger, when his services are not specially needed for the preservation of life. "He is bound," said the court, "to set a greater value on the life of others than on his own; and, while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think, that, if the passenger is on the plank, even the law of necessity justifies not the sailor who takes it from him."[5]

§ 846. **Duty to avoid taking Life.** — This doctrine, that one is not to destroy the life of an innocent person to save his own, is mentioned here to distinguish it from the rules pertaining to self-defence. From it, and from what is said in preceding paragraphs, may be deduced the further proposition, that every man is under

[1] People *v.* Sullivan, 3 Seld. 396; The State *v.* Martin, 30 Wis. 216; Edwards *v.* The State, 47 Missis. 581; Gonzales *v.* The State, 31 Texas, 495; The State *v.* Shippey, 10 Minn. 223; Atkins *v.* The State, 16 Ark. 568. But there are circumstances in which this is not so. Bohannon *v.* Commonwealth, 8 Bush, 481.

[2] The State *v.* Neeley, 20 Iowa, 108; Adams *v.* People, 47 Ill. 376; The State *v.* Bryson, Winston, No. 2, 86; The State *v.* Starr, 38 Misso. 270.

[3] Philips *v.* Commonwealth, 2 Duvall, 328; Bohannon *v.* Commonwealth, supra. And see Tweedy *v.* The State, 5 Iowa, 433; post, § 851.

[4] Ante, § 348 and the authorities there referred to; 4 Bl. Com. 186.

[5] Baldwin, J., in United States *v.* Holmes, 1 Wal. Jr. 1, 25, Whart. Hom. 287.

a duty to do all he safely can to avoid the taking of life, even though the precise letter of the adjudged cases seems to justify the taking. This proposition, though not distinctly announced in the cases, appears to have been in the minds of judges who have decided some of them.

§ 847. **Care in Self-defence — (Giving Way).** — And thus we are conducted to another proposition; namely, that a man who undertakes a defence of himself against an aggressor, instead of giving way, when by this means he can prevent a collision, does it at extreme peril. Not that he may not resist an attack, or that he must always endanger his own safety by playing the coward; but, if two paths are open for him, the one leading from a conflict and the other to it, and he chooses the latter, he must, to escape the penalties of the law, keep within its exact lines. Another preliminary consideration is —

§ 848. **How Old Authorities regarded — (Special Verdicts).** — In early times, special verdicts were commonly given in causes of homicide, not general ones as now; for, said Lord Hale, "the prisoner cannot plead any thing by way of justification, as that he did it in his own defence, or *per infortunium*, but must plead not guilty; and upon his trial the special matter is to be found by the jury, and thereupon the court gives judgment."[1] Consequently the judicial utterances on self-defence, found in the old books, are not to be regarded altogether as general legal doctrine; but rather as, in a degree, expressions of views proper to influence the minds of jurors contemplating such particular facts as are embodied in the special verdicts.[2]

§ 849. **Course of Discussion.** — With these general views in our minds, let us proceed more directly to consider, through the remainder of this sub-title, —

Under what circumstances the Perfect Defence — that is, the defence which may extend to the taking of the aggressor's life — is permissible: —

Life the Supreme Right. — The law holds the life of a man in the highest regard. And only in extreme instances of wrong-doing, and impelled by a supreme necessity, can another innocently take it away. Therefore, —

Resisting Crime — (Misdemeanor — Felony). — When, in general,

[1] 1 Hale P. C. 478.

[2] Vol. II. § 678.

a person is in the commission of any mischief whether civil or criminal, no other person opposing him, however lawfully, is entitled to proceed in such opposition to the taking of his life. But to this rule there are exceptions, of which the most prominent one relates to felony. Anciently the punishment of all felony was death;[1] from which reason, or from some other not appearing, it became established doctrine both in England and in our States, that one may oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon's existence.[2] Indeed, a man even commits an indictable misdemeanor who neglects to oppose a felony; or, it may be, stops in his opposition short of taking the felon's life, where that extreme measure is the only one which can be made effectual.[3] Again, —

Suppressing Riots and Affrays, &c. — It is the duty of officers, and, at least, the right of private persons, to suppress riots and affrays, together with some other misdemeanors of the like nature.[4] And when the disorder can be put down only by the taking of life, this may lawfully be done.[5]

Resisting Murderous Assault. — These views may be illustrated by the familiar doctrine, that one assaulted with murderous intent may, to avert the felonious result, take the aggressor's life;[6] and, though his justification rests also on the right of self-defence, it reposes equally on the authority with which the law invests every man to resist the commission of a felony.[7] But, —

§ 850. **Assault not Murderous.** — Where an assault is a simple one, not made with the intent to kill, or do other great bodily

[1] Ante, § 615, 616.

[2] Oliver *v.* The State, 17 Ala. 587; Monroe *v.* The State, 5 Ga. 85; Moore *v.* Hussey, Hob. 93; Semayne's Case, 5 Co. 91; The State *v.* Harris, 1 Jones, N. C. 190; Cooper's Case, Cro. Car. 544; United States *v.* Wiltberger, 3 Wash. C. C. 515; The State *v.* Rutherford, 1 Hawks, 457; The State *v.* Roane, 2 Dev. 58; Dill *v.* The State, 25 Ala. 15; 1 Hale P. C. 481, 547; McPherson *v.* The State, 22 Ga. 478; Noles *v.* The State, 26 Ala. 31; Mitchell *v.* The State, 22 Ga. 211; Staten *v.* The State, 30 Missis. 619; Keener *v.* The State, 18 Ga. 194; McClelland *v.* Kay, 14 B. Monr. 103; Rapp *v.* Commonwealth, 14 B. Monr. 614; People *v.* Payne, 8 Cal. 341; The State *v.* Brandon, 8 Jones, N. C. 463; ante, § 843; post, § 858–855, 867, 874; Vol. II. § 648–656, 706.

[3] Ante, § 717, 719; Crim. Proced. I. § 164, 165.

[4] Crim. Proced. I. § 166, 167, 169–171, 183.

[5] Vol. II. § 655. And see Patten *v.* People, 18 Mich. 314.

[6] The State *v.* Harris, 1 Jones, N. C. 190; 3 Inst. 55, 56; ante, § 842.

[7] See Noles *v.* The State, 26 Ala. 31; Staten *v.* The State, 30 Missis. 619; Aaron *v.* The State, 31 Ga. 167.

harm, and the person assailed is not deceived as to its character, — in other words, where the intent of the assailant is not to commit a felony but a misdemeanor,[1] — the right of what we call perfect defence does not exist. The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him;[2] while yet he may repel force by force, and, within limits differing with the facts of cases, give back blow for blow.[3]

Retreating "to the Wall." — These cases of mere assault, and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books,[4] that one cannot justify the killing of another, though apparently in self-defence, unless he retreated "to the wall," or other interposing obstacle, before resorting to this extreme right. But, —

Not necessary where Murder meant — Or Deadly Weapon. — Where an attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground, and, if need be, kill his adversary.[5] And it is the same where the attack is with a deadly weapon;[6] for, in this case, the person

[1] This proposition is practically accurate when viewed in connection with the doctrine that the person assailed is justified in acting from *appearances*. Ante, § 305 and note. But the reader should compare all the doctrines of the chapter with one another. There are many circumstances in which the full defence is permissible, while yet the assailant could not be convicted of assault with intent to commit a felony.

[2] People *v.* Harper, 1 Edm. Sel. Cas. 180; Stoffer *v.* The State, 15 Ohio State, 47; Commonwealth *v.* Drum, 8 Smith, Pa. 9; United States *v.* Wiltberger, 3 Wash. C. C. 515; Reg. *v.* Bull, 9 Car. & P. 22; Reg. *v.* Hewlett, 1 Fost. & F. 91; Greschia *v.* People, 53 Ill. 295.

[3] Vol. II. § 41, 698, 699, 702; Commonwealth *v.* Bush, 112 Mass. 280; The State *v.* Conally, 3 Oregon, 69; Evans *v.* The State, 33 Ga. 4; Commonwealth *v.* Mann, 116 Mass. 58; The State *v.* Benham, 28 Iowa, 154; Harrison *v.* Harrison, 43 Vt. 417; The State *v.* Martin, 30 Wis. 216.

[4] 1 Hale P. C. 479–481; 4 Bl. Com. 185; 3 Inst. 55, 56; Shorter *v.* People, 2 Comst. 193; post, § 869–871. See Stewart *v.* The State, 1 Ohio State, 66, 71; Creek *v.* The State, 24 Ind. 151; Farrow *v.* The State, 43 Ga. 30; Anonymous, J. Kel. 53.

[5] Foster, 273, where several observations occur, worthy of consideration; 3 Inst. 56; 1 East P. C. 271; The State *v.* Mullen, 14 La. An. 570; Pfomer *v.* People, 4 Parker C. C. 558; Aaron *v.* The State, 31 Ga. 167; Commonwealth *v.* Carey, 2 Brews. 404; Lingo *v.* The State, 29 Ga. 470. In a California case, "on the trial of the case," said Cope, J., "it was shown that the deceased had threatened to take the life of the defendant, and that these threats were communicated to the latter previous to the killing. It did not appear that the threats were followed by any overt act; and, under the circumstances, the mere apprehension of danger was insufficient to justify the homicide." People *v.* Lombard, 17 Cal. 316, 320. See ante, § 843.

[6] The State *v.* Thompson, 9 Iowa, 188, 192; Tweedy *v.* The State, 5 Iowa, 433. And see The State *v.* Potter, 13 Kan. 414; Kingen *v.* The State, 45 Ind. 518.

attacked may well assume that the other intends murder, whether he does in fact or not.

§ 851. **Deductions from foregoing Distinctions.** — The foregoing distinctions show how the pure right of self-defence complicates itself with other rights and duties. And, in looking into a particular case, we must bear all in our minds. Thus, —

Law of Misprision. — When a felony is attempted, the duty comes immediately to him who witnesses the attempt, to resist it; insomuch that, as we have seen,[1] if he merely declines this duty, he is guilty of an indictable misdemeanor, called misprision of felony. Now, if the person whom another attacks with intent to murder him flies, instead of resisting, he commits substantially this offence of misprision of felony; even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life. While, on the other hand, if he flies from one meaning merely to inflict a battery, he is in no way amenable either to the letter or spirit of a broken law. And —

§ 852. **Rights to the Two Defences, again — (Duty permissive).** — We see here what appears to be the principal distinction between the rights of perfect and imperfect defence. The perfect defence may be made whenever there is a duty to resist the aggressor; the imperfect is permissible, in one degree or another, when there is no duty to defend, yet the law permits it, if one pleases. And we shall by and by more fully see,[2] that, in the latter, there is a great difference in cases; which we may liken to ascending steps, laid all the way from the lowest point of privilege to remove forcibly a force employed against one's rights, up, by regular gradation, to the very edge of the perfect defence of which we are now treating.

§ 853. **Further of taking Life to prevent Felony.** — The books have some distinctions as to the right to take life to prevent a felony.[3] Thus, —

Felony by Force or not. — There are passages in which it seems to be implied, that this right does not exist where the felony is not of a nature to be committed by force.[4] Now, the cases which

[1] Ante, § 716 et seq., 849.

[2] Post, § 860 et seq.

[3] Ante, § 849, 850.

[4] 4 Bl. Com. 180; Monroe *v.* The State, 5 Ga. 85; Aaron *v.* The State, 31 Ga. 167. In a Connecticut case it was observed: "The class of crimes in prevention of which a man may, if necessa-

have arisen are of felony by force; because in others there is either no opportunity to interfere, or no necessity for a forcible interference. But, on principle, there can be no such distinction in the law itself, and probably none is found in actual adjudication.[1] Mr. East, however, states the doctrine in a way seldom or never practically misleading, thus: "A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends or endeavors, *by violence or surprise*, to commit a known felony; such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kill him in so doing, it is called justifiable self-defence."[2] Still this statement is objectionable as containing an unhappy mingling of doctrines; while, yet, the facts of actual life will seldom or never show a case in which the felony can be prevented only by killing the felon,[3] unless he was attempting or employing actual force, or his movements were awakening surprise in the person present to resist.

§ 854. **Spring-guns — (Further of Killing to prevent Crime).** —

ry, exercise his natural right to repel force by force to the taking of the life of the aggressor, are *felonies* which are committed by *violence and surprise*; such as murder, robbery, burglary, arson, breaking a house in the daytime *with intent to rob*, sodomy, and rape. Blackstone says: 'Such homicide as is committed for the *prevention* of any forcible and atrocious crime is justifiable by the law of nature; and also by the law of England, as it stood as early as the time of Bracton;' and he specifies, as of that character, those which we have enumerated. No others were specified by Hale or Hawkins, who wrote before him on the Pleas of the Crown, or have been specified by any writer since." The judge, therefore, goes on to say, that, according to the rules of the common law, a man cannot take life in order to prevent a larceny by one breaking and entering his shop; yet, as the Connecticut statute has made such a criminal act burglary, the life may be taken to prevent this burglary the same as burglary at the common law. (See Stat. Crimes, § 139). The State *v.* Moore, 31 Conn. 479. The reader who carefully examines the foregoing sections of my text will see what appear to me to be the *reasons* on which the old law on this subject rested. I am speaking of the inherent reasons of the law, in distinction from what may have been said about them by any particular author or judge. (See ante, § 274.) And I think the reasons thus given harmonize with the adjudications, and explain and enforce them, while excluding the supposed distinction between the different kinds of felony. It does not, however, follow, that the right to take life will extend to the prevention of every species of modern statutory felony, where the punishment is not death, but only imprisonment. In many cases of this sort the question may well be deemed open to doubt upon principle, as well as upon authority. See also post, § 855. And see Pond *v.* People, 8 Mich. 150.

[1] See the authorities cited ante, § 849.

[2] 1 East P. C. 271. And see the State *v.* Thompson, 9 Iowa, 188, 192.

[3] Ante, § 842.

In Kentucky, the court in a civil action held, that one having property in a warehouse well secured under locks may erect, as an additional protection at night, a spring-gun, made to explode on entering the house. Therefore, when a slave broke and entered it in the night, to steal, exploding the gun and wounding himself mortally, the warehouse owner was held not to be answerable to the owner of the slave for his value. And Nicholas, J., said: "It would seem, that the right of killing to prevent the perpetration of crime depends more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached to it by law, or upon the fact of its being designated in the penal code as a felony or not. A name can neither add to nor detract from the moral qualities of a crime; and, in the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means resorted to for its prevention."[1]

§ 855. **Continued.** — These observations (not speaking now of the question adjudged) leave out of view the central truth, that legal doctrine is shaped to promote certainty of judicial decision, as well as justice in the particular instances. And among the distinctions established to reconcile the demands of justice and certainty is the division of crime into felony and misdemeanor, with the differing consequences which flow from each.[2] As to the point decided, this case seems fairly within the general rule which permits one to interpose for the prevention of a felony. Yet, in Alabama, the right is limited to the defence of the habitation.[3] Where conceded, its practical carrying out may be dangerous, and it should be carefully guarded.[4]

[1] Gray *v.* Combs, 7 J. J. Mar. 478, 483. See McClelland *v.* Kay, 14 B. Monr. 103.

[2] Ante, § 609.

[3] Simpson *v.* The State, 59 Ala. 1.

[4] And see Bird *v.* Holbrook, 4 Bing. 628. **How in Connecticut.** — In Connecticut it is held, that spring-guns may be set to protect a shop against burglars; but, if they endanger persons travelling on the highway, the setting of them will be indictable as a nuisance. The State *v.* Moore, 31 Conn. 479; ante, § 853, note; post, § 856. **How in England, under Statute, &c.** — It was provided by 7 & 8 Geo. 4, c. 18, § 1 (now superseded by 24 & 25 Vict. c. 100, § 31, containing substantially the same provisions), that, "whereas it is expedient to prohibit the setting of spring-guns and man-traps, and other engines calculated to destroy human life, or inflict grievous bodily harm, &c., therefore, &c., if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily

§ 856. **Spring-guns as Nuisance.** — While the Connecticut court sustains the right thus to set spring-guns as a protection to person and property,[1] it holds that they may be so placed as to become an indictable public nuisance. They are such when located near a highway, if they render travelling thereon dangerous. But where, on a prosecution for nuisance, the jury, by a special verdict, found that the defendant put spring-guns in his shop for its protection against burglars; that they were loaded with large shot, and so placed as to discharge their contents obliquely toward the highway, the travelled path of which was about a rod and a half from the shop; that the shop was lathed and plastered on the inside, and double-boarded on the outside, but it was possible scattering shot might pass through the boards at places where by reason of cracks there was not a double thickness of boards; and that the travelling public were annoyed by apprehensions of harm from the guns; it was still held that such real and substantial danger did not appear as would warrant a conviction.[2]

§ 857. **In General, Perfect Defence of Property.** — The setting of spring-guns, and the taking of life by other means, when done in resistance of felony, operate indirectly as perfect defence of property within a limited range. But otherwise such defence of mere property is not permissible. The general doctrine is, that, while a man may use "all reasonable and necessary force, to defend his

harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor." And, where one entered another's garden at night, without permission, to search for a stray fowl, and, while looking into some bushes, came in contact with a wire which caused something to explode with a loud noise, knocking him down, and slightly injuring his face and eyes, it was held, that the other was not liable for this injury either at the common law, or, in the absence of evidence of its having been caused by a spring-gun or other engine "calculated to inflict grievous bodily harm," under the above statute. Wootton *v.* Dawkins, 2 C. B. N. S. 412. A dog-spear, set in the woods to protect game from dogs, is not within this statute; and, without it, one cannot recover for injury to his dog by a dog-spear, if, knowing of its existence, he walks through the wood, and the dog, attracted by game, runs upon it and is wounded. And the court intimated, that it would make no difference though the owner of the dog was ignorant of the existence of the dog-spear. Jordin *v.* Crump, 8 M. & W. 782. On the right to claim damages for injuries received by a man and his dog, from spring-guns and similar things, at the common law and by force of this statute, opinions not quite uniform have been expressed by different English judges. See the above case of Jordin *v.* Crump; also, Deane *v.* Clayton, 7 Taunt. 489; Ilott *v.* Wilkes, 3 B. & Ald. 304; and some others there referred to.

[1] Ante, § 855, note.

[2] The State *v.* Moore, 31 Conn. 479.

real or personal estate, of which he is in the actual possession, against another who comes to dispossess him without right,"[1] he cannot innocently carry this defence to the extent of killing the aggressor. If no other way is open, he must yield, and get himself righted by resort to the law.[2] But —

§ 858. **Defence of Castle.** — The general doctrine, as to the defence of property, is not applicable to the defence of what is termed the castle. In the early times, our forefathers were compelled to protect themselves in their habitations, by converting them into holds of defence; and so the dwelling-house was called a castle. And thence has grown up the familiar doctrine, that, while a man keeps the doors of his house closed, no other has the right to break in, under any circumstances; except in particular cases where it becomes lawful for the purpose of making an arrest of the occupant, or the like, — cases which it is not within our present line of discussion to consider. From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life.[3] As observed by Campbell, J., in a Michigan case,

[1] Ante, § 536.

[2] United States *v.* Wiltberger, 3 Wash. C. C. 515; Oliver *v.* The State, 17 Ala. 587; Commonwealth *v.* Green, 1 Ashm. 289, 297; Carroll *v.* The State, 23 Ala. 28; The State *v.* Morgan, 3 Ire. 186; McDaniel *v.* The State, 8 Sm. & M. 401; The State *v.* Zellers, 2 Halst. 220; Harrison *v.* The State, 24 Ala. 67; Commonwealth *v.* Drew, 4 Mass. 391; Monroe *v.* The State, 5 Ga. 85; Howell *v.* The State, 5 Ga. 48; Rex *v.* Ford, J. Kel. 51; The State *v.* Smith, 3 Dev. & Bat. 117; The State *v.* Lazarus, 1 Mill, 33; Moore *v.* Hussey, Hob. 93; Semayne's Case, 5 Co. 91; Reg. *v.* Sullivan, Car. & M. 209; United States *v.* Williams, 2 Cranch C. C. 438; The State *v.* Noles, 26 Ala. 31; McAuley *v.* The State, 3 Greene, Iowa, 485; The State *v.* McDonald, 4 Jones, N. C. 19; People *v.* Horton, 4 Mich. 67; Priester *v.* Augley, 5 Rich. 44; The State *v.* Buchanan, 17 Vt. 573; People *v.* Hubbard, 24 Wend. 369; Commonwealth *v.* Kennard, 8 Pick. 133; The State *v.* McDonald, 4 Jones, N. C. 19; Haynes *v.* The State, 17 Ga. 465; The State *v.* Brandon, 8 Jones, N. C. 463; Yonkle *v.* The State, 32 Ind. 220. See People *v.* Payne, 8 Cal. 341; People *v.* Batchelder, 27 Cal. 69; The State *v.* Burwell, 63 N. C. 661; Reg. *v.* Archer, 1 Fost. & F. 351; Murphy *v.* People, 37 Ill. 447; The State *v.* Vance, 17 Iowa, 138. See post, § 876.

[3] 1 Hale P. C. 458, where this learned author says: "A bailiff, having a warrant to arrest Cook upon a *capias ad satisfaciendum*, came to Cook's house and gave him notice, Cook menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest, Cook shoots him, and kills him; it was ruled, 1. That it is not murder because he cannot break the house, otherwise it had been if it had been upon an *habere facias possessionem*. 2. But it was manslaughter, because he knew him to be a bailiff. But, 3. Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defence of his house." S. C. Cook's Case, Cro. Car. 537. And see, as to the doctrine of the text, 1 Chit. Crim. Law, 56; Moore *v.* Hussey, Hob. 93, 96; Semayne's Case, 5 Co. 91, where it is said, "Every one

"a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life." [1] And a man's business office has been held, in Missouri, to be his dwelling-house within this rule.[2] Still, —

§ 859. **Waiving Protection of Castle.** — One may waive the protection of his castle by permitting another to enter; then, if the latter does enter without a breaking,[3] the parties stand toward each other on different ground.[4] Thus, —

Putting out of House. — If a man enters another's dwelling-house peaceably, on an implied license, he cannot be ejected except on request to leave, followed by no more than the necessary and proper force, even though misbehaving himself therein.[5] Yet if the entry itself is with violence or is opposed, no request to depart need precede the act of turning out; since the trespasser knows, as well without express words as with, that his absence is desired.[6] Hence a needless battery, resulting in death, employed in ejecting an intruder from the dwelling-house, will constitute felonious homicide.[7] And though one has forbidden another his house, yet, should the latter come peaceably, and not instantly leave on being ordered away, the former, killing him, will be guilty of murder.[8] Still one attacked in his home need not retreat,[9] and he may use all necessary force to eject the intruder.[10]

may assemble his friends and neighbors to defend his house against violence;" Commonwealth *v.* Drew, 4 Mass. 391; 4 Bl. Com. 223; Reg. *v.* Sullivan, Car. & M. 209; The State *v.* Zellers, 2 Halst. 220; Hudgins *v.* The State, 2 Kelly, 173; Carroll *v.* The State, 23 Ala. 28; Haynes *v.* The State, 17 Ga. 465; Temple *v.* People, 4 Lans. 119; Corey *v.* People, 45 Barb. 262; The State *v.* Patterson, 45 Vt. 308; The State *v.* Medlin, Winst. No. II. 99; Ford's Case, J. Kel. 51; Weaver *v.* Bush, 8 T. R. 78; The State *v.* Taylor, 82 N. C. 554; 1 Hawk. P. C. Curw. ed. p. 98, § 36; Crim. Proced. I. § 195. Such also is plainly the ancient doctrine. Thus Britton, treating of Appeals of Homicide, says: The defendant "may say, that, although he committed the act, yet he did not do it by felony prepense, but by necessity in defending himself, or his wife, *or his house*, or his family, or his lord, or his lady, from death." Nichols's Translation of Brit., vol. i. p. 113.

[1] Pond *v.* People, 8 Mich. 150, 177. See De Forest *v.* The State, 21 Ind. 23.

[2] Morgan *v.* Durfee, 69 Misso. 469.

[3] Stat. Crimes, § 290, 312.

[4] Crim. Proced. I. § 195, 199, 200.

[5] Post, § 862, 873; Gregory *v.* Hill, 8 T. R. 299; Shaw *v.* Chairitie, 3 Car. & K. 21; Green *v.* Bartram, 4 Car. & P. 308; Reg. *v.* Roxburgh, 12 Cox C. C. 8. And see Ballard *v.* Bond, 1 Jur. 7.

[6] Tullay *v.* Reed, 1 Car. & P. 6; Polkinhorn *v.* Wright, 8 Q. B. 197, 206; Green *v.* Goddard, 2 Salk. 641.

[7] The State *v.* Lazarus, 1 Mill, 33; McCoy *v.* The State, 3 Eng. 451. And see Reg. *v.* Sullivan, Car. & M. 209; Rex *v.* Longden, Russ. & Ry. 228.

[8] The State *v.* Smith, 3 Dev. & Bat. 117. See People *v.* Horton, 4 Mich. 67.

[9] The State *v.* Harman, 78 N. C. 515; post § 869.

[10] The State *v.* Dugan, 1 Houst. Crim. 563. And cases cited to last section.

IV. *The Imperfect Defence.*

§ 860. **Extends to both Person and Property.** — Though the perfect defence cannot, as just seen, be resorted to for the protection of property, except where it consists of the castle, or a felony is being committed upon it; yet, on the other hand, the imperfect defence is permitted as well of the property as the person.

§ 861. **As to Property.** — A man may lawfully defend his property in possession by any degree of force, short of the taking of life, necessary to make the defence effectual;[1] unless it amounts to a riot, a forcible detainer, or some other like crime. Yet he cannot proceed therein beyond what necessity requires.[2] For illustration, —

By Assault and Battery — Accidental Homicide. — An assault and battery may be justified as inflicted in defence of one's property.[3] And if, in the employment of necessary force, the party resisted is accidentally killed, the doctrine seems to be on authority,[4] and clearly is in principle, that the homicide is not punishable. Yet, consistent with this proposition, is another, that one in the defence of his property should not resort to means reasonably calculated to endanger life.[5] For, —

§ 862. **By Dangerous Weapon — Improper Battery — (Homicide).** — If a dangerous weapon is used when other means would suffice, resulting in death, however unintended;[6] or, *a fortiori*, if the trespasser is intentionally killed;[7] the party so resisting becomes guilty of a felonious homicide. Nor should one turn another out

[1] Ante, § 857; The State *v.* Johnson, 12 Ala. 840. Still Mr. East observes: "A man cannot justify maiming another in defence of his possessions, but only in defence of his person. This restriction, however, cannot be intended to extend to cases where a man defends himself against a known felony, threatened to be committed with violence, against even his property." 1 East P. C. 402.

[2] Ante, § 842; The State *v.* Clements, 32 Maine, 279; The State *v.* Lazarus, 1 Mill, 33.

[3] Harrington *v.* People, 6 Barb. 607; The State *v.* Briggs, 3 Ire. 357. And see The State *v.* Hooker, 17 Vt. 658; Faris *v.* The State, 3 Ohio State, 159.

[4] The principle of the statement in the text is possibly sustained in The State *v.* Merrill, 2 Dev. 269.

[5] Kunkle *v.* The State, 32 Ind. 220. And see Territory *v.* Drennan, 1 Montana, 41.

[6] Commonwealth *v.* Drew, 4 Mass. 391; McDaniel *v.* The State, 8 Sm. & M. 401; The State *v.* Zellers, 2 Halst. 220. And see Reg. *v.* Sullivan, Car. & M. 209.

[7] Harrison *v.* The State, 24 Ala. 67; McDaniel *v.* The State, 8 Sm. & M. 401; The State *v.* Smith, 3 Dev. & Bat. 117.

of his house with a kick,[1] or beat or tie to a horse a trespasser who yields;[2] and he who does these things, producing death, commits felonious homicide.

§ 863. **Defence of the Person.** — Since one may resort to the perfect defence of his person, it follows that he may to the imperfect. But the doctrine will be more exactly stated under the next sub-title.

V. *Summary showing the Right to defend one's Person.*

§ 864. **How the Discussion distributed.** — Much of what would properly appear under this sub-title will be found under the last two, which should be read in connection with this.

§ 865. **When killing in Self-defence permissible.** — The rule is commonly stated in the American cases thus: if the individual assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable.[3] And this proposition, it has been held, cannot be qualified by adding to it the words, "which [bodily harm] might probably endanger his life;" for persons attacked may destroy the life of an assailant, though no danger, near or remote, threatens their own lives, but only their safety in a less degree.[4] "The law gives a person the same right to use

[1] Wild's Case, 2 Lewin, 214. And see McCoy *v.* The State, 3 Eng. 451.

[2] Holloway's Case, Palmer, 545; s. c. nom. Halloway's Case, Cro. Car. 131, W. Jones, 198; 1 Hale P. C. 473; Foster, 291.

[3] Young *v.* The State, 11 Humph. 200; People *v.* Shorter, 4 Barb. 460; Shorter *v.* People, 2 Comst. 193; Stewart *v.* The State, 1 Ohio State, 66, 71; Copeland *v.* The State, 7 Humph. 479; The State *v.* Wells, Coxe, 424; Holmes *v.* The State, 23 Ala. 17; Carroll *v.* The State, 23 Ala. 28; Dill *v.* The State, 25 Ala. 15; Rapp *v.* Commonwealth, 14 B. Monr. 614; Campbell *v.* People, 16 Ill. 17; Meridith *v.* Commonwealth, 18 B. Monr. 49; Green *v.* The State, 28 Missis. 687; Pond *v.* People, 8 Mich. 150; People *v.* Cole, 4 Parker C. C. 35; The State *v.* Swift, 14 La. An. 827; Rippy *v.* The State, 2 Head, 217; Payne *v.* Commonwealth, 1 Met. Ky. 370; The State *v.* Mullen, 14 La. An. 570; Kingen *v.* The State, 45 Ind. 518; People *v.* Lamb, 54 Barb. 342; The State *v.* Abarr, 39 Iowa, 185; Commonwealth *v.* Crawford, 8 Philad. 490; Berry *v.* Commonwealth, 10 Bush, 15. And see Monroe *v.* The State, 5 Ga. 85; Pennsylvania *v.* Robertson, Addison, 246; Fahnestock *v.* The State, 23 Ind. 231, 257; The State *v.* King, 22 La. An. 454; Thompson *v.* The State, 24 Ga. 297; Isaacs *v.* The State, 25 Texas, 174; Pound *v.* The State, 43 Ga. 88; Head *v.* The State, 44 Missis. 731; Evans *v.* The State, 44 Missis. 762; The State *v.* Bertrand, 3 Oregon, 61; The State *v.* Conally, 3 Oregon, 69; Stoneman *v.* Commonwealth, 25 Grat. 887; ante, § 305.

[4] Young *v.* The State, 11 Humph. 200. And see The State *v.* Sloan, 47 Misso. 604; People *v.* Campbell, 30 Cal. 312; Reg. *v.* Hewlett, 1 Fost. & F. 91; The State *v.* Benham, 23 Iowa, 154; The State *v.* Burke, 30 Iowa, 331.

such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from *great bodily harm*, as it does to prevent his life being taken. He may excusably use this necessary force to save himself from any felonious assault," — though he should thereby kill the aggressor.[1] Let us look at some points of this doctrine more minutely.

§ 866. **Defence of Limb — Chastity — (Resistance of Felony).** — Grotius — not a common-law authority, but worthy of high respect on such a subject[2] — observes: "Since the loss of a limb, especially of a principal one, is very grievous, and nearly equal to the loss of life; and since, moreover, it can hardly be known whether it do not bring in its train loss of life; if it cannot otherwise be avoided, I think the author of such danger may be slain. Whether the same be lawful in defence of chastity, can scarcely be doubted, since not only common estimation, but the divine law, makes chastity of the same value as life."[3] But the right of self-defence even to the taking of life sufficiently results, in these cases, from the doctrine, already discussed, of resistance to the commission of a felony; though, doubtless, it equally results from the considerations thus mentioned by Grotius.

§ 867. **Repelling Battery.** — According to the books, a man cannot, as we have seen,[4] justify the killing of another who comes merely to beat him; though he may repel the assault by a beating till the aggressor desists.[5] Now, —

Danger of Great Bodily Harm. — The distinction is not a broad one, or quite discernible in principle, between this beating, especially if extreme, and the great bodily harm to prevent which, it has just been stated,[6] the assailant's life may be taken. And, in reason, the form of expression does not appear accurate when we say, in the language of most of the cases, that one may take the life of another to avoid great bodily harm from him. Perhaps the expression may be justified on the ground that it is less likely

[1] The State *v.* Burke, 30 Iowa, 331.

[2] See Bishop First Book, § 138, 572, *Grotius*, note.

[3] Grotius de Jure Belli et Pacis, ii. 1, 6 & 7, Whewell's ed. Vol. I. p. 211.

[4] Ante, § 843, 850.

[5] 1 East P. C. 272; United States *v.* Wiltberger, 3 Wash. C. C. 515; Nailor's Case, cited Foster, 278. And see Reg. *v.* Driscoll, Car. & M. 214.

[6] Ante, § 865.

to mislead a jury than one scientifically more accurate. But, on principle, and more definitely, the doctrine is thus, —

Resisting Attempted Felony — (Mayhem — Sodomy — Rape — Ultimate Danger to Life, &c.). — The attempt to commit any felony, such as a mayhem, the crime against nature, or a rape,[1] upon the person, — or, in the language of a learned court as quoted in a previous section,[2] any "*felonious* assault," — comes under the head of perfect defence; and this attempt may be resisted to the death, without any flying or avoiding of the combat.[3] Moreover, the danger, to constitute a danger to the life, need not be of immediate death, but of such an injury as will shorten the period of the earthly existence. And these considerations, it is submitted, should properly be deemed a sufficient extension of the right to take the life of him who does not endanger the life of the person he assails. But this statement of the doctrine, let it be repeated, does not differ greatly in effect from the common form; as, for example, the difference is not practically broad between danger of great bodily harm and danger of a felonious maim or mayhem.

§ 868. **Repelling Attempts against Liberty.** — The attempt to take away one's liberty is not such an aggression as may be resisted to the death. Thus, —

In Unlawful Arrest — Kidnapping. — If one, even an officer, undertakes to arrest another unlawfully, the latter may resist him. He has no protection from his office, or from the fact that the other is an offender. But the doctrine already stated,[4] that nothing short of an endeavor to destroy life will justify the taking of life, prevails in this case; consequently, if the one to be arrested kills the officer or private individual in resisting, he commits thereby the lower degree of felonious homicide called manslaughter.[5] Still, in principle, life and liberty stand on substantially one foundation; life being valueless without liberty. And the reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life, may be because liberty can be secured by a resort to the laws. And if a case should arise, in which the attempt was to convey a person by force beyond the reach of the laws, and there confine him perpetually, doubtless the courts would hold him justified legally, as in the judgment of every man he would be morally, in resisting to death. And there would be foundation for extending this proposition to any attempt to convey the individual out of the country.[1]

§ 869. **Conflict not to be sought.** — Though, if one is attacked by a man who intends to kill him, he may stand his ground and kill the assailant as already explained, still it would seem not permissible for him, knowing the other's designs, to seek the conflict.[2] Thus we have seen,[3] that one who is threatened must wait for some overt act before resorting to his right of self-defence.[4] And after a danger has passed, one is not justified in following up the adversary to take his life.[5] The principle of the law plainly is, that a conflict for blood should, if possible, be avoided. And from this principle proceeds the doctrine, already mentioned,[6] that, —

Retreating to the Wall. — If there is a mere fight, or an assault not murderously intended, and it progresses to a conflict for blood, neither party can innocently avail himself of the right of perfect defence by killing the other, until he has endeavored to extricate himself by "retreating to the wall," as the old phrase is. In the words of Lord Hale: "Regularly it is necessary, that the person that kills another in his own defence fly as far as he may to avoid the violence of the assault, before he turn upon his assailant; for, though in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet, in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honor, because the

[1] 1 Gab. Crim. Law, 495; 4 Bl. Com. 181; Foster, 274; 1 Hale P. C. 485.
[2] Ante, § 865.
[3] Ante, § 849, 850.
[4] Ante, § 863–868.
[5] Rex *v.* Delcany, Jebb, 88; Reg. *v.* Tooley, 11 Mod. 242; Roberts *v.* The State, 14 Misso. 138; Rex *v.* Gordon, 1 East P. C. 315, 352; Rex *v.* Patience, 7 Car. & P. 775; Rex *v.* Thompson, 1 Moody, 80; Rex *v.* Gillow, 1 Moody, 85, 1 Lewin, 57; Reg. *v.* Phelps, Car. & M. 180; Rex *v.* Withers, 1 East P. C. 295, 360; Commonwealth *v.* Drew, 4 Mass. 391; The State *v.* Craton, 6 Ire. 164; Rex *v.* Curran, 3 Car. & P. 397; Rex *v.* Addis, 6 Car. & P. 388; Rex *v.* Davis, 7 Car. & P. 785; Rex *v.* Howarth, 1 Moody, 207; Rafferty *v.* People, 72 Ill. 37; Goodman *v.* The State, 4 Texas Ap. 340. And see Rex *v.* Dixon, 1 East P. C. 313; The State *v.* Ramsey, 5 Jones, N. C. 195; Vol. II. § 699.

[1] And see Williams *v.* The State, 44 Ala. 41.
[2] And see Commonwealth *v.* Drum, 8 Smith, Pa. 9.
[3] Ante, § 843; post, § 872.
[4] Dawson *v.* The State, 38 Texas, 491; Johnson *v.* The State, 27 Texas, 758; Williams *v.* The State, 3 Heisk. 376; Evans *v.* The State, 44 Missis. 762; The State *v.* Horne, 9 Kansas, 119.
[5] The State *v.* Conally, 3 Oregon, 69; Evans *v.* The State, 33 Ga. 4.
[6] Ante, § 860.

king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another."[1] But he goes on to show, that this doctrine cannot apply where flight is impossible; and indeed he explains, as do all the old writers on this branch of our law, that the right to take the assailant's life is only to be exercised when no other means of escape are open. The proposition is admirably laid down in a New York case, that, when a man expects to be attacked, the right of self-defence does not arise until he has done every thing to avoid the necessity of using it;[2] and this proposition seems clearly to apply in all circumstances of the nature of those now under consideration.[3] Moreover, a person attacked in his own dwelling-house need not fly from it, but he may use all the violence necessary for his protection.[4] After a man has retreated, and no further way of escape is open, then, of course, he may turn and kill the aggressor.[5] But one must not have brought on himself the necessity which he sets up in his own defence.[6]

§ 870. **Continued — (Mutual Combat).** — The cases in which this doctrine of retreating to the wall is commonly invoked, are those of mutual combat. Both parties being in the wrong, neither can right himself except by "retreating to the wall." When one, contrary to his original expectation, finds himself so hotly pressed as to render the killing of the other necessary to save his own life, he is guilty of a felonious homicide if he kills him, unless he first actually puts into exercise this duty of withdrawing from the place.[7] Lord Hale says: "If A assaults B first, and upon that assault B reassaults A, and that so fiercely that A cannot retreat to the wall or other *non ultra* without danger of his life; nay, though A fall upon the ground upon the assault of B, and then kills B; this shall not be interpreted to be *se defendendo*, but to be murder, or simple homicide, according to the circumstances of the case; for otherwise we should have all cases

[1] 1 Hale P. C. 481.

[2] People *v.* Sullivan, 3 Seld. 396. And see United States *v.* Mingo, 2 Curt. C. C. 1.

[3] See Oliver *v.* The State, 17 Ala. 587; Reg. *v.* Smith, 8 Car. & P. 160; Creek *v.* The State, 24 Ind. 151.

[4] The State *v.* Martin, 30 Wis. 216. And see People *v.* Walsh, 48 Cal. 447.

[5] Stoffer *v.* The State, 15 Ohio State, 47.

[6] 1 Hawk. P. C. Curw. ed. p. 82, § 22; Vaiden *v.* Commonwealth, 12 Grat. 717; Haynes *v.* The State, 17 Ga. 465; post, § 870 and note.

[7] Foster, 227; The State *v.* Hill, 4 Dev. & Bat. 491; Stoffer *v.* The State, 15 Ohio State, 47. And see The State *v.* Howell, 9 Ire. 485.

of murders or manslaughters by way of interpretation turned into *se defendendo*."[1] But a better reason for this just conclusion is, that, by continuing in the combat, the party brought upon himself the necessity of killing his fellow-man.[2]

§ 871. **Continued — (Repentance — Withdrawal).** — This space for repentance is always open. And where a combatant in good faith withdraws as far as he can, really intending to abandon the conflict, and not merely to gain fresh strength or some new advantage for an attack, but the other will pursue him, then, if taking life becomes inevitable to save life, he is justified.[3] But a mere colorable withdrawal avails nothing.[4] In like manner, where, upon a quarrel, one of the parties retreated fifty yards, desiring to avoid the conflict, but the other pursued him with uplifted arm; and, being first struck by the retreating one with the fist, stabbed and killed him; the killing was held to be murder.[5]

[1] 1 Hale P. C. 482.

[2] Hawkins maintains, contrary in part to the doctrine of the text, that the one who gives the first blow cannot be permitted to kill the other, however necessary the killing for his own preservation, even after having put into exercise the virtue of retreating to the wall; because here also the necessity was brought upon himself. Yet he admits that there are good opinions the other way. 1 Hawk. P. C. Curw. ed. p. 87, § 17. And see Rex *v.* Kessal, 1 Car. & P. 437. Though this opinion of Hawkins, which shuts the gate of repentance, is not generally received, yet another proposition of his accords exactly with our text. It is, that, when a person who makes a murderous assault is himself driven to the wall, instead of retreating there to avoid further conflict, and there kills the other in his own defence, he is guilty of murder. 1 Hawk. P. C. Curw. ed. p. 87, § 18, p. 97, § 26; Anonymous, J. Kel. 58; The State *v.* Hill, 4 Dev. & Bat. 491.

[3] Stoffer *v.* The State, 15 Ohio State, 47; The State *v.* Hill, 4 Dev. & Bat. 491; The State *v.* Ingold, 4 Jones, N. C. 216; Lord Hale says: "Suppose that A by malice makes a sudden assault upon B, who strikes again, and pursuing hard upon A, A retreats to the wall, and, in saving his own life, kills B, — some have held this to be murder, and not *se defendendo*, because A gave the first assault. But Mr. Dalton thinketh it to be *se defendendo*, though A made the first assault, either with or without malice, and then retreated. It seems to me, that, if A did retreat to the wall, upon a real intent to save his life, and then merely in his own defence killed B, it is *se defendendo*, and with this agrees Stamf. P. C. lib. 1, c. 7, f. 15 *a*. But if, on the other side, A, knowing his advantage of strength or skill or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defence, but really intended the killing of B, then it is murder or manslaughter as the circumstance of the case requires." 1 Hale P. C. 479, 480.

[4] Foster, 227; Hodges *v.* The State, 15 Ga. 117.

[5] The State *v.* Howell, 9 Ire. 485. "It is true," said Nash, J., "that the deceased struck the first blow, but this does not mitigate the offence of the prisoner. In every stage of the transaction he was the assailant. When he approached the deceased, his arm was raised in the attitude to strike, and with a deadly weapon. The law did not require the deceased to wait till the prisoner had executed his threat, but justified him in anticipating the premeditated assault." See post, § 872. Where, on a trial for murder, the defendant was shown to have com-

§ 872. **Overt Steps — (Threats — Apprehended Harm).** — What has already been said should be borne in mind, that mere threats will not justify a killing, which is permissible only when some overt step has been taken toward carrying them into execution.[1] But a threatened blow need not be actually given,[2] — a branch of the doctrine that an assault may sometimes be met by a battery.[3] And as words alone will not justify even an assault,[4] so no mere apprehension of what another will do, however strong the fears excited, will justify one in taking his life.[5] Again, —

§ 873. **Improper Force.** — If improper force is used for defence, even where force is permissible, he who employs it must answer as for a felonious homicide should death accidentally follow.[6] And, —

Blow for Provoking Language. — If a man returns provoking language by a blow from an instrument calculated to produce death, which follows, he is guilty of murder.[7] Also, —

Killing Ghost. — It has been held to be no excuse for killing a person, that he was out at night dressed in white as a ghost; and this would be so, even if he could not otherwise be taken; since

menced the affray, and he asked the court to instruct the jury, "that, if the defendant had reason to believe, and did believe, that he was in great danger of losing his life, and under that belief killed the deceased, he was justified," this instruction was refused, and the refusal was held to be right. People *v.* Stonecifer, 6 Cal. 405.

[1] Ante, § 843, 869; Wall *v.* The State, 18 Texas, 682; People *v.* Butler, 8 Cal. 435. And see The State *v.* Barfield, 7 Ire. 299.

[2] The State *v.* Baker, 1 Jones, N. C. 267.

[3] Vol. II. § 41.

[4] Commonwealth *v.* Green, 1 Ashm. 289, 297; Vol. II. § 40.

[5] Dyson *v.* The State, 26 Missis. 362; Harrison *v.* The State, 24 Ala. 67; Dupree *v.* The State, 33 Ala. 380; The State *v.* Shippey, 10 Minn. 223. See Monroe *v.* The State, 5 Ga. 85; Pritchet *v.* The State, 22 Ala. 39; Evers *v.* People, 6 Thomp. & C. 156, 3 Hun, 716; United States *v.* Carr, 1 Woods, 480. In Georgia there was the following case: A presented a gun at B, and subsequently took it down. B then said, that, if he raised it again, he would throw a brickbat at him. He did again raise it, the brickbat was thrown, and B was shot. And it was held, that, in consideration of the threat or banter of B, such killing may have been no more than voluntary manslaughter; and it was error in the court below to charge, that, "if the first presenting of the gun was with malicious intent, notwithstanding what followed, the killing was murder." McGuffie *v.* The State, 17 Ga. 497. And see Keener *v.* The State, 18 Ga. 194; Atkins *v.* The State, 16 Ark. 568; Cotton *v.* The State, 31 Missis. 504; Lyon *v.* The State, 22 Ga. 399; Balkum *v.* The State, 40 Ala. 671; Aaron *v.* The State, 31 Ga. 167; The State *v.* Owen, Phillips, 425; The State *v.* Benham, 28 Iowa, 154; The State *v.* Ferguson, 9 Nev. 106.

[6] Ante, § 859, 862.

[7] The State *v.* Merrill, 2 Dev. 269.

"the person who appeared as a ghost was only guilty of a misdemeanor."[1]

Relative Strength. — In questions of self-defence, the relative strength of the parties may be taken into the account.[2]

§ 874. **Mistake of Facts.** — We have already seen,[3] how the doctrine is where one, mistaking the facts, undertakes self-defence, when really no occasion for it exists. And, —

Reasonable Man. — Constituting a part of this question, is a consideration of the reasonableness of an excited fear. Some of the cases appear to maintain that, to justify a self-defence, there must be a reasonable cause for fear,[4] or the circumstances must be such as to excite the fears of a reasonable man.[5] A doctrine like this was formerly held, by some courts, in the law of false pretences; namely, that a pretence, to be indictable, must be calculated to mislead men of ordinary capacity and prudence; so that a weak man, defrauded by a pretence which a stronger mind would have resisted, had no protection. But that doctrine is now exploded.[6] On the present one, the courts are perhaps divided.[7] In reason, and in accordance with all the analogies in the criminal law, if a man was careless, and therefore deemed a defence to be necessary when none was in fact, he would commit a crime in making it to the injury of an innocent person; because, as we have seen,[8] carelessness is criminal. But it is not criminal to be born underwitted, or with less intellect than some other person possesses; therefore, if one of little understanding, acting carefully, arrives at the conclusion that a defence of himself is necessary, the law should protect him in making it, precisely as if he possessed a stronger mind which was misled by graver appearances. If an insane man is misled by an insane delusion, he is protected.[9] By all the courts, then, the rule of reason is applied to the strongest intellects, and thence downward to the average, and to the intellects so feeble and deranged as to be regarded insane.

[1] Rex *v.* Smith, 1 Russ. Crimes, 3d Eng. ed. 546.

[2] Hinch *v.* The State, 25 Ga. 699; The State *v.* Benham, 28 Iowa, 154.

[3] Ante, § 305 and note.

[4] Creek *v.* The State, 24 Ind. 151, 154; The State *v.* Collins, 32 Iowa, 36. And see The State *v.* Abarr, 39 Iowa, 185.

[5] Golden *v.* The State, 25 Ga. 527, 533; People *v.* Williams, 32 Cal. 280.

[6] Vol. II. § 433, 434.

[7] See the authorities collected ante, § 305, note.

[8] Ante, § 313 et seq.

[9] Ante, § 392–394.

With what show of righteousness or of law, therefore, can a judge refuse to apply it to the rest?

VI. *Summary showing the Right to defend one's Property.*

§ 875. **Already explained.** — The doctrine on this subject is already, perhaps, sufficiently explained.[1]

In Brief. — One, in defence of his property, must not commit a forcible detainer, a riot, or any like crime. He must not kill the aggressor; but, if the question comes to this, he must find his redress in the courts. If the wrongful act is proceeding to a felony on the property, he may then kill the doer to prevent the felony, if there is no other way, otherwise this extreme measure is not lawful. And the defence may be such, and such only, as necessity requires; of course, within the limit which forbids the taking of life.[2] Therefore —

§ 876. **In Homicide.** — A man commits a felonious homicide who inflicts death in opposing an unlawful endeavor to carry away his property.[3] There is here the right to resist, but not to the taking of life.[4]

VII. *The Right to assist others in Defence of Person and Property.*

§ 877. **General Doctrine.** — The doctrine here is, that whatever one may do for himself he may do for another. The common case, indeed, is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feebler.[5] But a guest

[1] Ante, § 853–861.

[2] See, not as directly announcing the proposition of our text, Wild's Case, 2 Lewin, 214; Harrison v. The State, 24 Ala. 67; Rex v. Bourne, 5 Car. & P. 120; Halloway's Case, W. Jones, 198, Cro. Car. 131; The State v. Zellers, 2 Halst. 220; The State v. Baker, 1 Jones, N. C. 267; Commonwealth v. Power, 7 Met. 596; Reg. v. Sullivan, Car. & M. 209; The State v. Johnson, 12 Ala. 840; The State v. Clements, 32 Maine, 279; The State v. Lazarus, 1 Mill, 83; McCoy v. The State, 3 Eng. 451; Copeland v. The State, 7 Humph. 479; Shorter v. People, 2 Comst. 193; 1 East P. C. 402.

[3] Ante, § 857, 861; See People v. Honshell, 10 Cal. 83.

[4] People v. Hubbard, 24 Wend. 369; The State v. Johnson, 12 Ala. 840; Curtis v. Hubbard, 1 Hill, N. Y. 336; ante, § 857. But see The State v. Buchanan, 17 Vt. 573.

[5] United States v. Wiltberger, 3 Wash. C. C. 515; Rex v. Bourne, 5 Car. & P. 120; Pond v. People, 8 Mich. 150. And see Staten v. The State, 30 Missis. 619; Sharp v. The State, 19 Ohio, 379; Patten v. People, 18 Mich. 314; Parker v. The State, 31 Texas, 132; Dupree v. The State, 33 Ala. 380; Reg. v. Harrington, 10 Cox C. C. 370; Stoneman v. Commonwealth, 25 Grat. 887; Bristow v. Commonwealth, 15 Grat. 634; The State v. Johnson, 75 N. C. 174; Waybright v. The State, 56 Ind. 122; Commonwealth v. Malone, 114 Mass. 295.

in a house may defend the house;[1] or the neighbors of the occupant may assemble for its defence;[2] and, on the whole, though distinctions have been taken and doubts expressed, the better view plainly is, that one may do for another whatever the other may do for himself.[3] But there may be cases in which combinations for defence will be unlawful on other grounds; as amounting to breaches of the peace, or the like.

[1] Curtis v. Hubbard, 4 Hill, N. Y. 437; Cooper's Case, Cro. Car. 544.

[2] Semayne's Case, 5 Co. 91; ante, § 858, note.

[3] 1 East P. C. 289, 292, 293; Rex v. Adey, 1 Leach, 4th ed. 206, 1 East P. C. 329; Commonwealth v. Drew, 4 Mass. 391; Reg. v. Tooley, 11 Mod. 242. Succession of Irwin, 12 La. An. 676; The State v. Westfall, 49 Iowa, 328. See The State v. Shirley, 64 N. C. 610.

CHAPTER LVII.

THE DOMESTIC RELATIONS.

§ 878. **Scope of this Chapter.** — The domestic relations are more or less treated of in other connections. There will be here some recapitulation; but the leading purpose is to bring together such views and authorities as have no appropriate place elsewhere.

§ 879. **How the Chapter divided.** — We shall consider, I. Parent and Child; II. Guardian and Ward; III. Teacher and Pupil; IV. Master and Domestic Servant; V. Husband and Wife. And —

Doctrine common to All — (Exceptions). — A doctrine common to all is, that they furnish no protection for crime; but a violator of the criminal law in the relation is punishable the same as out of it. We have seen, that the rules of marital coercion furnish a partial exception.[1] And, again, the legal rights which any relation confers are respected in the law of crime the same as in the civil department.

I. *Parent and Child.*

§ 880. **In General of the Relation.** — Our law, especially in modern times, gives no countenance to the idea which once prevailed in some systems of jurisprudence, that the parent is a sort of owner of the child, who exists chiefly for his good. On the contrary, it looks always to the sunrise; regarding the child as the man of the future, while the parent is passing away in the west.

[1] Ante, § 356 et seq.

And it accords parental control and custody on the theory of the child's good, rather than the parent's.[1] So that, —

Authority and Chastisement. — To enable parents to rear their children for happiness and usefulness, "the law," says Kent, while compelling maintenance, "has given them a right to such authority, and, in support of that authority, a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust."[2] The little one is placed, helpless and untaught, in the parental hands. The helplessness is alike physical, mental, and moral. Parental discipline, rightly understood, is to assist the strivings and aspirations of the child's better nature. And the child, needing this assistance, is therefore entitled to it. The question of what help of this sort shall be given is better left to the parent than to any other person; because parental affection prompts more strongly than any other to the exercise of a merciful judgment. But as parents are sometimes unmerciful, the law itself casts over the child such protection as it can,[3] and visits them with punishment for any flagrant abuse of their trust. Consequently, —

§ 881. **Extent of Chastisement.** — The doctrine, as commonly expressed in general terms, is, that the parent may inflict *moderate* chastisement,[4] or such as is reasonable under the circumstances.[5] And, —

Assault and Battery — Felonious Homicide. — If he goes beyond this, he is indictable for assault and battery;[6] or, if the child dies, for a felonious homicide.[7] But —

§ 882. **Good Faith in Parent — (Parental Judgment).** — The law has provided no means whereby a parent, meditating chastisement, can first obtain a judicial opinion as to its necessity, the proper instruments, and its due extent. In reason, therefore, if he acts in good faith, prompted by true parental love, without passion, and inflicts no permanent injury on the child, he should

[1] 2 Bishop Mar. & Div. § 528 *c*, 528 *e*, 529, 532, 546, 549.
[2] 2 Kent Com. 203.
[3] Faulk *v.* Faulk, 23 Texas, 653; Neal *v.* The State, 54 Ga. 281; Commonwealth *v.* Coffey, 121 Mass. 66.
[4] 2 Kent Com. 204; 1 Russ. Crimes, 3d Eng. ed. 645.
[5] 1 Hawk. P. C. 6th ed. c. 60, § 23, Bac. Abr. Assault and Battery C.
[6] Vol. II. § 38, 72; 3 Greenl. Ev. § 63; The State *v.* Bitman, 13 Iowa, 485.
[7] Vol. II. § 656, 663, 683–685, 690; Grey's Case, J. Kel. 64; Rex *v.* Cheeseman, 7 Car. & P. 455; Anonymous, 1 East P. C. 261; Rex *v.* Hazel, 1 Leach, 4th ed. 368, 1 East P. C. 236; Rex *v.* Conner, 7 Car. & P. 438.

not be punished merely because a jury, reviewing the case, do not deem that it was wise to proceed so far. And something like this appears to have been held in North Carolina.[1] "A very large margin," said McCay, J., in the Georgia court, "must be left to the judgment of the parent."[2] So, in a civil cause between master mariner and seaman, Ware, J., observed: "When it is apparent that punishment has been merited, I have never been in the habit of attempting to adjust very accurately the balance between the magnitude of the fault and the quantum of the punishment. Unless unusual or unlawful instruments have been used, or there have appeared clear and unequivocal marks of passion on the part of the captain, or the punishment has been manifestly excessive and disproportionate to the fault, I have not thought myself justified in giving damages."[3] But the whipping of a child with an obviously improper instrument — as, for example, a saw twenty-two inches long and three-fourths of an inch wide — is in no ordinary case justifiable.[4] Where the question is simply whether or not the punishment was excessive, its decision is for the jury, not the court.[5] And, in one case, which was that of a teacher standing *in loco parentis*, it seems to have been deemed that the consideration of good faith or of the absence of passion was not of primary importance; but the jury was simply to determine whether, under all the facts, the punishment was reasonable and proper.[6]

[1] The State *v.* Alford, 68 N. C. 322.

[2] Neal *v.* The State, 54 Ga. 281, 282.

[3] Butler *v.* McLellan, 1 Ware, 219, 230. The like in Commonwealth *v.* Seed, 5 Pa. Law J. Rep. 78.

[4] Neal *v.* The State, supra. See Commonwealth *v.* Coffey, 121 Mass. 66; Stanfield *v.* The State, 43 Texas, 167.

[5] Johnson *v.* The State, 2 Humph. 283; Commonwealth *v.* Randall, 4 Gray, 36; Stanfield *v.* The State, supra.

[6] Commonwealth *v.* Randall, supra. **Improper Correction in Homicide.** — In North Carolina, it appearing in a murder case that the prisoner, who stood *in loco parentis* to the deceased, a boy eighteen years of age, punished him for lying, by keeping him naked on his back, with his feet tied up, from morning to dinner every day for a week, and repeatedly whipped him each day while in that position, the first day severely, the instruments used being a heavy leather strap, a knotted cord four double, and an iron ramrod, it was held not to be error for the court to refuse to instruct the jury, that, in the absence of express malice, the crime would be only manslaughter. The acts detailed manifest "a heart totally regardless of social duty and fatally bent on mischief." The State *v.* Harris, 63 N. C. 1. See Vol. II. § 663, 683–685. **Excessive Imprisonment, &c.** — Where, on an indictment for false imprisonment, the defendant was shown to have kept his blind and helpless boy in a cold and damp cellar, without fire, during several days in midwinter, under the excuse that the boy was covered with vermin, and had to be anointed with kerosene, he was held not to be justified, and so the allegation was sustained. Fletcher *v.* People, 52 Ill. 395. **Controlling Conscience of Child.** — See, as to forcing child out of church, &c., Commonwealth *v.* Sigman, 2 Pa. Law Jour. Rep. 36.

§ 883. **Criminal Neglect.** — Another branch of this general doctrine is, that, if a parent under legal obligation[1] to maintain his child refuses or neglects to furnish it with needful food or clothing,[2] and by reason of this it either dies or suffers a less physical injury, — or, in like manner and with like results, exposes it to the physical elements, or imprisons or abandons it, — the law visits the act or neglect as a crime, constituting either an assault and battery or a felonious homicide.[3] In these cases, unlike those of chastisement inflicted for faults, there is no right in the parent to proceed in a moderate way; and no inquiry presents itself, whether the fault of the child justified the act. The doctrines on this subject are developed in various other places in these volumes and in "Criminal Procedure." But, to illustrate, —

§ 884. **Abandonment an Assault.** — In one case it was ruled, that an indictment for abandoning a child should aver an assault.[4] But this would seem not to be required under all circumstances.[5]

Ability. — If the charge is of a lack of sustenance, ability to maintain the child must be shown.[6] And, —

Injury. — In some of these cases, the child must have suffered an injury.[7] Again, —

To charge Parish. — An indictment alleged that the prisoner left a child, a month old, of which she had the care, in the highway

[1] Vol. II. § 659 et seq.; 2 Bishop Mar. & Div. § 528, 528 *a*, 556–558; Stovall *v.* Johnson, 17 Ala. 14; Ilines *v.* Mullins, 25 Ga. 696; Tompkins *v.* Tompkins, 3 C. E. Green, 303; Myers *v.* Myers, 2 McCord Eq. 214.

[2] Reg. *v.* Troy, 1 Crawf. & Dix C. C. 556; Reg. *v.* Waters, Temp. & M. 57, 1 Den. C. C. 356, 13 Jur. 130, 18 Law J. N. S. M. C. 53; Reg. *v.* Phillpot, Dears. 179, 20 Eng. L. & Eq. 591; Rex *v.* Saunders, 7 Car. & P. 277.

[3] Gibson's Case, 2 Broun, 366; Beal's Case, 1 Leon. 327; Reg. *v.* Pelham, 8 Q. B. 959, 15 Law J. N. S. M. C. 105, 10 Jur. 659; Rex *v.* Ridley, 1 Russ. Crimes, 3d Eng. ed. 752, 2 Camp. 650, 653; Rex *v.* Squire, 1 Russ. Crimes, 3d Eng. ed. 490; Reg. *v.* Renshaw, 2 Cox C. C. 285, 11 Jur. 615, 20 Eng. L. & Eq. 593; Reg. *v.* Morris, 2 Crawf. & Dix C. C. 91; Reg. *v.* Hogan, 2 Den. C. C. 277, 15 Jur. 805, 20 Law J. N. S. M. C. 219, 5 Eng. L. & Eq. 553; Reg. *v.* Mulroy, 3 Crawf. & Dix C. C. 318; Reg. *v.* Chandler, Dears. 453, 24 Law J. N. S. M. C. 109, 1 Jur. N. S. 429, 29 Eng. L. & Eq. 551.

[4] Reg. *v.* Mulroy, 3 Crawf. & Dix C. C. 318.

[5] Vol. II. § 29; Crim. Proced. II. § 538, 538 *a*.

[6] Reg. *v.* Pelham, 8 Q. B. 959; Reg. *v.* Hogan, 2 Den. C. C. 277, 5 Eng. L. & Eq. 553; Reg. *v.* Ryland, Law Rep. 1 C. C. 99, 10 Cox C. C. 569; Reg. *v.* Rugg, 12 Cox C. C. 16.

[7] Vol. II. § 29; Reg. *v.* Pelham, supra; Reg. *v.* Phillpot, Dears. 179, 20 Eng. L. & Eq. 591; s. c. nom. Reg. *v.* Philpott, 6 Cox C. C. 140.

in a certain parish, with the intent to burden the parish with its maintenance. And the allegation was held to be insufficient, because it did not negative the settlement of the child in the parish, or aver any injury done to the child.[1]

Statutes — ("Abandonment"). — There are statutes making it indictable to "abandon or expose" a child,[2] and the like.[3]

§ 884 *a*. **Command of Parent.** — The command of the parent does not justify the child in committing a criminal act.[4] So also —

Protecting Child. — The parent has no right to protect his child in a crime.[5]

§ 884 *b*. **Enticing away Child.** — The doctrine is familiar in civil jurisprudence, that one who entices away a child from his father's service is liable in an action for damages.[6] Yet, in the absence of a statutory provision, he is not indictable therefor.[7]

II. *Guardian and Ward.*

§ 885. **Guardian not in Custody.** — Not every guardian has the custody of the person of the ward. And no legal reason appears why one who has not should possess the right to chastise. But —

Having Custody. — Some have the custody,[8] — a sort of question upon which the statutes of our States differ. Such a guardian stands *in loco parentis* to the child,[9] and he may exercise the paternal power of chastisement.[10] He may even change the child's domicil;[11] as to which, however, the courts will hold him under some restraint.[12]

[1] Reg. *v.* Cooper, 1 Den. C. C. 459, 3 Cox C. C. 559, 2 Car. & K. 876.

[2] Reg. *v.* White, Law Rep. 1 C. C. 311, 12 Cox C. C. 83; Shannon *v.* People, 5 Mich. 71.

[3] Cowley *v.* People, 21 Hun, 415.

[4] Ante, § 355; The State *v.* Herdina, 25 Minn. 161, 162; McDaniel *v.* The State, 5 Texas Ap. 475.

[5] The State *v.* Herdina, supra.

[6] Butterfield *v.* Ashley, 6 Cush. 249; Sargent *v.* Mathewson, 38 N. H. 54; Evans *v.* Walton, Law Rep. 2 C. P. 615; Bundy *v.* Dodson, 28 Ind. 295; Jones *v.* Tevis, 4 Litt. 25.

[7] The State *v.* Rice, 76 N. C. 194.

[8] Rex *v.* Isley, 5 A. & E. 441; Bounell *v.* Berryhill, 2 Ind. 613; Coltman *v.* Hall, 31 Maine, 196; Tenbrook *v.* McColm, 7 Halst. 97; In re Van Houten, 2 Green, Ch. 221; Woodworth *v.* Spring, 4 Allen, 321; Ward *v.* Roper, 7 Humph. 111.

[9] In re Andrews, Law Rep. 8 Q. B. 153.

[10] Stanfield *v.* The State, 43 Texas, 167. See also Pulton de Pace, 7 *b*; Rex *v.* Cheeseman, 7 Car. & P. 455; Armstrong *v.* Walkup, 12 Grat. 608.

[11] Townsend *v.* Kendall, 4 Minn. 412; Ex parte Bartlett, 4 Bradf. 221.

[12] Ex parte Martin, 2 Hill, Ch. 71; Trammell *v.* Trammell, 20 Texas, 406.

III. *Teacher and Pupil.*

§ 886. **Chastisement.** — The books commonly assume, that the teacher has the same right to chastise the pupil as the parent the child.[1] He certainly has no greater right, even though acting under express permission from the parent; for the latter cannot delegate a power which he does not himself possess.[2] Nor, it is plain, can the teacher of a mere day scholar, living with the parent, usurp the parental function of chastising for faults committed at home. But, within the proper jurisdiction of the teacher, the latter may exact a compliance with all reasonable commands; and, in return for any specific offence, not in the way of general castigation,[3] visit disobedience with kind and reasonable corporal punishment.[4] It should not be excessive and cruel, it should be proportioned to the gravity of the offence, and always within the bounds of moderation.[5] But plainly the teacher's calm and honest judgment as to what is required should have weight, as in the case of the parent.[6] And, where no improper weapon has been employed,[7] the presumption, until the contrary appears in the proofs, will be that what was done was done rightly.[8] On the whole, and for several reasons which will occur to the reader, the extent of the teacher's power will vary in some degree with what in the relation is special to the particular instance, and it will seldom quite equal the parental right. Yet on this question we have little direct authority.[9]

Pupil of Age. — When one who has attained majority voluntarily attends a school, he places himself by implication under its discipline. And it has been adjudged that the power of reasonable chastisement extends, therefore, to the teacher in such a case.[10]

[1] 1 Hawk. P. C. 6th ed. c. 60, § 23; Bac. Abr. Assault and Battery, C; Pulton de Pace, 6 *b*.

[2] Reg. *v.* Hopley, 2 Fost. & F. 202.

[3] The State *v.* Mizner, 50 Iowa, 145.

[4] Danenhoffer *v.* The State, 69 Ind. 295.

[5] Anderson *v.* The State, 3 Head, 455.

[6] Ante, § 882; Commonwealth *v.* Seed, 5 Pa. Law J. Rep. 78.

[7] Ante, § 882.

[8] The State *v.* Mizner, supra.

[9] See Commonwealth *v.* Randall, 4 Gray, 36; Anderson *v.* The State, 3 Head, 455.

[10] The State *v.* Mizner, 45 Iowa, 248.

IV. *Master and Domestic Servant.*

§ 887. **Different kinds of Servants.** — Servants are of different sorts, sustaining different relations to the master or employer. Some are simply agents,[1] as will be explained in the next chapter. And there are differences in domestic service.

Chastisement. — The older English books lay down the doctrine in general terms, that the master has the right of chastisement.[2] Nor do they always distinguish very nicely between the different kinds of servant.[3] Plainly, with us, and probably in England, the true rule gives the right only to the masters of apprentices and other minors to whom they stand *in loco parentis*. In these cases, the right does exist; yet most fully, though perhaps not exclusively, where the minor is domesticated in the household.[4] The relation of master and apprentice is for the instruction of the child, and there may be an analogy between it and teacher and pupil. But one who has simply hired a minor from the father is not, therefore, put *in loco parentis*, with the right of chastisement, where no parental consent thereto has been given.[5] And —

Immoderately beating Apprentice. — A master who beats his apprentice immoderately is indictable for the battery.[6]

§ 888. **Neglect, &c.** — The doctrines stated under Parent and Child,[1] concerning the liability of those who refuse to provide for the infant, apply to cases of master and infant servant, and master and apprentice, wherever there is the legal obligation to provide.[2] And the like may be said of the other doctrines laid down in the same connection.[3] In some circumstances, to create a liability, the infant must be of tender years.[4]

§ 889. **Criminal Responsibility of Master for Servant's Acts.** — The master is not punishable criminally for the offences of his servants, unless committed by his command or with his assent, in which cases he is.[5] But this doctrine, which is not special to domestic servants,[6] is, with its limitations, more particularly explained in other connections.[7]

V. *Husband and Wife.*

§ 890. **Elsewhere.** — Under a previous title,[8] the effect of coverture, as a presumed coercion, excusing the wife for criminal acts committed in the husband's presence, was considered. And many other questions relating to husband and wife are discussed in other connections in this volume and the second. Still there remains something for this chapter.

§ 891. **Imprisonment and Chastisement.** — Whether and when the husband may chastise or imprison the wife are explained in the author's "Marriage and Divorce."[9] The result is, that a former supposed right of chastisement is entirely abandoned, and the authority to imprison is very limited, if indeed it exists with us to any extent; while yet, in special circumstances,[10] the husband may exercise over the wife a physical restraint not precisely defined.[11] Hence, —

[1] Vol. II. § 332–338; Stat. Crimes, § 271.

[2] 1 Hawk. P. C. 6th ed. c. 60, § 23; Bac. Abr. tit. Assault and Battery, C; Rex *v.* Wiggs, 1 Leach, 4th ed. 378, 379, note.

[3] Rex *v.* Wiggs, supra.

[4] 2 Kent Com. 261; Pulton de Pace, 6 *b*; Burn Just. tit. Servants, xxvi.; Reg. *v.* Miles, 6 Jur. 243. In Burn's Justice by Chitty, Vol. I. p. 182, 28th ed. it is said: "The master has more authority over an apprentice than over a common servant, for he may legally correct his apprentice for negligence or other misbehavior, provided it be done with moderation; whereas, if the master or his wife beat any other servant, it is a good cause for departure and action. But, in case of gross misconduct, it is better for the master to apply to a justice of the peace or the sessions, to discharge or punish the apprentice, than to take the law into his own hands. The master cannot delegate this authority to another." So Chancellor Kent says: "The master may correct his apprentice, with moderation, for negligence or misbehavior." 2 Kent Com. 264. And see Rex *v.* Self, 1 Leach, 4th ed. 137, 1 East P. C. 226; Gates *v.* Lounsbury, 20 Johns. 427; People *v.* Phillips, 1 Wheeler Crim. Cas. 155; Matthews *v.* Terry, 10 Conn. 455, 458; Commonwealth *v.* Baird, 1 Ashm. 267; Commonwealth *v.* Conrow, 2 Barr. 402; In re Ambrose, Phillips, N. C. 91.

[5] Cooper *v.* The State, 8 Baxter, 324; Davis *v.* The State, 6 Texas Ap. 133; Matthews *v.* Terry, 10 Conn. 455. And see Commonwealth *v.* Baird, 1 Ashm. 267.

[6] Rex *v.* Keller, 2 Show. 289.

[1] Ante, § 883.

[2] Rex *v.* Friend, Russ. & Ry. 20; Reg. *v.* Gould, 1 Salk. 381; Rex *v.* Ridley, 2 Camp. 650; Reg. *v.* Smith, 8 Car. & P. 153; Reg. *v.* Edwards, 8 Car. & P. 611. See Rex *v.* Clerke, 2 Show. 193.

[3] See also Rex *v.* Meredith, Russ. & Ry. 46; Rex *v.* Booth, Russ. & Ry. 47, note; Rex *v.* Warren, Russ. & Ry. 47, note; Hays *v.* Bryant, 1 H. Bl. 253; Rex *v.* Wiggs, 1 Leach, 4th ed. 378, note; Rex *v.* Smith, 2 Car. & P. 449; Orton *v.* The State, 4 Greene, Iowa, 140.

[4] Reg. *v.* S. 5 Cox C. C. 279.

[5] Sloan *v.* The State, 8 Ind. 312; Forrester *v.* The State, 63 Ga. 349.

[6] The State *v.* Smith, 10 R. I. 258; Roberts *v.* Preston, 9 C. B. N. S. 208.

[7] Ante, § 316–319. Post, § 892.

[8] Ante, § 356 et seq.

[9] 1 Bishop Mar. & Div. § 754–756.

[10] Post, § 891 *a*.

[11] And see The State *v.* Oliver, 70 N. C. 60; Fulgham *v.* The State, 46 Ala. 143; Commonwealth *v.* McAfee, 108 Mass. 458; The State *v.* Craton, 6 Ire 164; Adams *v.* Adams, 100 Mass. 365; Taylor *v.* Taylor, 76 N. C. 433; and numerous other cases cited in Mar. & Div

Assault and Battery. — He is liable to indictment for assault and battery committed on her.[1] If he acted under provocation from her, it may be shown in mitigation of his punishment.[2]

§ 891 *a*. **Husband's Responsibility for Wife's Offences — (Liquor Selling).** — A husband is not to the same extent answerable for his wife's crimes[3] as he is civilly responsible for her torts.[4] For what she does in his absence and without his knowledge or consent he is not, in general, criminally liable.[5] But the rule that one's mere presence does not make him guilty of a crime committed by another without the concurrence of his will[6] does not apply to a husband in respect of his wife's criminal conduct. Though he is not even permitted to whip her,[7] he is required to put forth his marital power to restrain her from violating the laws. And if, for example, she with his knowledge and in his presence makes a sale of intoxicating liquor contrary to a statute, and he does not interfere, he may be punished for the sale.[8] More than this, a husband must regulate his own household; and if the wife, contrary to his wishes and remonstrance, persists in selling liquor in the house in violation of law, he is even liable criminally for sales made by her in his absence. Nor is it different though she owns the premises as her separate estate, and the sales are for her sole benefit.[9]

1 Bradley *v.* The State, Walk. Missis. 156; The State *v.* Buckley, 2 Harring. Del. 552; The State *v.* Mabrey, 64 N. C. 592. See also Reg. *v.* Rundle, Dears. 482, 24 Law J. N. S. M. C. 129, 1 Jur. N. S. 430, 29 Eng. L. & Eq. 555.

2 Robbins *v.* The State, 20 Ala. 36.

3 Stat. Crimes, § 1025.

4 2 Bishop, Mar. Women, § 254.

5 The State *v.* Baker, 71 Misso. 475.

6 Ante, § 633.

7 Ante, § 891.

8 Hensly *v.* The State, 52 Ala. 10.

9 The State *v.* McDaniel, 1 Houst. Crim. 506; Commonwealth *v.* Barry, 115 Mass. 146; Commonwealth *v.* Carroll, 124 Mass. 30. And see Commonwealth *v.* Kennedy, 119 Mass. 211; Commonwealth *v.* Pratt, 126 Mass. 462; The State *v.* Colby, 55 N. H. 72; The State *v.* Roberts, 55 N. H. 483.

CHAPTER LVIII.

RELATIONS OTHER THAN DOMESTIC.

§ 892. **Elsewhere.** — Like the domestic relations, those within the present title are treated of in connection with other topics in these volumes. Yet something may be useful here.

Principal and Agent, including Master and Servant other than domestic: —

Agent personally answerable. — Whatever one, knowing the facts,[1] does as the agent or servant of another he is criminally answerable for, precisely as though he had proceeded self-moved and for his own personal benefit.[2] And an agent merely present with the principal and lending the concurrence of his will, or assisting him, knowing the facts, is responsible for the latter's criminal act.[3] Again, —

Acting through Agent. — The rule, familiar in civil jurisprudence, that what one does through an agent is to be treated as his own act, prevails equally, though under slightly different modifications, in the criminal law.[4] The employer of him who commits a felony is not a principal felon, but he is an accessory before the fact.[5] In other crimes he and the agent are equally principal offenders.[6] Yet a mere authority to one to act as agent or servant in civil affairs does not include the power to commit a crime in behalf of the principal or master; or, as less precisely expressed, the latter is not responsible for the for-

1 Ante, § 310; Taylor *v.* The State, 5 Texas Ap. 529.

2 Ante, § 355, 658; The State *v.* Martin, 31 La. An. 849; The State *v.* Jackson, 2 Harring. Del. 542; Cutsinger *v.* Commonwealth, 7 Bush, 392; Murphy *v.* The State, 6 Texas Ap. 420, 421; The State *v.* Mercer, 32 Iowa, 405. And see Gibson *v.* Kauffield, 13 Smith, Pa. 168; Nall *v.* The State, 34 Ala. 262; Roberts *v.* The State, 7 Coldw. 359; Tardiff *v.* The State, 23 Texas, 169; The State *v.* Stucker, 33 Iowa, 396.

3 Anderson *v.* The State, 8 Texas Ap. 542, 544; Taylor *v.* The State, supra; Hannon *v.* The State, 5 Texas Ap. 549, 550, United States *v.* Rossvally, 3 Ben. 157.

4 Ante, § 218–221, 316, 317, 631; Clay *v.* People, 86 Ill. 147; Hobbs *v.* Young, 3 Mod. 313, 316, Holt, 66.

5 Ante, § 651, 673; The State *v.* Wyckoff, 2 Vroom, 65.

6 Ante, § 682, 685–687.

mer's unauthorized breaches of the criminal law.[1] On the other hand, any authorization of the offence, whether direct or by implication, makes the principal or master a criminal therein.[2] If the business itself in which the master is employed involves a violation of the law, the general authority implied to the servant or clerk who conducts it will suffice to render the former liable criminally for the doings of the latter.[3]

§ 893. *Freedmen:* —

Acts done in Slavery. — Slavery having passed away, those who were slaves are, in some localities, called freedmen. While it existed, there were generally special codes of laws regulating slaves; and offences committed by them, and even sometimes by free negroes, were prosecuted and punished differently from the like offences by free white people. A question which has ceased to be of practical importance was, by which law, or whether by either, a negro should be punished for what he did while a slave; and, on this question, judicial opinions were divided.[4]

After Emancipation. — Of course, on the abolition of slavery, negroes became punishable under the laws applicable to freemen, for criminal acts committed subsequently to emancipation.[5]

§ 894. **Recognizance by Master.** — Where a master entered into a recognizance for his slave's appearance in court; then, before the appearance-day, the slave was emancipated; then he delivered him to the sheriff, but federal soldiers rescued him; the liability on the bail-bond was held to be, on both of these grounds, discharged.[6]

[1] Ante, § 219, 317; The State v. Mahoney, 23 Minn. 181; Lathrope v. The State, 51 Ind. 192; Goods v. The State, 3 Greene, Iowa, 566; The State v. James, 63 Misso. 570; Thompson v. The State, 45 Ind. 495; Anderson v. The State, 39 Ind. 553; Hanson v. The State, 43 Ind. 550; O'Leary v. The State, 44 Ind. 91; Felton v. United States, 96 U. S. 699.

[2] McCutcheon v. People, 69 Ill. 601; Forrester v. The State, 63 Ga. 349.

[3] The State v. Wentworth, 65 Maine, 234; Molihan v. The State, 30 Ind. 266; Anderson v. The State, 22 Ohio State, 305. See The State v. Berhman, Riley, 92, 3 Hill, S. C. 90; Reg. v. Holbrook, 3 Q. B. D. 60, 4 Q. B. D. 42; Barnett v. The State, 54 Ala. 579; Stevens v. People, 67 Ill. 587; Mullinix v. People, 76 Ill. 211; Miller v. New York, 5 Thomp. & C. 219, 3 Hun, 35; Second National Bank v. Curren, 36 Iowa, 555; Gathings v. The State, 44 Missis. 343.

[4] Gibson v. The State, 35 Ga. 224; Burt v. The State, 39 Ala. 617; Nelson v. The State, 39 Ala. 667; George v. The State, 39 Ala. 675; Peters v. The State, 39 Ala. 681; Aaron v. The State, 39 Ala. 684; Keith v. The State, 5 Coldw. 35; Wharton v. The State, 5 Coldw. 1; Brown v. The State, 35 Ga. 232; The State v. Brodnax, Phillips, 41.

[5] Tempe v. The State, 40 Ala. 350; Eliza v. The State, 39 Ala. 693; Witherby v. The State, 39 Ala. 702; Ferdinand v. The State, 39 Ala. 706. And see Burns v. The State, 48 Ala. 195; Boyd v. The State, 7 Coldw. 69.

[6] Lewis v. The State, 41 Missis. 686.

Children as Illegitimate. — Whether children born of slave parents are to be deemed illegitimate after emancipation is a question discussed in "Marriage and Divorce."[1] It was held by the majority of a divided court, that, where a slave father has a slave child by a slave mother, and they are made free by a constitutional amendment, the father cannot be compelled to support the child as a bastard.[2]

Rights of Freedmen. — Under constitutional and statutory provisions securing to freedmen equality with free whites, various questions have arisen, not to be discussed in this connection.[3]

§ 895. *Legal Practitioners:* —

Capable of Crime. — A lawyer is not exempt from the criminal laws.[4] He may even commit treason while acting in his profession.[5] If he advises the friends of a felon to persuade the witnesses not to appear against him, and it is done, this is a misdemeanor in him and them; or, as Lord Coke expresses it, "a great contempt and misprision, for which they might be fined and imprisoned."[6] And "if a client and his attorney enter into a conspiracy to resist an officer in performing his duty, both are equally guilty."[7] So, in Virginia, a statute makes punishable "an attempt to employ as true" a forged writing knowing it to be forged; and it is held that, if one as counsel brings a suit on such a writing, with knowledge of the forgery, and with intent to defraud, he commits the offence.[8] Moreover it is familiar doctrine that an attorney may be guilty of a contempt of court.[9] And, though communications between counsel and client are generally privileged, yet, if a man goes to a lawyer for advice

[1] 1 Bishop Mar. & Div. § 163 *b*.

[2] Lewis v. Commonwealth, 3 Bush, 539. And see White v. Ross, 40 Ga. 339.

[3] The following are among the cases which may be consulted under this head: United States v. Rhodes, 1 Abb. U. S. 28; United States v. Cruikshank, 1 Woods, 308; Ellis v. The State, 42 Ala. 525; Murrell v. The State, 44 Ala. 367; Burns v. The State, 48 Ala. 195; Gaines v. The State, 39 Texas, 606; Donnell v. The State, 48 Missis. 661; Lonas v. The State, 3 Heisk. 287; The State v. Gibson, 36 Ind. 389. Other cases are cited under the several minuter titles, particularly in Stat. Crimes.

[4] Walker v. Commonwealth, 8 Bush, 86.

[5] Coke's Case, J. Kel. 12, 23.

[6] Robert's Case, 3 Inst. 139; 1 Hale P. C. 621.

[7] Caldwell, J., in United States v. Smith, 1 Dil. 212.

[8] Chahoon v. Commonwealth, 20 Grat. 733.

[9] Vol. II. § 253, 255 and note, 270; Ex parte Smith, 28 Ind. 47; Anonymous, 1 Stra. 384; Daw v. Eley, Law Rep. 7 Eq. 49; People v. Palmer, 61 Ill. 255. In re Rea, 14 Cox C. C. 139; Slater v. Merritt, 75 N. Y. 268; Ingle v. The State, 8 Blackf. 574; Wells v. Commonwealth, 21 Grat. 500.

how to commit a crime, — as, for example, how to forge a contract, — the communication is not privileged, and the adviser may be required to disclose it as a witness.[1] So, —

Disbarring. — An attorney is an officer of the court, and he may be suspended from his functions or disbarred for misconduct toward the court or the client.[2] He is otherwise also liable to the summary process of the court in respect of his duties.[3]

§ 896. *Physician and Patient:* —

Elsewhere. — The doctrines governing this relation are sufficiently discussed in other parts of these volumes.[4]

[1] People *v.* Blakeley, 4 Parker C. C. 176.

[2] Vol. II. § 255, note, 270; In re Woolley, 11 Bush, 95; The State *v.* Tunstall, 51 Texas, 81; Ex parte Trippe, 66 Ind. 531; Kane *v.* Haywood, 66 N. C. 1; In re Browne, 2 Col. Ter. 553; Kepler *v.* Klingensmith, 50 Ind. 434; In re Baluss, 28 Mich. 507; In re ———, 1 Hun, 321; Ex parte Walls, 64 Ind. 461; Walker *v.* Commonwealth, 8 Bush, 86.

[3] Ex parte Edwards, 7 Q. B. D. 155; In re Browne, supra. See The State *v.* McLane, 43 Texas, 404; Hawkins *v.* Smith, 56 Ga. 571.

[4] Ante, § 217, 314 and note, 558; Vol. II. § 86, 664, 685, 693.

CHAPTER LIX.

PARDON.[1]

§ 897. **Scope of this Chapter.** — The subject of pardon divides itself into two parts, — the one relating to the law, and the other to the procedure. The former belongs to the present volumes; the latter to "Criminal Procedure."

Distinguished from English. — In England, this subject presents itself under various complications of doctrine; but, in this country, it is comparatively simple.

§ 898. **How defined.** — A pardon is a remission of guilt.[2]

[1] For the procedure as respects the plea of pardon, see Crim. Proced. I. § 832 et seq.

[2] 1. The principal question relating to this definition is, whether the words should be "remission of guilt" or "remission of the punishment of guilt." The books do not abound in definitions of pardon. Lord Coke says: "A pardon is a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. All that is forfeited to the king by any attainder, &c., he may restore by his charter; but if, by the attainder, the blood be corrupted, that must be restored by authority of Parliament. We call it in Latin *pardonatio*, and derive it *a per et dono: per* is a preposition, and in the Saxon tongue is *for* or *vor;* as to forgive is thoroughly to remit, and forethink is to repent, and forbear is to bear with patience, as it is said, *leve est ferre, perferre grave.*" 3 Inst. 233.

2. In the Law Dictionary of Jacob, afterward known by the name of Tomlins, its principal late editor, we have the following, referring, for authority, to Staundf. Pl. Cor. 47: "Pardon. The remitting or forgiving of an offence committed against the king." Tit. Pardon.

3. In the Supreme Court of the United States, Marshall, C. J., defined as follows: "A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." United States *v.* Wilson, 7 Pet. 150, 160. And Field, J., speaks of pardon as "releasing the offence, obliterating it in legal contemplation." Osborn *v.* United States, 91 U. S. 474, 478.

4. In this confusion and lack of defining, we should look to the law as adjudged to see what is the true definition. Bishop First Book, § 261–264, 266. Looking thus, we find, that, for example, after one is pardoned, he cannot be accused of the offence by words verbally spoken, without subjecting the speaker to an action of slander, the same as though the offence had not been committed. Thus, says Starkie: "In Cuddington *v.* Wilkins, Hob. 81, which was an action for publishing these words of the plaintiff, 'He is a thief,' the defendant pleaded, that the plaintiff had been guilty of stealing six

Amnesty. — The word "amnesty" does not in legal language differ greatly in meaning from "pardon." But it is not often, if ever, applied to a pardon granted to a single individual for an ordinary crime; it signifies a general pardon to rebels for their treason and other high political offences, or the forgiveness which one sovereign grants to the subjects of another, who have offended by some breach of the law of nations.[1] "An amnesty," says Vattel, "is a perfect oblivion of the past."[2] Whether or not there may be a partial amnesty, there are pardons which come short of such "total oblivion."

§ 899. **In whom Power of Pardon.** — In England, the Crown has the power of pardon,[3] and practically most pardons proceed from this source. The power has been regulated from time to time by statutes, some of which are of early dates. And sometimes pardons, general and special, have been granted by acts of

sheep. The plaintiff replied, that, after the felony, and before the publication of the words, he had been pardoned by a general pardon. Upon a demurrer, this replication was holden to be good, inasmuch as the guilt, as well as the punishment, is taken away by a pardon." 1 Stark. Slander, 237, 238. Turning to this case, in Hobart, one of the most authoritative of the old reporters, we read: "The whole court were of opinion, that, though he [the plaintiff] were a thief once, yet, when the pardon came, it took away not only *pœnam* but *reatum*, for felony is *contra coronam et dignitatem regis*. Now, when the king had discharged it and pardoned him of it, he had cleared the person of the crime and infamy. . . . And it was said, that he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain, after he be cured or manumissed, but that he hath been a thief or villain he might say." p. 81 *b*, 82. And see post, § 917. Hawkins states the effect of a pardon in the same way. "I take it to be settled at this day," he observes, "that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy of all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction [a point settled and practised upon in all our courts at the present time, post, § 917]; because the pardon makes him, as it were, a new man." 2 Hawk. P. C. Curw. ed. p. 547, § 48.

5. It is impossible, therefore, to doubt, that, in the law, a pardon is a remission, not merely of the punishment of guilt, but of the guilt itself. Of course, as the the human law does not control the divine, no one supposes, that, before the tribunal of God, a pardon from an earthly sovereign is pleadable. Therefore, in a moral sense, a man may be guilty after the executive of the country has pardoned him; but, in a law book, we treat of law, not of ethics.

[1] Vattel Law of Nations, b. 3, c. 18, and b. 4, c. 2; Knote *v.* United States, 10 Ct. Cl. 397.

[2] Vattel Law of Nations, b. 4, c. 2, § 20; The State *v.* Blalock, Phillips, 242.

[3] Rex *v.* Parsons, 1 Show. 283; Rex *v.* Greenvelt, 12 Mod. 119; s. c. nom. Greonvelt's Case, 1 Ld. Raym. 213, 214; Shugborough *v.* Biggins, 5 Co. 50 *a*; s. c. nom. Shackborough *v.* Biggins, Cro. Eliz. 632, 682; Searle *v.* Williams, Hob, 288, 293; Smith *v.* Bowen, 11 Mod. 254.

Parliament.[1] With us, the constitutions of the United States and of the several States provide for pardons; or, should there be a State or two in which this is not so, the defect is supplied by legislation.[2] By the Constitution of the United States, the President is vested with the "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."[3] In most of the States, the power is reposed in the governor, who is to exercise it with the advice of his council, or other officers designated for the purpose, or alone, as the provision may be.[4] Sometimes special powers of remitting fines and forfeitures are conferred on the courts.[5]

§ 900. **Pardon as Legislative Act.** — According, therefore, to the system of laws whence ours are derived, pardon may proceed from either the executive or the legislative department, the power not being exclusive in either.[6] In our country, it is the general style of our written constitutions to confer *specific* executive powers on the Governor or President, and *general* legislative authority on the legislature. The result would seem to be, that ordinarily the governor of a State, for example, can exercise the pardoning power expressly given him, and no other; while the legislature may exercise all pardoning power not expressly withheld. So the question stands in principle. In authority, it has been held, under a constitution forbidding any one department of the government to exercise powers properly belonging to another, that pardons, being grantable by the governor, cannot be given by the legislature.[7] Ordinarily, as the function is both

[1] 3 Inst. 233 et seq.

[2] And see Story Const. § 1496. **Whether Statute required.** — When the constitution of a State vests in the governor the power of pardon, he may exercise it, though no legislation exists on the subject. Baldwin *v.* Scoggin, 15 Ark. 427. **No Power in Legislature.** — In Alabama, the legislature cannot pardon, the power being exclusively in the governor. Haley *v.* Clark, 26 Ala. 439.

[3] Const. U. S. art. 2, § 2, cl. 1.

[4] See the constitutions and the statutes of the several States; also, Commonwealth *v.* Caton, 4 Call. 5; Ex parte Birch, 3 Gilman, 134, 145; The State *v.* Fuller, 1 McCord, 178; The State *v.* Fleming, 7 Humph. 152, Ex parte Hunt, 5 Eng. 284; The State *v.* Twitty, 4 Hawks, 193; Ex parte Hickey, 4 Sm. & M. 751; Shoop *v.* Commonwealth, 8 Barr, 126; The State *v.* Simpson, 1 Bailey, 378; The State *v.* Brewer, 7 Blackf. 45; Charleston *v.* Corleis, 2 Bailey, 186; Commonwealth *v.* Lockwood, 109 Mass. 323; Ex parte Scott, 19 Ohio State, 581; Dominick *v.* Bowdoin, 44 Ga. 357; Grubb *v.* Bullock, 44 Ga. 379; Wilkerson *v.* Allan, 23 Grat. 10; Blair *v.* Commonwealth, 25 Grat. 850; The State *v.* Nichols, 26 Ark. 74; The State *v.* Dunning, 9 Ind. 20.

[5] Strafford *v.* Jackson, 14 N. H. 16.

[6] The State *v.* Nichols, 26 Ark. 74.

[7] The State *v.* Sloss, 25 Misso. 291. To a like effect is The State *v.* Nichols, supra. Cooley says: "Whether the leg-

executive and legislative in the country whence we derive our unwritten laws, the vesting of the power in the governor would appear not to make it exclusive in him. And, in one way or another, pardons, and especially the broader amnesty, are widely granted by the legislatures of our States.[1]

§ 901. **Continued.** — There is another view of this question, as to pardon before final judgment. The power to make laws carries with it the power to repeal them. If a statute is repealed, no proceeding against an offender under it can be instituted, or, if instituted, carried further. So that, unless final judgment has been rendered, the repeal of a statute has the practical effect of a legislative pardon;[2] and, in reason, the greater power includes the less. It plainly includes the right to pass a general act of amnesty. And this, in principle, includes the authority to pass a special act of pardon. But some of our State constitutions require that all laws shall be general; and it would probably violate such a provision for the legislature to undertake to pardon a single person.

§ 902. **Common-law Authorities.** — We have seen,[3] that the common law of crimes prevails generally in our States. Therefore the English authorities on pardon are pertinent there.[4] And though the national tribunals cannot take jurisdiction of any crime without the aid of a statute;[5] yet, as observed constantly in practice, when a jurisdiction has been acquired, they look into the common law for their rules of decision. On the question of pardon, the course of the courts was early explained by Marshall, C. J., thus: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."[1]

islature can constitutionally remit a fine, when the pardoning power is vested in the governor by the constitution, has been made a question; and the cases of Haley *v.* Clark, 26 Ala. 439, and People *v.* Bircham, 12 Cal. 50, are opposed to each other upon the point. If the fine is payable to the State, perhaps the legislature should be considered as having the same right to discharge it that they would have to release any other debtor to the State from his obligation." Cooley Const. Lim. 2d ed. 115, note.

[1] Bird *v.* Breedlove, 24 Ga. 623; The State *v.* Blalock, Phillips, 242; Haddix *v.* Wilson, 3 Bush, 523; Michael *v.* The State, 40 Ala. 361; The State *v.* Keith, 63 N. C. 140. And see Greathouse's Case, 2 Abb. U. S. 382; Michael *v.* The State, 40 Ala. 361; The State *v.* Dunning, 9 Ind. 20.

[2] Stat. Crimes, § 175–185. But it is not quite so in full. After a pardon has been granted and accepted, it cannot be withdrawn; while, after a statute is repealed, a new statute may authorize prosecution for an offence committed under it before the repeal. Ib. § 180.

[3] Ante, § 35–38, 189.

[4] People *v.* Bowen, 43 Cal. 439.

[5] Ante, § 194, 199.

§ 903. **Not before Offence committed.** — There can be no pardon of an offence until committed; for earlier immunity granted would be a license, procurable only from the legislature.[2] But, —

Before or after "Conviction." — By the general doctrine, when guilt is incurred, it can be remitted either before judicial proceedings are undertaken, or during their pendency, or after their termination, or after the punishment has been partly or fully endured.[3] Yet, by express words in the constitutions of considerable numbers of our States, the pardoning power is forbidden to act before "conviction."[4] A conviction, in ordinary legal language, consists of a plea or verdict of guilty, and it is immaterial whether or not final judgment has been rendered thereon.[5] Therefore, though a constitution has this clause, there may be a pardon under it after verdict and before sentence.[6]

[1] United States *v.* Wilson, 7 Pet. 150, 160; s. p. Ex parte Wells, 18 How. U. S. 307, 310, 311, where Wayne, J., observed: "We must give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution." And see Stat. Crimes, § 97; People *v.* Bowen, supra.

[2] Thomas *v.* Sorrell, Vaugh. 330, 333; Case of Pardons, 12 Co. 29; Rex *v.* Wilcox, 2 Salk. 458; Rex *v.* Williams, Comb. 18; Shipley *v.* Craister, 2 Vent. 131; 2 Hawk. P. C. Curw. ed. p. 540, § 28. And see Ib. and § 29, for some possible exceptions in England; but they can probably have no application in this country. See post, § 904 and note.

[3] Rex *v.* Reilly, 1 Leach, 4th ed. 454; Rex *v.* Crosby, 1 Ld. Raym. 39; Anonymous, 1 Vent. 349; Rex *v.* Castlemain, T. Raym. 379; post, § 904; Commonwealth *v.* Bush, 2 Duvall, 264. It was therefore held in Missouri, that the pardoning power given by the constitution to the governor of the State extends to the granting of pardons as well before as after conviction. And Scott, J., after referring to the English authorities, added: "It seems to be equally well settled in the United States, that, unless the power of pardoning is restricted, it may be exercised as well before as after conviction." The State *v.* Woolery, 29 Misso 300, 301. The words of the Georgia constitution being, that the governor "shall have power to grant reprieves and pardons, to commute penalties, and to remit any part of a sentence for offences against the State except in cases of impeachment," it is held that the pardon may be as well before conviction as after. Dominick *v.* Bowdoin, 44 Ga. 357; Grubb *v* Bullock, 44 Ga. 379.

[4] Ex parte Birch, 3 Gilman, 134, 145.

[5] Stat. Crimes, § 348.

[6] Commonwealth *v.* Mash, 7 Met. 472 The State *v.* Fuller, 1 McCord, 178; Duncan *v.* Commonwealth, 4 S. & R. 449; Blair *v.* Commonwealth, 25 Grat. 850; Commonwealth *v.* Lockwood, 109 Mass. 323; The State *v.* Alexander, 76 N. C 231. And see The State *v.* Nichols, 26 Ark. 74; The State *v.* Dyches, 28 Texas, 535.

§ 904. **Pardons and Amnesty by President.** — The Constitution of the United States does not forbid the pardoning power to act before conviction. Therefore the President may pardon an offence as soon as it has been committed; but not, as just said, before its commission. To attempt this would be an encroachment upon powers exclusively legislative; in other words, it would be an endeavor to annul the law of the land.[1]

§ 905. **Procured by Fraud — (Suppression of Facts).** — A pardon procured by a fraud on the pardoning power is void.[2] It is so even, according to the English books, whenever the king has not been truly and fully apprised of the nature of the case, and the state of the proceedings.[3] Gabbett observes: "It may be laid down as a general rule, that any suppression of truth or sugges

[1] See ante, § 64. **The Amnesty Proclamations.** — An instance of oversight, rather than of any real purpose to violate constitutional duty, was pointed out by me to President Lincoln, in a letter published in the newspapers, dated Feb. 22, 1865, as follows: "The Constitution provides, art. 2, § 2, that the President 'shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.' Before there can be a pardon, there must be an offence. You cannot to-day pardon what you think a man may do to-morrow. And if you promise to-day, to pardon a crime which a man may commit to-morrow, you thereby in effect violate the Constitution. You abuse the godlike power of mercy, which the Constitution has put into your hands. Yet on the 8th of December, 1863, you issued a proclamation which, taken in connection with what accompanied it, and with other circumstances and events, is understood, perhaps unjustly, by the whole country, North and South, to be of this unlawful kind. Is it your intent that those only who have done nothing since December 8, 1863, to help the rebellion, can have the benefit of your amnesty proclamation? You said, in your Message a year afterward, that the rebels could still have the benefit of it; and you did not limit the statement to include only those who had done nothing to help the rebellion since it was issued." The error was in attempting to apply such a proclamation to offences afterward to be committed; and omitting, in the instrument itself, to state explicitly that it could not be so applied. Questions upon the effect of the amnesty statutes and proclamations, promulgated during and at the close of our late civil war, are fast passing away; but those who have occasion to look into them will find help from the following cases: Armstrong *v.* United States, 13 Wal. 154; Pargoud *v.* United States, 13 Wal. 156; Carlisle *v.* United States, 16 Wal. 147; Lapeyre *v.* United States, 17 Wal. 191; The Confiscation Cases, 20 Wal. 92; Greathouse's Case, 2 Abb. U. S. 382; United States *v.* Hughes, 1 Bond, 574; Bragg *v.* Lorio, 1 Woods, 209; United States *v.* Six Lots of Ground, 1 Woods, 234; Brown *v.* United States, McCahon, 229; Haym *v.* United States, 7 Ct. Cl. 443; Hamilton *v.* United States, 7 Ct. Cl. 444; Waring *v.* United States, 7 Ct. Cl. 501; Knote *v.* United States, 10 Ct. Cl. 397; Michael *v.* The State, 40 Ala. 361; Haddix *v.* Wilson, 3 Bush, 523; Ex parte Law, 35 Ga. 285; United States *v.* Athens Armory, 35 Ga. 344; The State *v.* Keith, 63 N. C. 140; The State *v.* Shelton, 65 N. C. 294; The State *v.* Haney, 67 N. C. 467; Ex parte Hunter, 2 W. Va. 122; Hedges *v.* Price, 2 W. Va. 192.

[2] Commonwealth *v.* Halloway, 8 Wright, Pa. 210, 219.

[3] 2 Gab. Crim. Law, 585; 2 Hawk. P. C. Curw. ed. p. 533, § 8, 9. See also The State *v.* McIntire, 1 Jones, N. C. 1.

tion of falsehood, in a charter of pardon, will vitiate it; and, upon this principle, if it state the party to be attainted when in fact no attainder had ever taken place, it will be altogether invalid."[1] So likewise it is void, if the party is attainted, and it does not mention the attainder; the presumption from the omission being, that the king was not truly informed;[2] while, on the other hand, if the charter of pardon, drawn in general terms, contains an exception of any particular class of felony, the exception applies equally whether there has been an attainder of it or not.[3]

§ 906. **Continued.** — The like doctrine as to fraud prevails with us.[4] If, on comparing the instrument of pardon with the record in the cause, the court sees that the executive may have been imposed upon by false statements, or an omission of relevant facts, it will hold the pardon to be void.[5] Even though the pardoned person did not himself participate in the deception, yet the pardon is equally void if others procured it by false papers and representations. "He can claim nothing as a favor that is founded on the fraud of his friends, so as to prevent the frustration of the fraud."[6] But, —

[1] 2 Gab. Crim. Law, 586; 3 Inst. 238.

[2] 2 Hawk. P. C. Curw. ed. p. 534; Rex *v.* Maddocks, 1 Sid. 430; Anonymous, J. Kel. 28.

[3] 2 Hawk. P. C. Curw. ed. p. 535, § 13.

[4] Commonwealth *v.* Kelly, 9 Philad. 586.

[5] The State *v.* Leak, 5 Ind. 359. In this case, persons had become sureties in a recognizance, to the amount of $2,000, for the appearance of A, charged with murder. The principal and sureties were defaulted; and, after judgment rendered on the forfeited recognizance, the governor remitted $1,500 to the sureties, by an instrument which did not state the crime for which A was to appear and answer, or the amount of the judgment thus rendered. And it was held, that the remission was void, because it must be presumed the governor was not informed of the true state of the facts. As to the necessity of supplying the information to the pardoning power, see Bird *v.* Breedlove, 24 Ga. 623.

[6] Commonwealth *v.* Halloway, 8 Wright, Pa. 210, 219, 220, by Lowrie, C. J. The court considered, that Stat. 27 Edw. 3, stat. 1, c. 2, is common law in Pennsylvania; or, if not, "we think," said the judge, "the principles of the common law demand this conclusion, and they have a rather wider extent than the provisions of this statute." The statute is as follows: "Because our lord the king hath often granted charters of pardon of felonies upon feigned and untrue suggestions of divers people, whereof much evil hath chanced in times past; and for to eschew such evil, &c., in every charter of pardon of felony, which shall be granted at any man's suggestion, the said suggestion, and the name of him that maketh the suggestion, shall be comprised in the same charter; and if after the same suggestion be found untrue, the charter shall be disallowed and holden for none. And the justices before whom such charter shall be alleged shall inquire of the same suggestion, and that as well of charters granted before this time as of charters which shall be granted in time to come;

Erroneous Date of Conviction. — In the absence of fraud, a pardon will be good, though it states the date of the conviction incorrectly, if it was intended to cover, and does cover, the particular offence.[1]

§ 907. **Delivery and Acceptance.** — A pardon, to be valid, must be delivered, and, like a deed of land, accepted by the grantee. Where there is no acceptance, it is void.[2] In Pennsylvania, by usage, a delivery to the warden of the prison is *prima facie* a delivery to the prisoner; but, in a particular instance, the intention may be shown to be otherwise, when it will not have this effect.[3] And perhaps there are other localities in which a mere delivery to the prison-keeper will be adequate; though it is not quite clear on what principle this can be so. A mere delivery to the marshal or sheriff is not a delivery to the prisoner.[4]

Not revocable. — After delivery, a pardon cannot be revoked.[5] But it can be, after passing out of the hands of the executive, at any time before delivery.[6]

As to General Legislative Pardon. — The doctrine of delivery and acceptance does not apply to a legislative act of amnesty and pardon. The courts take notice of such an act like any other general statute. Nor, being a law, and not a deed, does it require acceptance.[7] And, —

General Pardon by Proclamation. — The like rule applies to a general executive pardon or amnesty. There is no instrument meant for delivery; and, though one might doubtless decline to avail himself of his rights under such a proclamation, the courts take judicial notice of it, and it goes into effect on being executed

and, if they find them untrue, then they shall disallow the charters so alleged, and shall moreover do as the law demandeth." If this statute is common law with us, still perhaps one or two of its provisions should be interpreted in the light of principles relating to directory statutes mentioned elsewhere. Stat. Crimes, § 255.

[1] Commonwealth *v.* Ohio and Pa. Railroad, 1 Grant, Pa. 329. Yet if a pardon misrecites the offence, it will be inoperative. United States *v.* Stetter, 1 Whart. Crim. Law, 5th ed. § 766, note.

[2] United States *v.* Wilson, 7 Pet. 150. Marshall, C. J. in this case observed: "It may be supposed, that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment." p. 161. s. p. In re Callicot, 8 Blatch. 89, 96.

[3] Commonwealth *v.* Halloway, 8 Wright, Pa. 210.

[4] In re De Puy, 3 Ben. 307.

[5] The State *v.* Nichols, 26 Ark. 74 And see United States *v.* Hughes, 1 Bond, 574.

[6] In re De Puy, supra.

[7] The State *v.* Blalock, Phillips, 242.

in due form of law. It remains only for the person relying on it to comply with its conditions, if any.[1]

§ 908. **By what Rules construed.** — A pardon is to be construed by the rules applying to grants. If, therefore, its meaning is in doubt, it is to be taken most strongly against the grantor,[2] yet not beyond the fair import of its words.[3] In like manner, while amnesty, by statute or proclamation, is not a deed or within its reasons, it is justly said to be an act of grace, to be interpreted liberally in favor of those for whose benefit it is intended.[4] But its meaning, like that of other writings, must be gathered from its language, to the exclusion of extrinsic information concerning the intent of the pardoning power.[5] And it is not to be understood as attempting the repeal of a statute in violation of the constitution,[6] but solely as contemplating effects within the constitutional power of pardon.[7] Still, —

Effect distinguished. — A pardon, like any other instrument, may have an effect quite beyond its words, — to be explained further on.[8] And, —

What a Pardon — (Order to discharge Prisoner). — There is no one exclusive form of language essential to this instrument. Therefore a writing, by the President, under the seal of the United States, directing the immediate discharge of a person sentenced to imprisonment for robbing the mail, was held to be a pardon.[9] But —

Promise of Pardon. — A mere promise of pardon is not a pardon, though it may properly lead the court to continue the case until the thing promised can be obtained.[10]

§ 909. **To what the Power extends.** — The power of pardon extends, in England, to all indictable offences, to ecclesiastical

[1] Lapeyre *v.* United States, 17 Wal. 191; Armstrong *v.* United States, 13 Wal. 154; Pargond *v.* United States, 13 Wal. 156; Greathouse's Case, 2 Abb. U. S. 382; United States *v.* Hughes, 1 Bond, 574; Hamilton *v.* United States, 7 Ct. Cl. 444.

[2] Wyrral's Case, 5 Co. 49 *b*; Ex parte Hunt, 5 Eng. 284.

[3] 2 Hawk. P. C. Curw. ed. p. 585, 589, 540, § 12, 24, 25. See Rawleigh's Case, 2 Rol. 50.

[4] The State *v.* Shelton, 65 N. C. 294.

[5] Greathouse's Case, 2 Abb. U. S. 382.

[6] The Confiscation Cases, 20 Wal. 92.

[7] Stat. Crimes, § 90. And see further as to the interpretation of pardons, Rex *v.* Johnson, 3 Mod. 241; Philips's Case, 1 Sid. 170; Oswald *v.* Everard, 1 Ld. Raym. 637; Pool *v.* Trumbal, 3 Mod. 56; Wyrral's Case, 5 Co. 49 *b*; Plitton's Case, 6 Co. 79 *b*; Littleton *v.* Dudley, 5 Co. 47 *a*; Franklin's Case, 5 Co. 46 *b*.

[8] Post, § 916 et seq.

[9] Jones *v.* Harris, 1 Strob. 160.

[10] Rex *v.* Garside, 4 Nev. & M. 33, 2 A. & E. 266. See The State *v.* Baptiste, 26 La. An. 134; Crim. Proced. I. § 847.

ones,[1] and to wrongs pursuable by penal action;[2] except that, when a right to a penalty or to costs has vested in a private person, the pardon of the offender cannot take it away.[3] The constitutions of some of our States expressly extend the pardoning power to the remission of fines and forfeitures, while those of other States, and that of the United States, do not; but the whole is included, the same as in England, under the general power.[4] Still, —

§ 910. **Vested Rights.** — There is some obscurity in the books as to the effect of a pardon on what are termed vested rights.[5] A distinction exists between a vested right in action, or *chose in action*, and property vested in possession, or reduced to possession. And, though the cases are in confusion, and not all are harmonious with any principle, the doctrine seems to be, that, as to the former, the pardon cannot take away such a right from an individual,[6] but it can from the State; while, as to the latter, under our constitutions, the pardoning power cannot even divest the State of property vested in it in possession. Nor, in England, will it be construed to do the latter unless its words are express.[7] But, more particularly, —

Costs. — If costs are coming to a prosecutor or an attorney, and

[1] Cooke *v.* Hall, 5 Co. 51 *a*; Cuddington *v.* Wilkins, Hob. 81; Rex *v.* Turvil, 2 Mod. 53; Smith *v.* Shelbourn, Cro. Eliz. 685, 686; Winchcombe *v.* Winchester, Hob. 165, 167; Trollop's Case, 8 Co. 68 *a*.

[2] 3 Inst. 238; 2 Hawk. P. C. Curw. ed. p. 543, § 33. See Bentley *v.* Ely, 2 Stra. 912.

[3] Thomas *v.* Sorrell, Vaugh. 330, 333; Cooke *v.* Hall, 5 Co. 51 *a*; Pool *v.* Trumbal, 3 Mod. 56; Howell *v.* James, 2 Stra. 1272; 2 Hawk. P. C. Curw. ed. p. 543, § 34; In re Deming, 10 Johns, 232, 483.

[4] Story Const. § 1504; Osborn *v.* United States, 91 U. S. 474; United States *v.* Harris, 1 Abb. U. S. 110; United States *v.* Thommasson, 4 Bis. 336; United States *v.* Athens Armory, 2 Abb. U. S. 129; The State *v.* Timmons, 2 Harring. Del. 528; The State *v.* Underwood, 64 N. C. 599; Libby *v.* Nicola, 21 Ohio State, 414. In Kentucky, "The 10th section of the 3d article of the constitution," it was observed, "vests in the governor power to remit fines and forfeitures, but prohibits him from remitting the fees of a commonwealth attorney, &c., in penal or criminal cases." And the court held, that, before judgment, the governor can remit the forfeiture incurred on a recognizance, in favor of the sureties. Commonwealth *v.* Morgan, 14 B. Monr. 392. Indeed, the right of the commonwealth's attorney, which cannot be remitted, does not accrue till judgment is rendered. Commonwealth *v.* Spraggins, 18 B. Monr. 512. See also Commonwealth *v.* Dennistion, 9 Watts, 142; Haynes *v.* The State, 3 Humph. 480; Wilkerson *v.* Allan, 23 Grat. 10; United States *v.* McKee, 4 Dil. 128.

[5] As to what rights of property are vested, see 2 Bishop Mar. Women, § 38–53.

[6] See Stat. Crimes, § 178, 179; 2 Bishop Mar. Women, § 32–34.

[7] Toomes *v.* Etherington, 1 Saund. 361; Rex *v.* Turvil, 2 Mod. 53; Rex *v.* Salaway, 3 Mod. 100; Rex *v.* Johnson, 3 Mod. 241; 2 Hawk. P. C. c. 37, § 54; Knote *v.* United States, 95 U. S. 149.

are already taxed;[1] or probably, in our practice, if final judgment is rendered, leaving the taxation a mere ministerial act to be done by the clerk;[2] they are recoverable after pardon. And if the costs are to go into the treasury of the State, not every form of words in a general pardon will remit them after judgment; and possibly there are courts which will hold that they cannot be remitted, being a right vested in the State.[3] If the pardon comes before sentence, though after conviction, the costs are always remitted, or rather they are never incurred.[4] Even after sentence, it is believed that the general American doctrine holds it to be competent for the pardoning power to remit, if it chooses, such costs as are payable to the State.[5] Again, —

Penalties and Forfeitures. — If, on a judgment against a convicted person, there is a penalty which is payable to a private individual, it cannot be remitted by a pardon.[6] And, in general, when by judicial process property has become vested in one, it cannot be taken from him.[7] But here we come to the distinction, between property vested in possession, and a vested right of action. It appears to be established doctrine that if, for example, a mere judgment of forfeiture vests specific property in the United States, the President, who has no power to dispose of what belongs to the nation, cannot, by his pardon, divest the nation

[1] Cooke *v.* Hall, 5 Co. 51 *a*; 2 Hawk. P. C. Curw. ed. p. 546; Anglea *v.* Commonwealth, 10 Grat. 696; The State *v.* McO'Blenis, 21 Misso. 272; Duncan *v.* Commonwealth, 4 S. & R. 449. See also Lyon *v.* Morris, 15 Ga. 480; Routt *v.* Feemster, 7 J. J. Mar. 131; Edwards *v.* The State, 7 Eng. 122; The State *v.* Farley, 8 Blackf. 229; Schuylkill *v.* Reifsnyder, 10 Wright, Pa. 446.

[2] Duncan *v.* Commonwealth, 4 S. & R. 449; Ex parte McDonald, 2 Whart. 440.

[3] Libby *v.* Nicola, 21 Ohio State, 414; Schuylkill *v.* Reifsnyder, 10 Wright, Pa. 446; Estep *v.* Lacy, 35 Iowa, 419. See Parrott *v.* Wilson, 51 Ga. 256.

[4] Harris *v.* White, Palmer, 412; Watts's Case, Cro. Jac. 336; Commonwealth *v.* Hitchman, 10 Wright, Pa. 357; White *v.* The State, 42 Missis. 635; The State *v.* Underwood, 64 N. C. 599; Commonwealth *v.* Ahl, 7 Wright, Pa. 53. The case of Playford *v.* Commonwealth, 4 Barr, 144, seems to lay down the doctrine, that, when a pardon comes between the verdict and the sentence, the payment of costs may still be compelled. But the case plainly is misunderstood by the reporter. The judges decided whatever they did decide in it on the strength of Duncan *v.* Commonwealth, supra, which expressly holds the contrary; namely, that costs do not follow under such circumstances. And so are the later Pennsylvania cases above cited.

[5] Libby *v.* Nicola, supra; post, § 916.

[6] Frazier *v.* Commonwealth, 12 B. Monr. 369; Rowe *v.* The State, 2 Bay, 565; The State *v.* Williams, 1 Nott & McC. 26; Rucker *v.* Bosworth, 7 J. J. Mar. 645; Shoop *v.* Commonwealth, 3 Barr, 126. See Rankin *v.* Beaird, Breese, 123.

[7] Osborn *v.* United States, 91 U. S. 474.

of it, and give it back to its former owner.[1] And it is the same with the governor of a State.[2] A judgment of fine and costs is, as already intimated, distinguished from a judgment of forfeiture of specific property in this, that the latter vests the property itself in the state, while the former vests in it a mere *chose in action*. At all events, the accepted doctrine appears to be, that it is competent for a pardon to remit the fine and costs yet unpaid to the State.[3] Even —

County. — There is authority that a county is liable to have penalties, which have vested in it, divested by the executive pardon.[4] And —

Revenue Forfeiture. — The Supreme Court of the United States has decided, that the authority given to the Secretary of the Treasury by the act of March 3, 1797, c. 361, to remit forfeitures under the revenue laws, may be exercised at any time before payment of the money to the collector.[5]

§ 911. **Qui Tam, &c.** — If the proceeding is by penal action in the civil form, and the penalty is to accrue in part to the prosecutor and the residue to the State, still the pardoning power extends to such a case.[1] But, according to the English doctrine, to bar the action, so as to defeat the claim of the private person, the pardon must transpire before suit commenced; for the commencement of it vests the right.[2] Where a forfeiture is to be enforced by a seizure and condemnation *in rem*, the private interest vests, certainly on the condemnation, probably on the seizure.[3] But —

Proceeding by Indictment, &c. — If the proceeding is in the name of the king or state, by indictment or criminal information, the rule, we have seen,[4] is different; and the private interest does not vest, even on the verdict of the jury, but only on the final judgment of the court.[5] Yet, subject to any doubt suggested by some of the foregoing paragraphs, though the pardon cannot take away the individual claim, it can that of the state;[6] even, it appears, so far as to require, under special circumstances, the remission of money which has already passed out of the hands of the convict.[7]

§ 912. **Impeachments.** — The Constitution of the United States expressly excepts out of the pardoning power cases of impeachment,[8] and the like exception exists in most of the State constitutions. It is the same also in England by act of parliament.[9]

§ 913. **Legislative Contempts.** — Of legislative contempts, Story says: "The Constitution [of the United States] is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and, to make it effectual, the former is excluded by implication."[10] But —

Contempts of Court. — Contempts of court are public offences, pardonable like any other.[11]

[1] The Confiscation Cases, 20 Wal. 92, 112; United States *v.* Six Lots of Ground, 1 Woods, 234; Bragg *v.* Lorio, 1 Woods, 209; Knote *v.* United States, 10 Ct. Cl. 397. But see Brown *v.* United States, McCahon, 229; United States *v.* Harris, 1 Abb. U. S. 110.

[2] Aldrich *v.* Jessup, 3 Grant, Pa. 158.

[3] See post, § 911, 916. The State *v.* Timmons, 2 Harring. Del. 528; United States *v.* Harris, 1 Abb. U. S. 110; United States *v.* Thomasson, 4 Bis. 336. **Informer's Share.** — In United States *v.* Harris, it was held that after judgment the President may by pardon remit the part of a fine, penalty, or forfeiture which accrues to the United States, but not the informer's share In United States *v.* Thomasson, the latter clause of this doctrine was disapproved, and it was held that both the informer's moiety and the other may be remitted by pardon even after judgment. The court deemed, that the English doctrine is not applicable as a rule to ascertain the President's power under our National Constitution. I simply state these cases, not undertaking to say how far either is sound.

[4] Holliday *v.* People, 5 Gilman, 214. But see Shoop *v.* Commonwealth, 3 Barr, 126. And see The State *v.* Simpson, 1 Bailey, 378. In the Pennsylvania case of Cope *v.* Commonwealth, 4 Casey, 297, it was held, that a pardon of one convicted of conspiracy, even after sentence, will operate as a release of all fines imposed for the offence, though due, not to the commonwealth, but to the county. In another Pennsylvania case it was observed: "Sometimes the sentence of the court is, that the party in default be fined, as well as imprisoned; and it would be a distinction the reason of which would not be very obvious, to give power to the governor to remit the imprisonment, but deny him the right to remit the fine, upon the pretence that the right to the money was vested in the county. In the case of costs, private persons are interested in them; but, as to fines and forfeitures, they are imposed upon principles of public policy." Rogers, J., in Commonwealth *v.* Denniston, 9 Watts, 142, 143.

[5] United States *v.* Morris, 10 Wheat. 246. See The Hollen, 1 Mason, 431, 434, 435.

[1] Ante, § 909.

[2] 2 Hawk. P. C. Curw. ed. p. 543, § 33, 34; Grosset *v.* Ogilvie, 5 Bro. P. C. 527.

[3] United States *v.* Lancaster, 4 Wash. C. C. 64; McLane *v.* United States, 6 Pet. 404. See The Hollen, 1 Mason, 431, 434, 435.

[4] Ante, § 910.

[5] Duncan *v.* Commonwealth, 4 S. & R. 449; The State *v.* Youmans, 5 Ind. 280. And see Greonvelt's Case, 1 Ld. Raym. 213, 214.

[6] Rowe *v.* The State, 2 Bay, 565; The State *v.* Williams, 1 Nott & McC. 26; The State *v.* Timmons, 2 Harring. Del. 528.

[7] In re Flournoy, 1 Kelly, 606. See post, § 916; Parrott *v.* Wilson, 51 Ga 255.

[8] Ante, § 899.

[9] Reg. *v.* Boyes, 1 B. & S. 311.

[10] Story Const. § 1503. It is the same in England by Stat. 12 & 13 Will. 3, c. 2. 4 Bl. Com. 261. "But after the impeachment is solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged." 2 Hawk. P. C. Curw. ed. p. 547, § 44.

[11] Hawk. ut sup, p. 540, § 26; Trollop's Case, 8 Co. 68 *a*; Reg. *v.* Watson,

§ 914 **Full — Partial — Conditional.** — A pardon may, by the English law, be full, partial, or conditional. It may be conditional, if the pardoning power please, by the constitutions of some of our States.[1] And where, as in other States, and under the Constitution of the United States, the power of pardon is granted simply in general terms, the pardon may still be partial or conditional, as well as full, the same as in England; for the greater includes the less.[2] Where the pardon is full, its collateral and consequential effects cannot be abridged by its language; for they depend on the law of the land.[3]

Conditional. — A conditional pardon may be on condition either precedent or subsequent; if precedent, — that is, if by its terms some event is to transpire before it takes effect, — its operation is deferred until the event occurs.[4] If the condition is subsequent, the pardon goes into operation immediately, yet becomes void whenever the condition is broken.[5]

§ 915. **Nature of the Condition.** — It is said that the condition must not be impossible, criminal, or illegal.[6] But, within this limit, the approved conditions are quite diverse. One is, that the prisoner shall leave, permanently or for a time, the State or country.[7] Another is, that he shall submit to a punishment men-

2 Ld. Raym. 817, 818; Ex parte Hickey, 4 Sm. & M. 751; The State v. Sauvinet, 24 La. An. 119; In re Mullee, 7 Blatch. 23.

[1] Ex parte Hunt, 5 Eng. 284; Libby v. Nicola, 21 Ohio State, 414, 418.

[2] Flavell's Case, 8 Watts & S. 197; The State v. Addington, 2 Bailey, 516; The State v. Twitty, 4 Hawks, 193; Perkins v. Stevens, 24 Pick. 277; People v. Potter, 1 Parker, C. C. 47; Ex parte Wells, 18 How. U. S. 307; Osborn v. United States, 91 U. S. 474; United States v. Six Lots of Ground, 1 Woods, 234; People v. Potter, Edm. Sel. Cas. 235. Contra, as to conditional pardons, Commonwealth v. Fowler, 4 Call, 35. The statutes of the United States provide, that, "whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President shall have full discretionary power to pardon or remit, in whole or in part, either one of the two kinds, without, in any manner, impairing the legal validity of the other kind, or of any portion of either kind, not pardoned or remitted." R. S. of U. S. § 5330.

[3] People v. Pease, 8 Johns. Cas. 333; Cook v. Middlesex, 3 Dutcher, 687; Cook v. Middlesex, 2 Dutcher, 326.

[4] Haym v. United States, 7 Ct. Cl. 443; Waring v. United States, 7 Ct. Cl. 501; Scott v. United States, 8 Ct. Cl. 457; Commonwealth v. Haggerty, 4 Brews. 326.

[5] Flavell's Case, 8 Watts & S. 197; Reg. v. Foxworthy, Holt, 521.

[6] Lee v. Murphy, 22 Grat. 789; People v. Potter, Edm. Sel. Cas. 235.

[7] The State v. Smith, 1 Bailey, 283; People v. Potter, 1 Parker, C. C. 47; Reg. v. Foxworthy, 7 Mod. 153; Commonwealth v. Philadelphia County Prison, 4 Brews. 320; Commonwealth v. Haggerty, 4 Brews. 326. But see Commonwealth v. Hatsfield, 1 Pa. Law Jour. Rep. 177.

tioned, not originally pronounced.[1] If the condition is of a sort not allowable, it is void, and the pardon is absolute.[2]

Breach of Condition. — If the condition is violated, — as if, it being that the party shall leave the country and not return, yet either he declines to go,[3] or goes and comes back,[4] — the original sentence may be enforced.[5] But —

How Condition construed. — A condition in a pardon, as in a grant, is construed strictly. Therefore, if the words are "depart without delay" from the State, it is not broken, says the Arkansas court, by the prisoner's return to the State after he has left it.[6] And when the condition was, that the pardoned person should leave the State within a specified time, the court deducted a period when he was sick and deranged.[7]

§ 916. **Effect of Pardon.** — Though a pardon is not conditional, it may be partial, in which case it is to be construed according to its special terms.[8] A full pardon absolves the party from all the

[1] The State v. Addington, 2 Bailey, 516; The State v. Smith, 1 Bailey, 283; Lee v. Murphy, supra. But see The State v. Twitty, 4 Hawks, 193.

[2] Commonwealth v. Hatsfield, supra; People v. Potter, supra. See United States v. Six Lots of Ground, 1 Woods, 234.

[3] The State v. Fuller, 1 McCord, 178; The State v. Addington, 2 Bailey, 516; The State v. Smith, 1 Bailey, 283; Rex v. Madan, 1 Leach, 4th ed. 223; Roberts v. The State, 14 Misso. 138.

[4] The State v. Smith, 1 Bailey, 283; The State v. Chancellor, 1 Strob. 347; People v. Potter, 1 Parker, C. C. 47. And see Rex v. Aickles, 1 Leach, 4th ed. 390; Rex v. Thorpe, 1 Leach, 4th ed. 896, note.

[5] Flavell's Case, 8 Watts & S. 197; Commonwealth v. Philadelphia County Prison, 4 Brews. 320; Commonwealth v. Haggerty, 4 Brews. 326. See West's Case, 111 Mass. 443.

[6] Ex parte Hunt, 5 Eng. 284. Yet see, on this general question, Rex v. Miller, 1 Leach, 4th ed. 74, 2 W. Bl. 797; Reg. v. Foxworthy, 7 Mod. 153.

[7] People v. James, 2 Caines, 57. And see Rex v. Madan, 1 Leach, 4th ed. 223; Rex v. Badcock, Russ. & Ry. 248. **Mortgage to secure Condition.** — A mortgage given to secure to a county a sum of money payable as the condition of a pardon was held to be valid, — not void as executed under duress. "The money, for which the mortgage was given," said the judge, "was a fine imposed by the circuit court of the county, and which, when paid, was to pass into the county treasury, to be distributed among the school districts in the county, for the support of school libraries." Rood v. Winslow, 2 Doug. Mich. 68. **Release of Damages by Prisoner to obtain Pardon.** — A release, by one imprisoned for unlawfully selling liquors which have been destroyed under a statute the constitutionality of which is doubted, of all claims for damages against the official persons who ordered and executed the destruction, in consideration that a third person agrees fairly to bring before the governor and council an application for his pardon, to be delivered to the releasees when the pardon arrives, cannot be revoked; but upon the performance of the agreement, and the arrival of the pardon, takes effect as from the first delivery; and is not contrary to public policy. Timothy v. Wright, 8 Gray, 522.

[8] Ante, § 910, 914; Libby v. Nicola, 21

legal consequences of his crime, and of his conviction, direct and collateral;[1] including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided.[2] Yet, we have seen,[3] it cannot divest rights vested in individuals, or always those vested in the State; and, if a fine coming to the government has been already paid over, or if property has vested on an attainder, it will not be restored unless by express words in the instrument of pardon.[4] And even should there be such express words, the better doctrine under our constitutions is, that the pardon cannot undo what has been done, so as to entitle the recipient to have again the money which he has paid in the way of fine, or have compensation for his services rendered the State while a prisoner under sentence.[5] Still, if a fine has not been paid, the pardoned person, according, at least, to the common opinion, can no more be made to pay it, after pardon, than to serve out his term of imprisonment.[6] Neither will the pardon of one offence operate as a discharge from any other.[7] Nor will it defeat a suit by an individual for damages, founded on the same transaction.[8]

§ 917. **Capacity to be Witness.** — Among the collateral consequences of an attainder, or final sentence against the prisoner, removed by pardon, is the incapacity to be a witness.[9] Yet only

Ohio State, 414; Franklin's Case, 5 Co. 46 *b*.

[1] Rex *v.* Greenvelt, 12 Mod. 119; Strickland *v.* Thorpe, Yelv. 126; Perte *v.* Cambridge, 3 Lev. 332; In re Deming, 10 Johns. 232, 483; Carlisle *v.* United States, 16 Wal. 147; Wood *v.* Fitzgerald, 3 Oregon, 568.

[2] Thomas *v.* Sorrell, Vaugh. 330, 338; Hall *v.* Vaughan, 5 Co. 49 *a*; Tombes *v.* Ethrington, 1 Lev. 120; Foxley's Case, 5 Co. 109 *a*.

[3] Ante, § 910, 911.

[4] Tombes *v.* Ethrington, 1 Lev. 120; In re Church's Will, 11 Eng. L. & Eq. 240. And see ante, § 911.

[5] Cook *v.* Middlesex, 3 Dutcher, 637; Cook *v.* Middlesex, 2 Dutcher, 326; ante, § 910.

[6] Baldwin *v.* Scoggin, 15 Ark. 427; Holliday *v.* People, 5 Gilman, 214; ante, § 910.

[7] Hawkins *v.* The State, 1 Port. 475; Commonwealth *v.* Roby, 12 Pick. 496, 508; Anonymous, Sir F. Moore, 756, pl. 1044; The State *v.* McCarty, 1 Bay, 334; Reg. *v.* Harrod, 2 Car. & K. 294.

[8] Hedges *v.* Price, 2 W. Va. 192.

[9] Hoffman *v.* Coster, 2 Whart. 453; Jones *v.* Harris, 1 Strob. 160; Rex *v.* Reilly, 1 Leach, 4th ed. 454; Rex *v.* Crosby, 1 Ld. Raym. 39, 5 Mod. 15; Rex *v.* Celier, T. Raym. 369; Rex *v.* Castlemain, T. Raym. 379; People *v.* Pease, 3 Johns. Cas. 333. The State *v.* Blaisdell, 33 N. H. 388. In New York a statute provides, that a person convicted of perjury "shall not thereafter be received as a witness to be sworn in any matter or cause whatsoever, until the judgment against him be reversed," — the effect of which statute is to prevent the pardon from restoring the competency of the witness. Houghtaling *v.* Kelderhouse, 1 Parker, C. C. 241. And see Blanc *v.* Rodgers, 49 Cal. 15.

a full pardon has this effect.[1] Even then the conviction may be shown as impairing the witness's credit.[2] Also, as explained in a note,[3] one sued for the slander of calling another a thief, or the like, cannot defend himself by proving the charge, if the offence has been pardoned, — a proposition possibly, but not probably, limited in a manner to take away most of its practical operation for this country; namely, limited to cases wherein the pardon precedes the conviction.[4] Again, —

Criminate Self. — After pardon, a witness cannot object to answering a question on the ground that the answer will criminate himself.[5]

§ 918. **Corruption of Blood.** — Under the English common law, corruption of blood is not restored by a pardon from the Crown.[6] And —

Statutory Disability. — There seems to be a doctrine, not well defined, and especially not satisfactory in itself, namely, that a disability imposed expressly by statute as a consequence of the offence is not thus taken away.[7]

Right to Vote. — Generally a pardon restores the forfeited right to vote.[8] Otherwise in Rhode Island.[9] And, —

§ 919. **Second Offence.** — According to a Kentucky decision, if a second offence is more heavily punishable than the first, a pardon of the first does not prevent the infliction of the heavier punishment on the second. "The pardon," observed Robertson, J., "relieved the convict of the entire penalty incurred by the offence pardoned, and nothing else or more. It neither did nor could relieve from any penal consequence resulting from a different offence, committed after the pardon, and never pardoned." [10]

§ 920. **United States.** — A pardon by the President of the United States does not remove disabilities imposed by State laws.[11]

[1] Perkins *v.* Stevens, 24 Pick. 277.

[2] Baum *v.* Clause, 5 Hill, N. Y. 196.

[3] Ante, § 898, note.

[4] Cuddington *v.* Wilkins, Hob. 81; 2 Hawk. P. C. Curw. ed. p. 547, § 48; 1 Stark. Slander, 237, 238.

[5] Reg. *v.* Boyes, 1 B. & S. 311, 9 Cox C. C. 32, 2 Fost. & F. 157.

[6] Co. Lit. 391 *b*; Walsingham's Case, 2 Plow. 547, 558.

[7] Rex *v.* Castlemain, T. Raym. 379; Anonymous, 3 Salk. 155; Commonwealth *v.* Fugate, 2 Leigh, 724; 1 Greenl. Ev. § 378 and note. See Rex *v.* Crosby, 2 Salk. 689; Stat. Crimes, § 139, 140; ante, § 917, note.

[8] Jones *v.* Alcorn Registrars, 56 Missis. 766.

[9] Opinion of Judges, 4 R. I. 583.

[10] Mount *v.* Commonwealth, 2 Duvall, 93, 95.

[11] Ridley *v.* Sherbrok, 3 Coldw. 569; Ex parte Hunter, 2 W. Va. 122. And see Armstrong's Foundry, 6 Wal. 766. But see Jones *v.* Alcorn Registrars, supra.

§ 921. *Practical Views on Granting Pardons:* —

Important. — Of practical importance not exceeded by any questions ordinarily discussed in law books, are some, heretofore neglected by legal authors, relating to the principles which should guide the executive power in granting and withholding pardons. Let us look at some of these.

§ 922. **Public Motives, not Private.** — No official person, whatever his station or the nature of his office, is justified in performing any official acts from private motives, or in pursuance of mere private views. An executive officer, asked to grant a pardon, should neither comply nor refuse merely because he would personally be pleased to see the prisoner suffer or to see him go free. He is bound to act upon public considerations. For example, —

Appeal from Legislature. — He does not sit as a court of appeal from the legislature. If he believes the law under which a prisoner is suffering to be unwise or unjust, still this opinion cannot properly incline him to grant the pardon; because the power which makes and unmakes laws is not in him, and officially he is required to look upon the law as just and wise, however his private opinion may revolt.[1] Again, —

§ 923. **Appeal from Judicial Decision.** — The executive officer, in whom is the power of pardon, is not, therefore, a judicial functionary to whom lies an appeal from the ordinary courts. Consequently it would be unlawful for the President, or for the governor of a State, to grant a pardon simply because he differed from the judges in the construction to be put upon a law.[2] If the court was divided in opinion, but the majority was against the prisoner, that might, under some circumstances, furnish ground for leaning to mercy by issuing a pardon. Likewise, —

§ 924. **Appeal from Jury.** — An appeal does not lie from the verdict of a jury to the governor or President on a mere question of fact. Still there may be circumstances in which it is both the right and the duty of the pardoning officer to look below the verdict into what appears, at the time of the application for the pardon, to have been the real facts. And facts unknown at the time of the trial, or within the period allowed by law for

[1] And see Stat. Crimes, § 235; ante, § 303 *a*, note, 303 *b*.

[2] See, in connection with this question, for another somewhat differing one, Crim. Proced. I. § 287–294.

applications for a new trial, may properly be considered by the pardoning officer.

§ 925. **Proceed by Rule.** — The pardoning officer, therefore, should proceed by rule, as do the judges in the exercise of judicial functions. Technically, the power of pardon is termed discretionary; so are a large part of the powers exercised by the courts. With a court, for instance, it is discretionary whether to try a cause when it is reached on the calendar, or to continue it. Yet this discretion should be exercised on public considerations, and according to rule, not from mere private impulses or views. And a judge who should continue causes, or bring them on for trial, as personal motives impelled, to the injury of suitors, would commit thereby a high misdemeanor in office, for which he ought to be impeached. And the same would follow if the President or a governor should act thus on private views in granting or withholding pardons.

§ 926. **Practical Restraint — (Impeachment).** — These suggestions are important, because lawyers are apt to sympathize with public sentiment, and accept, without reflection, the legal expositions of newspapers and politicians however erroneous. And nothing is more absolutely a perversion of all just doctrine than the opinion which assigns to the President, or to a governor, the power to pardon without limit, and denies to the impeaching power the right to interfere. The pardoning power is necessarily discretionary in its nature; therefore it is necessarily the more open to control by the impeaching power. If it comes to be understood that a single man, intrusted with the high function of pardon, can, because he is so intrusted, open all the prisons of the country, and let every guilty person go free, thus at a blow striking down the law itself, and not be himself punished for the high misdemeanor, the most disastrous consequences to liberty and law will sooner or later follow. Such a conclusion is itself the annihilation of law, and only upon law can liberty repose. Still, —

Pardon effectual. — This sort of executive abuse will not authorize the courts to decline giving effect to the executive pardon.[1]

[1] The State *v.* Ward, 9 Heisk. 100.

BOOK VIII.

CONSEQUENCES OF CRIME AND ITS PROSECUTION.

CHAPTER LX.

THE PUNISHMENT BY SENTENCE OF COURT.[1]

§ 927. **Consequences proceed from Sentence, not Crime.** — There are strictly no consequences of crime, except that a person really guilty is more likely to be troubled with a prosecution, and found guilty by the jury, than one who is not. The consequences which in a sort of general way are said to follow crime, come, not from it, but from the proceedings in court, or the sentence.[2]

§ 928. **Scope of this Chapter.** — This chapter is in matter closely related to those in "Criminal Procedure," entitled "The Sentence," "The Execution of the Sentence," "The Record,"[3] and some others. Yet nothing which is there considered is treated of here. In that work, the formal proceedings are discussed; in the present chapter, we are to look at the substance of the judgment to be pronounced against a convicted wrong-doer.

§ 929. **Order of the Chapter.** — We shall consider, I. Erroneous Sentences; II. What Punishment should be awarded; III. What Punishment in Joint Convictions.

I. *Erroneous Sentences.*

§ 930. **Erroneous Sentence defined.** — An erroneous sentence is one to which the defendant is not, by the record, liable.

[1] For the procedure as concerns the punishment, see Crim. Proced. I. § 1289 et seq., and other places.

[2] Crim. Proced. I. § 89 et seq.

[3] Crim. Proced. I. § 1289–1374.

Subject to Reversal. — The general doctrine is, that such a sentence will, on due application to the court, be reversed.[1] But —

Error in Defendant's Favor. — Some of the American courts hold, that one cannot take advantage of an error in his favor, as where the punishment is less than the law prescribes.[2] According to which view, if the sentence is, for example, to two years' imprisonment, where the minimum allowed by the statute is three years, this error is not available to him on an application to have the proceedings reversed.[3] Other American courts[4] and the English[5] hold, that, since it violates the law to inflict a less severe punishment than the minimum set down in the statute, one may assign this sort of mistake in his favor for error. Yet, —

§ 931. **Continued.** — Harmoniously with the latter view it is held, that, if the judgment is divisible, and the one part is lawful and the other unlawful, the lawful part may be affirmed and the unlawful reversed. Thus, —

Unlawful Fine and Lawful Order to Abate Nuisance. — In Connecticut, where the fine for a nuisance was by statute to be not less than five dollars, yet in a sentence it was four, together with an order of abatement, the court reversed this, as to the fine, but affirmed it as to the abatement.[6] And, —

Lawful Fine, omitting Order to repair Way. — In a New York case, "the objection," said Chancellor Walworth in the Court of Errors, "that the defendant was fined only, and that he was not also compelled to repair the road, is one which cannot be urged by the plaintiff in error, even if a judgment to repair could have been given on this conviction. The defendant may, on a writ of error, object that the punishment inflicted upon him is too great in its

[1] Rex v. Ellis, 5 B. & C. 395, 8 D. & R. 173; Bourne v. Rex, 2 Nev. & P. 248, 7 Ad. & E. 58, 1 Jur. 542; Silversides v. Reg., 2 Gale & D. 617; Tully v. Commonwealth, 4 Met. 357; Daniels v. Commonwealth, 7 Barr, 371; Wilde v. Commonwealth, 2 Met. 408; The State v. Gray, 8 Vroom, 368.

[2] Ooton v. The State, 5 Ala. 463; Commonwealth v. Shanks, 10 B. Monr. 304; Barada v. The State, 13 Misso. 94. And see Jones v. The State, 13 Ala. 153; Campbell v. The State, 16 Ala. 144.

[3] Wattingham v. The State, 5 Sneed, 64; McKinney, J., observing: "The rule that a party cannot assign for error that which is for his own advantage applies as well to criminal as to civil proceedings." p. 65. And see Hoskins v. The State, 27 Ind. 470; Behler v. The State, 22 Ind. 345; Crim. Proced. I. § 1374.

[4] Rice v. Commonwealth, 12 Met. 246; Taff v. The State, 39 Conn. 82.

[5] Whitehead v. Reg. 7 Q. B. 582, 9 Jur. 594, 1 Cox C. C. 199; Bourne v. Rex, 2 Nev. & P. 248, 7 Ad. & E. 58.

[6] Taff v. The State, 39 Conn. 82, on the authority of In re Sweatman, 1 Cow. 144, and The State v. James, 37 Conn. 355.

extent, or that it is different in form from what the law has prescribed; but, where a party is subject to two distinct and independent punishments for the same offence, if one of them is inflicted upon him by the sentence of the court, he cannot object that the court has not gone further and inflicted the other pen alty also."[1] Again, —

§ 932. **Error unimportant to Prisoner.** — According to a Mary land case, if the statute makes a fine payable one half to the informer and the other half to the State, yet the whole is adjudged to the State, this judgment will not be reversed on prayer of the defendant; since he has no interest in the disposition of the fine.[2]

II. *What Punishment should be awarded.*

§ 933. **Both Statutory and at Common Law.** — The common law provides punishments for all its offences. But, with us, it is the general course for legislation, while creating statutory offences, to fix the penalties for those at common law as well. Yet sometimes a common-law punishment remains. And often questions arise under the statutes, making a knowledge of the common law of the subject essential to their interpretation.

§ 934. **By whom Punishment assessed.** — Under the common-law procedure, it is for the court, not the jury, to determine what, within the limits of the law, shall be the punishment in each case. The question is for the judicial discretion.[3] But, in some of our States, the statutes direct that the jury shall assess the punishment in their verdict.[4] In some others, there is, relating to it, a sort of division of responsibility between judge and jury.[5]

[1] Kane *v.* People, 8 Wend. 203, 211, s. p. McQuoid *v.* People, 3 Gilman, 76; Dodge *v.* The State, 4 Zab. 455. See Barth *v.* The State, 18 Conn. 482.

[2] Rawlings *v.* The State, 2 Md. 201. See further, on this subject, Nemo *v.* Commonwealth, 2 Grat. 558; Sword *v.* The State, 5 Humph. 102; Daniels *v.* Commonwealth, 7 Barr, 371; Logan's Case, 5 Grat. 692.

[3] United States *v.* Mundel, 6 Call, 245, 248.

[4] As to which see Fooxe *v.* The State, 7 Misso. 502; McWhirt's Case, 3 Grat. 594; Cook *v.* United States, 1 Greene, Iowa, 56; Commonwealth *v.* Frye, 1 Va. Cas. 19; Dias *v.* The State, 7 Blackf. 20; Doty *v.* The State, 6 Blackf. 529; The State *v.* Douglass, 1 Greene, Iowa, 550; Nemo *v.* Commonwealth, 2 Grat. 558; Ervine *v.* Commonwealth, 5 Dana, 216; Hawkins *v.* The State, 3 Stew. & P. 63; Chesley *v.* Brown, 2 Fairf. 143, 147; Blevings *v.* People, 1 Scam. 172; O'Herrin *v.* The State, 14 Ind. 420; The State *v.* Bean, 21 Misso. 259; Morton *v.* Princeton, 18 Ill. 383; Leech *v.* Waugh, 24 Ill. 228.

[5] Cook *v.* United States, 1 Greene, Iowa, 56; The State *v.* McQuaig, 22 Misso. 319; Behler *v.* The State, 22 Ind. 345; Moss *v.* The State, 42 Ala. 546; Melton *v.* The State, 45 Ala. 56.

Constitutional. — Legislation, putting the question of punishment into the hands of the jury, has been held in Indiana not to be unconstitutional.[1]

§ 935. **Common-law Punishment for Felony — (Rape — Petit Larceny — Mayhem).** — The ordinary common-law punishment for felonies is, as before shown,[2] death by hanging; the exceptions being, it is said, petit larceny,[3] rape, and mayhem.[4] Therefore death is the award of the law for any statutory felony, unless the statute specifically directs otherwise.[5] But, —

§ 936. **Benefit of Clergy.** — As felonies, statutory and by common law, comprehend a large part of the crimes, the uniform infliction of this highest penal consequence would be too bloody. Accordingly the legislation and judicial wisdom of our fatherland found for the evil a remedy in the plea of clergy, or benefit of clergy; or, as it was sometimes termed after the passage of various acts of Parliament on the subject, the benefit of the statutes. A word explanatory of this benefit of clergy, by way of memento of departed piety, humanity, and genius, may not be inappropriate.

§ 937. **Continued.** — Lord Coke observes, that the privilege of clergy "took its roots from a constitution of the pope, that no man should accuse the priests of holy church before a secular judge."[6] The English clergy, therefore, demanded to be exempt from the jurisdiction of the lay tribunals; and, to an extent not quite certain, the demand was yielded to by the ancient common law and by acts of Parliament as early as Edw. 1 or earlier. It seems that, generally, when a priest in orders[7] was brought before a temporal judge on a charge of felony,[8] his case was transferred, either with or without trial, to the ecclesiastics.[9] Yet the clergy frequently complained that their privilege was violated, and accordingly acts of Parliament were passed from time to time to remove the difficulty; till this indulgence became the right, not

[1] Rice *v.* The State, 7 Ind. 332.

[2] Ante, § 615.

[3] Rex *v.* Ellis, 5 B. & C. 395, 8 D. & R. 173; Gray *v.* Reg., 6 Ir. Law, 482, 502.

[4] 2 Hawk. P. C. Curw. ed. p. 472, § 7.

[5] 4 Bl. Com. 98; The State *v.* Scott, 1 Hawks, 24, 34. And see ante, § 622.

[6] 2 Inst. 636. See also 1 Burn, Ec. Law, Phillim. ed. 185.

[7] Searle *v.* Williams, Hob. 288.

[8] 2 Inst. 636.

[9] 2 Hawk. P. C. Curw. ed. p. 496, § 110; 4 Bl. Com. 333; 2 Inst. 633.

only of clerks in orders, but of all persons capable of becoming such; namely, of all males, without canonical impediment, able to read.[1] At a later period, the canonical impediments were declared to be no longer barriers, women also were admitted into the happy circle,[2] and the disqualification of ignorance was abolished.[3] Finally, the privilege became pleadable only after conviction,[4] and the offender was not to be delivered to the ecclesiastics.[5] During almost the entire period in which this plea was allowed, the convict was burned in the hand before being discharged; and, for a short time, for larceny, he was burned on the left cheek, near the nose.[6] Yet to prevent a general immunity from punishment for felony, statutes were also passed, taking away the benefit of clergy from specific felonies; and sometimes the same act which created a felony provided that it be punished with death without benefit of clergy.[7] The plea was abolished in England, in 1827, by 7 & 8 Geo. 4, c. 28, § 6; and, in the following year, for Ireland by 9 Geo. 4, c. 54.[8] This outline the reader can fill up by consulting the older English books on the criminal law.[9]

§ 938. **Benefit of Clergy with us.** — In this country, the plea of benefit of clergy has been usually acknowledged as belonging to our common law,[10] and the books contain some cases in which it was pleaded. The Indiana[11] and Minnesota[12] courts have rejected it. In North Carolina, the privilege has been conceded to women, the court observing: "No reason can at this day exist, why females shall not be entitled to the benefit of clergy, as well as males."[13]

[1] 2 Hawk. P. C. Curw. ed. p. 471, § 4, 5.
[2] Ib. p. 472, § 6, 8.
[3] Ib. p. 501, § 115.
[4] Ib. p. 498, § 110.
[5] 4 Bl. Com. 369.
[6] 2 Hawk. P. C. Curw. ed. p. 502–507, § 121–135.
[7] 2 Hawk. P. C. Curw. ed. p. 483 et seq.
[8] Gray v. Reg., 6 Ir. Law, 482, 504.
[9] And see Duchess of Kingston's Case, 1 Leach, 4th ed. 146; Armstrong v. L'Isle, 12 Mod. 109, 110; Rex v. Mouncer, 2 Leach, 4th ed. 567, 2 East P. C. 639; Rex v. Byford, Russ. & Ry. 521.
[10] The State v. Jernigan, 3 Murph. 12; s. c. nom. The State v. Jernagan, N. C. Term R. 44; The State v. Kearney, 1 Hawks, 53; The State v. Scott, 1 Hawks, 24; The State v. Isham, 3 Hawks, 185; The State v. Boon, Taylor, 246; The State v. Seaborn, 4 Dev. 305; The State v. Henderson, 2 Dev. & Bat. 543; The State v. Carroll, 2 Ire. 257; The State v. Sutcliffe, 4 Strob. 372; Commonwealth v. Posey, 4 Call, 109; Commonwealth v. Miller, 2 Ashm. 61; Commonwealth v. Gable, 7 S. & R. 423; Mass. Stat. 1784, c. 56.
[11] Fuller v. The State, 1 Blackf. 63.
[12] The State v. Bilansky, 3 Minn. 246.
[13] The State v. Gray, 1 Murph. 147. Also, in this State, it seems that the statutory pardon, which is an incident to the benefit of clergy, does not take effect until the party is burned in the hand and delivered. If the record accidentally omits to set out such execution of the sentence, it may be shown by a witness. Keith v. Goodwin, 6 Jones, N. C. 398.

Yet, with us, as in England and Ireland, it has generally been abolished by statutes. How it is in two or three States, such as North Carolina and South Carolina,[1] where it was in force at dates comparatively recent, the author is not informed.

§ 939. **Common-law Punishment for Felony, continued.** — Hanging, therefore, which is the original punishment for felony, is, with us, nearly done away with; the usual penalty being imprisonment in the State prison.[2]

Transportation. — The modern English transportation is unknown at the common law,[3] while neither is it among the legislative penalties imposed in this country.[4]

§ 940. **Common-law Punishment for Misdemeanor.** — The ordinary and appropriate common-law punishment for misdemeanor is fine and imprisonment, or either of them, at the discretion of the court.[5] It extends to all cases in which the law has not provided some other specific penalty. For example, when a statute forbids or commands an act of a public nature,[6] but is silent as to the punishment, the common law imposes, for disobedience, fine and imprisonment.[7] A majority of the Connecticut court held, that the fine must be for a limited sum, not for all the defendant's property; and the imprisonment, for a stated number of years, not for life.[8] But this distinction is doubtful, as one of principle.

§ 941. **Statutory Fine "and" Imprisonment — "Or."** — If a statute provides a fine *and* imprisonment, both must be inflicted;[9] but if, instead of the word *and*, it uses the disjunctive *or*, only one of them can be imposed.[10]

[1] The State v. Bosse, 8 Rich. 276; The State v. Sutcliffe, 4 Strob. 372.
[2] See ante, § 616, 933.
[3] Archb. New Crim. Proced. 182; 2 Hawk. P. C. Curw. ed. p. 507 et seq; Rex v. Lewis, 1 Moody, 372; Rex v. Hope, 1 Moody, 396; Bullock v. Dodds, 2 B. & Ald. 258.
[4] The State v. Bosse, 8 Rich. 276. But see Aldridge v. Commonwealth, 2 Va. Cas. 447.
[5] The State v. Roberts, 1 Hayw. 176; Northampton's Case, 12 Co. 132, 134. To these, other inflictions, such as are mentioned in the next section, may, under the common law of England, sometimes be added. 2 East P. C. 838.
[6] Ante, § 237.
[7] United States v. Coolidge, 1 Gallis. 488, 493.
[8] The State v. Danforth, 3 Conn. 112. And see Respublica v. De Longchamps, 1 Dall. 111; The State v. Myhand, 12 La. An. 504; Shuttleworth v. The State, 35 Ala. 415.
[9] United States v. Vickery, 1 Har. & J. 427.
[10] The State v. Kearney, 1 Hawks, 53. And see, further, Wilde v. Commonwealth,

§ 942. **Other Common-law Punishments for Misdemeanor.** — There are other common-law punishments, used chiefly in particular cases of misdemeanor. Among these are, —

Pillory — Whipping — Ducking — Slitting Nostrils — and perhaps some other of the like disgraceful kind.[1] Said an American judge: "The general rule of the common law was, that the punishment of all infamous crimes should be disgraceful: as the pillory for every species of *crimen falsi*,[2] as forgery, perjury, and other offences of the same kind. Whipping was more peculiarly appropriated to petit larceny, and to crimes which betray a meanness of disposition, and a deep taint of moral depravity."[3]

§ 943. **Whipping and Pillory with us.** — But though whipping[4] and the pillory have been sometimes employed in this country, we may doubt whether any of our courts would now inflict either, merely on the strength of English common-law authority. Under the national government, they were abolished by act of Congress in 1839.[5]

Ducking with us — (Common Scold). — The common-law punishment of a common scold is ducking,[6] by being "placed in a certain engine of correction called the trebucket, castigatory, or *cucking*-stool, which in the Saxon language is said to signify the scolding-stool; though now it is frequently corrupted into *ducking*-stool, because the residue of the judgment is, that, when she is so

2 Met. 408. That a fine is not a debt, see Dixon *v.* The State, 2 Texas, 481.

[1] 4 Bl. Com. 377. And see Rex *v.* Bland, 2 Leach, 4th ed. 595, 2 East P. C. 760; Rex *v.* Thanet, 1 East P. C. 408; Oldfield's Case, 12 Co. 71; Rex *v.* Howell, Russ. & Ry. 253.

[2] S. P., Lewis *v.* Commonwealth, 2 S. & R. 551.

[3] Taylor, C. J., in The State *v.* Kearney, 1 Hawks, 53, 54. Pulton observes: "Our lawes do chastise those that breake the peace by fraics, assault, batteries, riots, or routs, with imprisonment of their bodies, until their hot bloods be cooled, and their distemperat humors be qualified: but they do impose sharper and more durable punishments upon such as do forge deeds, commit or procure perjurie, or be maintainors of other mens suits or quarrels: accounting these last offences to tend more and for a longer time to the breach or blemish of the peace, or hinderance of the justice of the realme than the former doe; as he that committeth forgerie in some cases, shall be set on the pillorie, loose his eares, have his nostrels slit, and pay to the partie grieved his double costs and damages: and in some cases, shal be hanged as a felon: he that committeth perjurie, shall in some cases be one yeare imprisoned, be set upon the pillorie, and never after be allowed as a witnesse: and he that maintayneth other men's suits, shall in some cases be three yeres imprisoned, and further punished at the king's pleasure: and some other cases sustaine other disgraces." Pulton de Pace, ed. of 1615, 42 *b*.

[4] Commonwealth *v.* Wyatt, 6 Rand. 694; The State *v.* Kearney, 1 Hawks, 53.

[5] 5 U. S. Stats. at Large, c. 36, § 5; R. S. of U. S. § 5327.

[6] Reg. *v.* Foxby, 6 Mod. 11.

placed therein, she shall be plunged in the water for her punishment."[1] But our courts hold, that fine and imprisonment with us take the place of ducking.[2]

§ 944. **Forfeitures of Specific Articles.** — We have no precedents for a general practice of sentencing prisoners to forfeit particular articles of property, instead of, or in addition to, a fine of a specified sum of money. But such forfeitures are sometimes required by statutes;[3] and they rest on the same reasons as fines.

Forfeitures of Office, &c. — Sometimes, also, statutes impose as a punishment the forfeiture of an office,[4] or of the capacity to hold office.[5]

Distinguished. — We have elsewhere distinguished this class of forfeitures from another.[6]

§ 945. **Bonds for Peace and Good Behavior.** — In all cases of misdemeanor, the court has, from the common law, authority, to be exercised or not as a sound discretion may dictate, to require, as a part of the sentence, that the defendant give bonds to keep the peace and be of good behavior.[7] As to when the discretion will be exercised, —

In Gross Misdemeanor — (Gaming — Bawdy-house — Liquor-selling — Libel). — In Tennessee, it was deemed that sureties should not be required on conviction for a single act of gaming, under circumstances not aggravating; the misdemeanor must be gross. And Green, J., enforced the doctrine, and drew the distinction, as follows: "The offence of keeping a bawdy-house is, in its nature, a *gross misdemeanor;* so also of a gaming-house, or disorderly house. But the selling of a single half-pint of whiskey, unaccompanied by any other fact, although against law, and a misdemeanor, would not be a *gross misdemeanor*. But if it were to appear in evidence, that the party selling was surrounded with drunken, noisy, obscene men, to the great annoyance of the public, this state of things, produced by this practice, and in part by

[1] 4 Bl. Com. 169.

[2] James *v.* Commonwealth, 12 S. & R. 220; United States *v.* Royall, 3 Cranch, C. C. 620.

[3] Boles *v.* Lynde, 1 Root, 195.

[4] Commonwealth *v.* Fugate, 2 Leigh, 724.

[5] Doty *v.* The State, 6 Blackf. 529; Barker *v.* People, 3 Cow. 686, 20 Johns. 457.

[6] Ante, § 816 et seq.

[7] Dunn *v.* Reg., 12 Q. B. 1031; O'Connell *v.* Reg., 11 Cl. & F. 155; Rex *v.* Hart, 30 Howell St. Tr. 1131, 1194, 1344, 12 Q. B. 1041, note; Reg. *v.* Dunn, 12 Jur. 99; Rex *v.* Rainer, 1 Sid. 214; Territory *v.* Nugent, 1 Mart. La. 108.

the very whiskey he might be convicted of selling, would constitute *such* violation of the law a *gross misdemeanor*. So a libel might, or might not, be a *gross* offence, according as the circumstances of the publication, and its character, might mitigate or aggravate it. So a game of cards might be played against law, but under circumstances that would not justify, in this *legal* view of the subject, the denomination of a *gross* misdemeanor. But, if played in connection with common gamblers associated at a gaming-house, or, as is sometimes the case, by the road-side on Sunday, with *negroes*, it would be a *gross* misdemeanor. These illustrations are only intended to indicate the general character of offence to which, we think, this power of requiring sureties for good behavior pertains."[1]

§ 946. **"Cruel and Unusual Punishment" — (Unconstitutional).** — The infliction of "cruel and unusual punishment" is forbidden by the Constitution of the United States.[2] This clause restrains the national government only, not the States.[3] But there is a like provision in some of the State constitutions.

§ 947. **What is such Punishment — (Fine — Imprisonment — Stripes — Disfranchisement).** — It is not possible to derive, from the few decisions in the books, any distinct rule as to what is a "cruel and unusual punishment."[4] Fine and imprisonment are not.[5] And stripes, inflicted at the discretion of the court, have been held not to be.[6] Neither are disfranchisement, and the forfeiture of citizenship.[7] Evidently, in reason, the punishments commonly inflicted at the time when the Constitution was adopted, could not be deemed "unusual," and no punishment is "cruel" simply because it is severe, or "cruel and unusual" because it is disgraceful. But mere torture, however slight, would be within the prohibition.

§ 948. **Aggravation and Mitigation.** — The entire criminal transaction, in a particular case, may embrace more of wickedness than the indictment charges; or there may be other circumstances

[1] Estes *v.* The State, 2 Humph, 496, 499.

[2] Const. U. S. Amendm. art. 8.

[3] Story Const. § 1904; Pervear *v.* Commonwealth, 5 Wal. 475; James *v.* Commonwealth, 12 S. & R. 220; Barker *v.* People, 3 Cow. 686, 20 Johns. 457.

[4] See Story Const. § 1903; The State *v.* Adams, 1 Brev. 279; Turnipseed *v.* The State, 6 Ala. 664.

[5] Ligan *v.* The State, 3 Heisk. 159.

[6] Commonwealth *v.* Wyatt, 6 Rand. 694. See Aldridge *v.* Commonwealth, 2 Va. Cas. 447.

[7] Huber *v.* Reily, 3 Smith, Pa. 112. See Wilson *v.* The State, 28 Ind. 393.

of aggravation, on the one hand, or of mitigation, on the other. So when the court pronounces sentence, if the law has given it a discretion, it looks at any evidence proper to influence a judicious magistrate to make the punishment heavier or lighter,[1] yet not to exceed the limits fixed for what of crime is within the allegation and the verdict.[2] It is the doctrine in Alabama, where the jury assess the punishment, that, to aggravate an offence, evidence is not admissible of what amounts to a crime separate from the one charged in the indictment.[3] If the discretion is to be exercised by the judge after the trial is ended, there does not seem to be any sound reason for restricting him by a technical rule of this sort, though the point has not probably been adjudged. Guilt, on this issue, is not to be denied, the verdict being conclusive; therefore testimony will not be heard tending to prove that no crime in law was committed.[4] Yet, —

On Nolo Contendere. — If the defendant merely enters, by permission, a plea of *nolo contendere*,[5] he seems to be allowed to show under this plea his innocence.[6]

§ 949. **Aggravation and Mitigation in Felony.** — The English rule seems to be, that the evidence we are considering is receivable only in misdemeanor, not in felony.[7] And such is doubtless the true

[1] The State *v.* Townsend, 2 Harring. Del. 543; Robbins *v.* The State, 20 Ala. 36; Rex *v.* Mahon, 4 A. & E. 575; Rex *v.* Lynn, 2 T. R. 733; Rex *v.* Grey, 2 Keny. 307; Wilson *v.* The Mary, Gilpin, 31; Rex *v.* Turner, 1 Stra. 139; Rex *v.* Burdett, 4 B. & Ald. 314; The State *v.* Smith, 2 Bay, 62; Rex *v.* Sharpness, 1 T. R. 228; Rex *v.* Withers, 3 T. R. 428; Rex *v.* Williams, Lofft, 759; Rex *v.* Pinkerton, 2 East, 357; Rex *v.* Mawbey, 6 T. R. 619, 627; Morton *v.* Princeton, 18 Ill. 383; Sarah *v.* The State, 18 Ark. 114. See Rex *v.* Cox, 4 Car. & P. 538; Rex *v.* Esop, 7 Car. & P. 456; People *v.* Cochran, 2 Johns. Cas. 73.

[2] Rex *v.* Withers, 3 T. R. 428, 482; Leech *v.* Waugh, 24 Ill. 228, ante, § 930.

[3] Ingram *v.* The State, 39 Ala. 247, 253, 254; R. W. Walker, J., observed: "It is said that, 'in giving evidence of matter in aggravation, the distinction is, that, where the aggravating matter is the immediate consequence of the offence for which the defendant is on trial, it may be shown; but, if it is a distinct crime, not necessarily connected with the offence charged in the indictment, it cannot be received.' Baker *v.* The State, 4 Pike, 56, 61. The decision in Skains *v.* The State, 21 Ala. 218, 222, is express to the point, that evidence of distinct offences, not charged in the indictment, cannot be looked to in aggravation of the fine."

[4] The State *v.* Brinyea, 5 Ala. 241; 2 Gab. Crim. Law, 540.

[5] Crim. Proced. I. § 802–804.

[6] Reg. *v.* Templeman, 1 Salk. 55, in which case it is said, that Lord Holt, C. J. "took a difference where a man confesses an indictment, and where he is found guilty; in the first case a man may produce affidavits to prove [this was for assault and battery] *son assault*, upon the prosecutor in mitigation of fine; otherwise, when the defendant is found guilty." See also Rex *v.* Minify, 1 Stra. 642.

[7] Rex *v.* Ellis, 9 D. & R. 174, 6 B. & C. 145.

view, when the felony is punished by hanging; for of hanging there can be no mitigation. But if the court has a discretion, the practice ought, on principle, to be the same in the higher crimes as in the lower; and so it is in Massachusetts, and probably elsewhere generally in the United States.

§ 950. **Form of the Evidence.** — Evidence addressed to the discretion of the judge, in mitigation or aggravation of punishment, need not be attended by the formalities required before the jury, on the trial of the main issue. The court will now, if it sees no reason to order otherwise, listen to mere *ex parte* affidavits.[1] And even hearsay evidence, wholly inadmissible on general principles, has, under special circumstances, been suffered to be brought before the court on this issue.[2] A witness may be compelled, by subpœna, to attend the court on this issue, the same as on any other.[3] And counsel will be heard.[4]

§ 951. **Day of executing Sentence.** — The day on which death or other corporal pain is to be inflicted need not be inserted in the judgment.[5] If it is not, it may be in the warrant;[6] or, if it is in the judgment, and execution fails to be done on that day, — as where the sheriff dies,[7] or the prisoner escapes, being afterward retaken,[8] — the court may direct it to be done on a subsequent day. And —

§ 952. **Statutory Time as to Punishment.** — A statute defining the time after conviction, or after any other period, within which sentence shall be executed, is to be construed as merely directory to the court,[9] and the execution may be on a later day;[10] though, if it is not to be until after a period named, the prisoner may claim the space thus allowed him.[11]

§ 953. **Judgment for Two or more Offences.** — When a prisoner,

[1] Reg. *v.* Templeman, 1 Salk. 55; Rex *v.* Morgan, 11 East, 457; Rex *v.* Pinkerton, 2 East, 357; Reg. *v.* Wilson, 4 T. R. 487; Rex *v.* Williams, 26 Howell St. Tr. 654, 709; Rex *v.* Thanet, 27 Howell St. Tr. 821, 943.

[2] Rex *v.* Archer, 2 T. R. 203, note.

[3] The State *v.* Smith, 2 Bay, 62.

[4] Rex *v.* Equitable Gas Co., 3 Nev. & M. 759; Rex *v.* Bunts, 2 T. R. 683.

[5] Atkinson *v.* Rex, 3 Bro. P. C. 517; Rex *v.* Wyatt, Russ. & Ry. 230; Rex *v.* Doyle, 1 Leach, 4th ed. 67. And see Webster *v.* Commonwealth, 5 Cush. 386, 407; Rex *v.* Hartnett, Jebb, 302; Crim. Proced. I. § 1311. And see People *v.* Murphy, 45 Cal. 137.

[6] Rex *v.* Doyle, 1 Leach, 4th ed. 67.

[7] The State *v.* Kitchens, 2 Hill, S. C. 612.

[8] Bland *v.* The State, 2 Ind. 608.

[9] Stat. Crimes, § 255, 256. See Brightwell *v.* The State, 41 Ga. 482.

[10] Seaborn *v.* The State, 20 Ala. 15; Rex *v.* Wyatt, Russ. & Ry. 230; Stat. Crimes, § 255.

[11] John *v.* The State, 2 Ala. 290. But see Rex *v.* Wyatt, Russ. & Ry. 230.

under an unexpired sentence of imprisonment, is convicted of a second offence; or when there are two or more convictions on which sentence remains to be pronounced; the judgment may direct, that each succeeding period of imprisonment shall commence on the termination of the period next preceding,[1] — a doctrine, however, which has been, it is believed without due consideration, denied in Indiana.[2] And, —

Pardon of one Offence — Reversal on Error, &c. — If, in such a case, the earlier period is afterward shortened in consequence of good conduct, or by a pardon of the offence, or a reversal of the sentence on writ of error, the next following one commences immediately, the same as if the earlier were ended by lapse of time.[3]

[1] Commonwealth *v.* Leath, 1 Va. Cas. 151; Mills *v.* Commonwealth, 1 Harris, Pa. 631, 634; The State *v.* Smith, 5 Day, 175; Wilkes *v.* Rex, 4 Bro. P. C. 360, 367; Kite *v.* Commonwealth, 11 Met. 581; People *v.* Forbes, 22 Cal. 185; Ex parte Dalton, 49 Cal. 468; Williams *v.* The State, 18 Ohio State, 46. And see Rex *v.* Bath, 1 Leach, 4th ed. 441; Cole *v.* The State, 5 Eng. 318; People *v.* Forbes, 22 Cal. 185. Reg. *v.* Cutbush, Law Rep. 2 Q. B. 379, 10 Cox C. C. 489; Ex parte Meyers, 44 Misso. 279; Ex parte Turner, 45 Misso. 381. As to the rule where there are convictions on several counts of one indictment, compare Rex *v.* Robinson, 1 Moody, 413, and Gregory *v.* Reg. 15 Jur. 79, 19 Law J. N. s. Q. B. 366, with Carlton *v.* Commonwealth, 5 Met. 532, and Booth *v.* Commonwealth, 5 Met. 535; and see Baker *v.* The State, 4 Pike, 56; Barnes *v.* The State, 19 Conn. 398; Rex *v.* Tandy, 2 Leach, 4th ed. 833, 1 East P. C. 182; Crowley *v.* Commonwealth, 11 Met. 575; Kite *v.* Commonwealth, 11 Met. 581; Josslyn *v.* Commonwealth, 6 Met. 236; Commonwealth *v.* Kirk, 9 Leigh, 627; The State *v.* Turner, 2 McMullan, 399; Townsend *v.* People, 8 Scam. 326; The State *v.* Davidson, 12 Vt. 300; The State *v.* Lassley, 7 Port. 526; Friar *v.* The State, 3 How. Missis. 422; The State *v.* Hood, 51 Maine, 363. But this question is more particularly for "Crim. Proced." I. § 458, 1327, and notes.

[2] Miller *v.* Allen, 11 Ind. 389. In this case, a prisoner, having been sentenced to two years' imprisonment on each of two separate indictments, the one sentence to commence on the expiration of the other, applied, after serving in prison two years, for his discharge on habeas corpus; on the ground, that, in the absence of any statutory direction, the court could not postpone the time at which either sentence should begin to run, therefore that the two sentences did in matter of law run concurrently. And the discharge was granted. The judges were not aware that the question had been elsewhere decided the other way, and said: "We have been furnished with no authorities on the question involved; and, in the absence of authority to the contrary, it seems to us that the discharge of the petitioner was correct." p. 391. And see James *v.* Ward, 2 Met. Ky. 271. Cases like this should admonish prosecuting officers of their duty to study the criminal law, and furnish the courts with needed authorities.

[3] Opinion of Justices, 13 Gray, 618; Kite *v.* Commonwealth, 11 Met. 581; Brown *v.* Commonwealth, 4 Rawle, 259; Ex parte Roberts, 9 Nev. 44.

III. *What Punishment in Joint Conviction.*

§ 954. **How in Principle.** — The law as the earlier discussions of this volume disclose, deems a man who participates with others in an offence, just as culpable as if he did the whole alone. The same is the rule also in morals. Therefore, in legal reason, if more persons than one are jointly convicted of a crime, or if one has already been convicted and punished and the others are convicted afterward, each should receive a several sentence, and the same in extent of punishment, as if he had done the whole alone and had been alone convicted. And we are about to see that this is so likewise in authority.

§ 955. **Distinguished from Civil Suit.** — Looking, then, at this subject in the light of the decisions, we have seen, that the object of a civil suit is to recover damages for what an individual has suffered; while a criminal prosecution is for punishment, and the cure of a public wrong; and we have observed some distinctions growing out of this diversity.[1] Consequently, in the civil suit, the plaintiff is to be compensated but once, however many the persons against whom he proceeds. But, in crime, each man whose will contributes to what another executes, is guilty of it the same as though done by his own hand; and he is to be punished accordingly.[2] Even, in some cases, the mere combining with others will make a man indictable, when he would not be if he had undertaken, and even performed, the same wrong singly. But, aside from this doctrine of conspiracy, —

The Rule. — Where two or more are convicted together of the same offence, the sentence against them is several, each to pay the whole forfeiture, or suffer the whole of whatever other penalty or punishment the law provides, precisely as if he were the only person who had participated in the act.[3]

[1] Ante, § 208, 221, 235, 256–263, 264, 265, 301.

[2] 2 East P. C. 740; Reg. *v.* King, 1 Salk. 182; Commonwealth *v.* McAtee, 8 Dana, 28; The State *v.* Smith, 1 Nott & McCord, 13; Reg. *v.* Atkinson, 2 Ld. Raym. 1248, 1 Salk. 382, 11 Mod. 79, as to which see the report in Mod. where Holt, C. J., said, "but they shall severally have judgment;" Godfrey's Case, 11 Co. 42 *a*, 1 Rol. 32, 35; The State *v.* Smith, 1 Nott & McC. 13; United States *v.* Babson, 1 Ware, 450; The State *v.* Hopkins, 7 Blackf. 494; The State *v.* Berry, 21 Misso. 504.

[3] Caldwell *v.* Commonwealth, 7 Dana, 229; The State *v.* Gay, 10 Misso. 440; Jones *v.* Commonwealth, 1 Call, 555; Rex *v.* Morris, 2 Leach, 4th ed. 1096; Commonwealth *v.* Harris, 7 Grat. 600;

§ 956. **How in Penal Actions.** — The doctrine is different where a penalty is to be recovered in a proceeding civil in form, — as, in a *qui tam* action, — though the thing done is in its nature criminal. For the law does not regard the act as being properly a crime; or, if it does, still the rules which regulate civil proceedings must be applied. If the thing complained of is a single act, joint in its nature, the participants may be sued jointly; and the judgment must be joint, for one damage, contrary to the rule which would prevail if the proceeding were by indictment.[1] And when the full penalty has been adjudged against one, and by him paid, no suit can afterward be carried on against others who offended jointly with him.[2] For illustration, —

§ 957. **In Liquor-selling — (By Action or Indictment).** — Where a statute provides a pecuniary penalty for a sale of intoxicating liquor without license, all who participate in it may be proceeded against jointly, whether by action or indictment.[3] But, if by indictment, the judgment is several against each for the whole penalty;[4] while, if by action, it is joint, and the penalty can be collected only once out of all.[5] Yet, —

Form Civil where Act is Several. — In another class of cases, the acts of the participants are in nature several; and, if the proceeding is civil in form, there must be a separate action against each, and the whole penalty will be adjudged to each.[6]

Calico *v.* The State, 4 Pike, 480; The State *v.* Smith, 1 Nott & McC. 13; The State *v.* Hunter, 33 Iowa, 361; Rex *v.* Manning, 2 Comyns, 616; McLeod *v.* The State, 35 Ala. 395; Waltzer *v.* The State, 3 Wis. 785, 786, where Smith, J., remarked: "The guilt of one is neither mitigated nor enhanced from the fact that another may be also guilty;" Curd *v.* Commonwealth, 14 B. Monr. 386. **Husband and Wife.** — This is so even where husband and wife are jointly indicted, and the punishment is a fine, — each is to be sentenced to pay the whole fine severally; and, where the fine was joint, judgment was arrested. Commonwealth *v.* Ray, 1 Va. Cas. 262. **Sentence following Verdict.** — See Cain *v.* The State, 20 Texas, 355.

[1] See the cases, generally, cited to the next section and the last; Warren *v.* Doolittle, 5 Cow. 678; People *v.* Kolb, 8 Abb. Ap. Dec. 529.

[2] Boutelle *v.* Nourse, 4 Mass. 431; Frost *v.* Rowse, 2 Greenl. 130.

[3] Commonwealth *v.* Sloan, 4 Cush. 52; Commonwealth *v.* Tower, 8 Met. 527. And see Stephens *v.* The State, 14 Ohio, 386; Rex *v.* Crofts, 7 Mod. 397. **Auctioneer without License.** — In Vaughn *v.* The State, 4 Misso. 530, it was held, that two persons could not be jointly indicted for pursuing the business of auctioneers without license. See also The State *v.* Coleman, Dudley, S. C. 32.

[4] Commonwealth *v.* Harris, 7 Grat. 600.

[5] Ingersoll *v.* Skinner, 1 Denio, 540; Tracy *v.* Perry, 5 N. H. 504.

[6] Marsh *v.* Shute, 1 Denio, 230; Curtis *v.* Hurlburt, 2 Conn. 309; Arnold *v.* Loveless, 6 Rich. 511. **The Distinctions further considered.** — I am sufficiently clear, that the distinctions set down in the text are sustained alike by legal reason and actual adjudication, though they

§ 958. **General Views — Conclusion.** — The distinctions thus drawn have not always lain clear in the minds of the judges; consequently there are in the books some enunciations, chiefly *dicta*, which might seem at one or two points adverse. The careful reader will consult the note to the last paragraph. And he should remember, that there are, in the law, as in other departments of human knowledge, axiomatic and indestructible truths on which blows have no effect. There are principles which courts cannot overturn, however much they may seem to ignore or reject them.[1]

seem not to have occurred to the judges generally. The case of Rex *v.* Bleasdale, 4 T. R. 809, little considered by the court, seems perhaps adverse. In Barada *v.* The State, 13 Misso. 94, this question was not decided; but the case went off on the point (see ante, § 932), that the defendants could not object to a joint fine, it not being to their injury. And *possibly* there may be such a thing as the matter being sufficiently civil in nature, while criminal in form, to justify a joint sentence; yet the suggestion should be received cautiously, if at all. The true doctrine was pretty plainly stated by Powell, J., in Reg. *v.* King, 1 Salk. 182, a case criminal in form. "This penalty," says the report, "is not in the nature of a satisfaction to the party grieved, but a punishment on the offender; and crimes are several, though debts be joint, which, per Powell, *distinguishes this from the case of Partridge* v. *Nalor*, Cro. Eliz. 480; and s. c. nom. Patridge *v.* Emson, Noy, 62." Partridge *v.* Naylor, was an action against three persons, upon Stat. 1 & 2 Phil. & M. c. 12, to recover a penalty for wrongly impounding a distress; and the court held, that the judgment should be joint for one penalty against all. This case was pressed upon the court in the criminal one of Rex *v.* Clarke, Cowp. 610, where the defendants sought to avoid an information which alleged that they "had *severally* forfeited the sum of £40" for assaulting and resisting custom-house officers, contrary to 8 Geo. 1, c. 18, § 25. The court sustained the information; but Lord Mansfield, on the bench, not adverting to the distinction presented in our text, drew another, which may possibly be just in a degree when applied to cases civil in form, though probably not even then in full; while clearly it can have no proper application to cases, like the one before him, in which the proceeding is criminal. This will appear when we look at his observations in connection with a few words interspersed in brackets by me. He said: "Where the *offence* is, in its *nature*, *single*, and cannot be severed, there the *penalty* shall be only *single*; because, though several persons may join in committing it, it still continues but *one* offence. But where the offence is in its nature *several*, and where every person concerned may be *separately* guilty of it, there, each offender is separately liable to the penalty; because the crime of each is distinct from the offence of the others, and each is punishable for his own crime. For instance: the offence enacted by Stat. 1 & 2 Phil. & M. c. 12, is the impounding a distress in a wrong place. [We have seen, that the proceeding to recover the penalty under the statute is in form civil.] One, two, three, or four may impound it wrongfully; it still is but *one* act of impounding, it cannot be severed. It is but *one* offence; and therefore shall be satisfied by *one* forfeiture. [Suppose the object impounded was a man, and numbers were jointly indicted for the false imprisonment; there would be then but *one* act, *one* offence; yet the doctrine is clear, that each should receive his several sentence for the full penalty of the law.] So, under the statute, 5 Anne, c. 14, for the preservation of game [as to which see Hardyman *v.* Whitaker, 2 East, 573, note, and Rex *v.* Bleasdale, supra]; killing a hare is but *one* offence in its nature; whether one or twenty kill it, it cannot be killed more than once. [So of killing a man; but if twenty kill him once, the twenty must be severally hung.] If partridges are to be netted by night; two, three, or more may draw the net; but still it constitutes only *one* offence. [So when the partridge net is stolen, two, three, or more may jointly draw it away; yet, if they are indicted for the larceny, each must receive the full penalty.] But *this statute* relates to an *offence* in its *nature several*, a several offence at common law; and the statute adds a further sanction against that, which each man must commit severally. One may resist, another molest, another run away with the goods: one may break the officer's arm, another put out his eye. All these are distinct acts; and every one's offence entire and complete in its nature. [The reader will remember, that, according to the doctrine applicable to indictments, ante § 628, et seq., 648, 649, 673, 685, each is guilty for what the other does, the same as if his own hand performed the act.] Therefore each person is liable to a penalty for his own separate offence." These views by Lord Mansfield, obviously ill-considered, have been since commended. Marsh *v.* Shute, 1 Denio, 230; Ingersoll *v.* Skinner, 1 Denio, 540; and see The State *v.* Smith, 1 Nott & McC. 18. Contra, Curtis *v.* Hurlburt, 2 Conn. 309. But their palpable incorrectness, as appears on a close inspection, shows with what caution we should take the off-hand words of even the greatest judges; and how valueless is all blind commendation, however high the source whence it proceeds.

[1] See ante, § 64, note par. 11, and § 140, note; Bishop First Book, § 401, 455, 456.

CHAPTER LXI.

THE PUNISHMENT FOR AN OFFENCE SUBSEQUENT TO THE FIRST.

§ 959. **Of Statutory Regulation.** — It is just that an old offender should be punished more severely, for the same act, than one who transgresses for the first time. Therefore a statute sometimes provides a heavier penalty for a second or third offence than for the first.

Form of the Provision. — There are two forms of the provision: the one, in effect, directing that the indictment for an offence may charge it to be a second or third one, the heavier punishment to follow a conviction for the entire matter alleged; the other, permitting the prosecuting officer to bring up from the place of confinement prisoners who have before been convicted, and, on showing the conviction, have the additional penalty imposed.

§ 960. **Statutes diverse.** — The statutes are in terms diverse; and a particular consideration of their varying forms, and the consequent results, would not greatly aid the reader. Some cases, which may be helpful, are cited in a note.[1]

Foreign Conviction. — A former conviction in another State or country is not construed to be within a general provision of this sort.[2]

Optional. — It is optional with the prosecuting power to rely on the statute, or to proceed for a second or third offence as for a first, as deemed best.[3]

[1] People *v.* Butler, 3 Cow. 347; Russell *v.* Commonwealth, 7 S. & R. 489; Scot *v.* Turner, 1 Root, 168; Newton *v.* Commonwealth, 8 Met. 535; Commonwealth *v.* Mott, 21 Pick. 492; Commonwealth *v.* Getchell, 16 Pick. 452; Phillips *v.* Commonwealth, 3 Met. 588; Plumbly *v.* Commonwealth, 2 Met. 413; Bump *v.* Commonwealth, 3 Met. 533; Kite *v.* Commonwealth, 11 Met. 581; Smith *v.* Commonwealth, 14 S. & R. 69; Commonwealth *v.* Phillips, 11 Pick. 28; Ross's Case, 2 Pick. 165; Riley's Case, 2 Pick. 172; Evans *v.* Commonwealth, 3 Met. 458; Ex parte Seymour, 14 Pick. 40; Rand *v.* Commonwealth, 9 Grat. 738; Long *v.* The State, 35 Texas, 6; Commonwealth *v.* Morrow, 9 Philad. 583.

[2] People *v.* Cæsar, 1 Parker C. C. 645.

[3] Reg. *v.* Summers, Law Rep. 1 C. C 182.

§ 961. **The Allegation.** — Where the offence is the first, or is prosecuted only as such, the indictment need not charge it to be the first; for this is presumed.[1] But if it is the second or third, and the sentence is to be heavier by reason of its being such, the fact thus relied on must be averred in the indictment;[2] because, by the rules of criminal pleading, the indictment must always contain an averment of every fact essential to the punishment to be inflicted.[3] And —

Proof of First Offence. — The allegation of the former offence, or former conviction, as the terms of the statute may be, must be proved.[4]

§ 962. **Particulars of the Allegation.** — How, more minutely, the allegation should be, will depend chiefly on the statutory terms, which vary in the different States. But some propositions are the following: —

Jurisdiction. — According to New York doctrine, which seems sound, if the conviction for a first offence was before a court of special or limited jurisdiction, the averment of the conviction on an indictment for the second must show the jurisdiction;[6] but it may be done by general words, without stating the facts on which the jurisdiction depends.[6] Doubtless, on principles explained in "Criminal Procedure,"[7] if the court is a superior one of general jurisdiction, this averment of jurisdiction may be omitted.[8]

§ 963. **"Conviction."** — If the statute authorizes the increased punishment on a second "conviction," the indictment need only allege the *conviction*, it need not add that sentence was rendered thereon; because one is convicted on the mere finding of the jury that he is guilty.[9]

[1] Kilbourn *v.* The State, 9 Conn. 560.

[2] Rex *v.* Allen, Russ. & Ry. 513; Reg. *v.* Willis, Law Rep. 1 C. C. 363, 12 Cox, C. C. 192; Smith *v.* Commonwealth, 14 S. & R. 69; Commonwealth *v.* Welsh, 2 Va. Cas. 57; Wilde *v.* Commonwealth, 2 Met. 408; Plumbly *v.* Commonwealth, 2 Met. 413; Reg. *v.* Page, 9 Car. & P. 756; Rand *v.* Commonwealth, 9 Grat. 738; Long *v.* The State, 35 Texas, 6; The State *v.* Regan, 63 Maine, 127; Garvey *v.* Commonwealth, 8 Gray, 382; Walters *v.* The State, 5 Iowa, 507. See, however, The State *v.* Smith, 8 Rich. 460; The State *v.* Freeman, 27 Vt. 523.

[3] Crim. Proced. I. § 77 et seq.

[4] Tuttle *v.* Commonwealth, 2 Gray, 505; Reg. *v.* Willis, Law Rep. 1 C. C. 363, 12 Cox C. C. 192; Johnson *v.* People, 55 N. Y. 512; Commonwealth *v.* Briggs, 5 Pick. 429, 7 Pick. 177; post, § 963, 964.

[5] People *v.* Cook, 2 Parker, C. C. 12.

[6] People *v.* Golden, 3 Parker, C. C. 330. And see People *v.* Powers, 2 Seld. 50.

[7] Crim. Proced. I. § 663, 664.

[8] And see Stroup *v.* Commonwealth, 1 Rob. Va. 754.

[9] Stevens *v.* People, 1 Hill, N. Y. 261;

Proving the Conviction. — Plainly the fact of the previous conviction, depending chiefly upon record evidence, is to be established without much resort to oral testimony; yet, as the question involves that of identity, it ought to be passed upon by the jury.[1] The identity may be shown by any evidence which satisfies the jury, it not being necessary to produce a witness who was present at the former trial.[2] In an English case, Lord Campbell, C. J., observed: "A statement of a previous conviction does not charge an offence. It is only the averment of a fact which may affect the punishment. The jury do not find the person guilty of the previous offence; they only find that he was previously convicted of it, as an historical fact."[3] It is no objection to the evidence of the former conviction, that, as it tends to show the prisoner's character to be bad, it may prejudice him on the main issue. Being relevant to a necessary allegation, it must be admitted.[4] If the defendant pleads "guilty of the offence as charged in the indictment," no proof of the former conviction will be required.[5]

§ 964. **Previous "Conviction" in England.** — The English practice in these cases has not been uniform. But in a trial in 1834, Park, J., directed that the evidence of the former conviction should be produced with the other testimony before the defence was called for, — observing: "I used never to allow the jury to know any thing of the previous conviction till they had given their opinion on the charge upon which the prisoner was to be tried; because I thought, that, if the jury were aware of the previous conviction, it was (to use a common expression) like trying a man with a rope about his neck. However, the judges have had a meeting on the subject, at which thirteen of them were present, and they held that my practice, and that of another learned judge, was wrong; and the opinion of the judges is, that

Stat. Crimes, § 348. Contra, under a Pennsylvania statute, which, though the word "convicted" was employed in it, was construed to embrace in meaning, not only the rendering of the verdict of the jury, but the added sentence of the court thereon. Smith *v.* Commonwealth, 14 S. & R. 69. And this averment, like any other, will be required to be more or less broad according to the terms of the statute. Wood *v.* People, 53 N. Y. 511; Johnson *v.* People, 55 N. Y. 512; Gibson *v.* People, 5 Hun, 542; The State *v.* Volmer, 6 Kan. 379.

[1] Hines *v.* The State, 26 Ga. 614; Brooks *v.* Commonwealth, 2 Rob. Va. 845.

[2] Reg. *v.* Leng, 1 Fost. & F. 77.

[3] Reg. *v.* Clark, Dears. 198, 201, 3 Car. & K. 367, 6 Cox C. C. 210, 20 Eng. L. & Eq. 582.

[4] Johnson *v.* People, 55 N. Y. 512.

[5] People *v.* Delany, 49 Cal. 394.

the previous conviction must be proved before the prisoner is called on for his defence."[1] Therefore, in 1851, it was by 14 & 15 Vict. c. 19, § 9, provided, "that it shall not be lawful, on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and, whenever in any indictment such previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid; provided, that, if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence." The practice, under this statute, was to arraign the prisoner on the whole indictment in the usual manner. Then, if he plead not guilty, the jury were first charged to inquire of the subsequent offence. Should the verdict be guilty, they were next, without being re-sworn, to pass upon the other part of the indictment. And, in each instance, only the part of the indictment on which they were about to pass was read to them.[2] Directions similar to the foregoing are contained in the subsequent statute of 24 & 25 Vict. c. 99, § 37, and the like procedure has been affirmed as correct.[3]

§ 965. **Twice in Jeopardy.** — One subjected to an increased punishment for a second offence, is not a second time put in jeopardy for the first, contrary to a provision in our constitutions; but the further punishment is for persisting in wrong, by repeating the crime.[4]

Conclusion. — A few further cases will be found in a note.[5]

[1] Rex *v.* Jones, 6 Car. & P. 391.

[2] Reg. *v.* Key, 2 Den. C. C. 347, 3 Car. & K. 371, 5 Cox C. C. 369, 8 Eng. L. & Eq. 584.

[3] Reg. *v.* Martin, Law Rep. 1 C. C. 214.

[4] People *v.* Stanley, 47 Cal. 113.

[5] Evans *v.* Commonwealth, 3 Met. 453; Wilde *v.* Commonwealth, 2 Met. 408; Plumbly *v.* Commonwealth, 2 Met. 413; Phillips *v.* Commonwealth, 3 Met. 588; Commonwealth *v.* Keniston, 5 Pick. 420; Murray *v.* Commonwealth, 13 Met. 514; Cooke petitioner, 15 Pick. 234; Commonwealth *v.* Phillips, 11 Pick. 28; Ex parte Dick, 14 Pick. 86; Ex parte Stevens, 14

The foregoing discussion is in part such as belongs to "Criminal Procedure," rather than to this work. But it was deemed to be unnecessary to divide so brief a subject between the two books.

Pick. 94; Commonwealth *v.* Getchell, 16 Pick. 452; Ex parte White, 14 Pick. 90. Three Convictions in one Term of Court. — The State *v.* Riley, 28 Iowa, 547; Commonwealth *v.* Tuck, 20 Pick. 356; Haggett *v.* Commonwealth, 3 Met. 457.

CHAPTER LXII.

CONSEQUENCES OF THE SENTENCE BY OPERATION OF LAW.

§ 966. **Scope of this Chapter.** — The consequences stated in the last two chapters come only when set down in the sentence. In this chapter, we are to contemplate such as result from it by operation of law, though not mentioned therein.

§ 967. **Attainder defined.** — Attainder, in the primary meaning of the word, is the status, or, as the law formerly was, the taint of blood, of one condemned by final judgment of the court for treason or felony; and, in a secondary sense, it is the judgment itself.[1] It must be a final judgment, rendered after conviction,[2] or after outlawry[3] (where outlawry is known, as it is not generally in this country),[4] and then the offender is said to be attaint or attainted.[5]

Its Common-law Consequences — (Forfeiture — Corruption of Blood). — The effects of an attainder are, by the ancient common

[1] In Tomlins's Law Dictionary, attainder is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate, inseparable consequence, by the common law, on the pronouncing the sentence of death." And most of the other definitions, which I have consulted, speak of it as following the death sentence. In Burn's Law Dictionary, however, it is defined to be "where sentence is pronounced against a person convicted of treason or felony; he is thus *attinctus*, tainted, or stained," &c. It is natural that the old books should define it as following the death sentence, because the penalty of all felony and of treason was anciently death. But in actual use in more modern times, it is not limited to capital felonies and to treason. Sometimes it is even applied, not quite accurately, to one under sentence for a high misdemeanor. In modern language, and in localities where corruption of blood is unknown to the law, the word attainder is not much employed; still I do not understand its use to be improper in such circumstances, and its meaning is then as defined in my text.

[2] Stat. Crimes, § 348.

[3] Rex *v.* Earbery, Fort. 37.

[4] **Outlawry.** — Outlawry is or has been practised in Virginia. Commonwealth *v.* Hale, 2 Va. Cas. 241; Commonwealth *v.* Hagerman, 2 Va. Cas. 244; Commonwealth *v.* Pearce, 6 Grat. 669; Commonwealth *v.* Anderson, 2 Va. Cas. 245. And see Respublica *v.* Steele, 2 Dall. 92; Dale *v.* Gunter, 46 Ala. 118, 137.

[5] 4 Bl. Com. 380, 381; 2 Gab. Crim. Law, 566; 3 Inst. 212; Skinner *v.* Perot, 1 Ashm. 57; Wells *v.* Martin, 2 Bay, 20. See Stat. Crimes, § 348.

law, wide and sweeping. Not attempting minute accuracy, all the property of the attainted one, real and personal, is forfeited; his blood is corrupted, so that nothing can pass by inheritance to, from, or through him;[1] he cannot sue in a court of justice,[2] he may simply apply to have his attainder reversed, and he may be sued;[3] and thus, his wife, children, and collateral relations suffering with him, the tree, falling, comes down with all its branches.

§ 968. **Other Forfeitures — (For Flight — Homicide by Accident or in Self-defence — Suicide — Standing Mute — Challenging too Many Jurors).** — By the old English law also, if a man, however innocent, is indicted for felony, and flies, he forfeits by the flight his goods. And "he that committeth homicide by misadventure shall forfeit his goods; and so shall he which doth kill a man in his own defence forfeit his goods; and likewise he that killeth himself, and is *felo de se*, shall forfeit his goods; and he that being indicted of felony will stand mute, and not answer directly, or challenge peremptorily above twenty persons, shall forfeit his goods."[4]

§ 969. **Reasons for these Old Rules.** — The doctrine of forfeiture and corruption of blood is not so destitute of foundation in reason as sometimes it is assumed to be. When a man has committed such flagrant wrong against the community as to be an unfit member of it, the corruption of blood isolates him, so that

[1] Co. Lit. 392; 3 Inst. 211; Toomes *v.* Etherington, 1 Saund. Wms. ed. 361 and note; Finch's Case, 6 Co. 63 *a*, 68 *b*; Coombes *v.* Queen's Proctor, 16 Jur. 820, 24 Eng. L. & Eq. 598; s. c. nom. Coombs *v.* Queen's Proctor, 2 Rob. Ec. 547.

[2] Co. Lit. 130 *a*.

[3] 2 Gab. Crim. Law, 567; 3 Inst. 211.

[4] Pulton de Pace, ed. of 1615, 214 *b*-216 *a*; Hales *v.* Petit, 1 Plow. 253, 262, 263. **Further of Forfeiture and Corruption of Blood.** — This subject of forfeiture and corruption of blood has been frequently legislated upon in England, resulting in a considerable change in the law from what it was anciently. The reader who wishes to become familiar with this considerable title in the jurisprudence of our mother country will do best to consult the older English books. See Pulton de Pace, titles Forfeiture and Corruption of Blood; 2 Hawk. P. C. Curw. ed. c. 49; 1 Hale P. C. 354 et seq.; 2 Gab. Crim. Law, 566 et seq.; 4 Bl. Com. 380-390. And see 2 Kent Com. 385 et seq.; 4 Ib. 426; Bullock *v.* Dodds, 2 B. & Ald. 258; The Palmyra, 12 Wheat. 1; Brown *v.* Waite, 2 Mod. 130, 134. **Deodands.** — As to deodands, which are any personal chattels that are the immediate occasion of the death of a human being, and are by the English common law forfeited, see 1 Bl. Com. 300; Reg. *v.* Polwart, 1 Gale & D. 211, 1 Q. B. 818; ante, § 827. By the laws of the ancient Saxons, "If one in hewing a tree happened to kill a man, the relations were entitled to the tree, provided they took it within thirty days; which was in the nature, and might perhaps be the origin, of *deodands*." 1 Reeves Hist. Eng. Law, 3d ed. 17.

he cannot exercise the rights violated; and the forfeiture puts back what the community had given him. And, though his kindred suffer with him, they suffer only the necessary consequence of his severance from the body of persons standing toward the government as participants of its favor.

§ 970. **Continued — How in United States.** — While this view of the doctrine appears to be the true one, it is not the same which is sometimes stated. It has been assumed to rest on ancient policy; adopted to make men cautious against injurious accidents, watchful over the conduct of their relatives, and ready, if accused, to give themselves up for trial. At any rate, the doctrine has received little favor in this country;[1] where it has seemed unjust to disinherit men because their kindred become felons, and to take away their goods for accidents unavoidable. Indeed, as concerns some of the ancient forfeitures, they evidently rest on no satisfactory reason; and the others are unnecessary, since punishment can best be inflicted by direct sentence of the court. And though strictly no injustice is chargeable to a government that takes away rights because of their violation, even when indirectly ill consequences fall on the innocent, yet, as justice can be as effectually administered in some other way, humanity demands that it be so done. Therefore the Constitution of the United States provides, that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."[2] And, by an act of Congress, all forfeitures and corruptions of blood, whether for treason or felony, are, as to convictions under the United States laws, abolished.[3] In some of the older States, there are early traces of judicial recognitions of the common-law forfeitures, or early statutes creating like forfeitures;[4] and, in New York, there are judicial decisions acknowledging the incapacity of felons attaint, especially when imprisoned for life, to come as plaintiffs into the courts.[5] More recently the constitutions of some of the States

[1] Story Const. § 1300.

[2] Const. U. S. art. 3, § 3.

[3] 1 U. S. Stats. at Large, 117, act of April 30, 1790, c. 9, § 24; R. S. of U. S. § 5326; 2 Kent Com. 386; Story Const. § 1300.

[4] Dietrick *v.* Mateer, 10 S. & R. 151; Hinchman *v.* Clark, Coxe, 340; Dunham *v.* Drake, Coxe, 315; Ash *v.* Ashton, 3 Watts & S. 510; Wells *v.* Martin, 2 Bay, 20; Boyd *v.* Banta, Coxe, 266; Commonwealth *v.* Pennock, 3 S. & R. 199.

[5] Graham *v.* Adams, 2 Johns. Cas. 408; Troup *v.* Wood, 4 Johns. Ch. 228; Planter *v.* Sherwood, 6 Johns. Ch. 118, which last case, particularly, see. As to Mississippi,

and the statutes of others have interposed to prevent these forfeitures, while in most of them the courts never followed the English doctrine. As resulting from all this, the proposition becomes now substantially if not universally true, that forfeitures and corruptions of blood, consequent upon attainder for treason and felony, and upon accidental homicide and the like, are unknown in this country.[1] Yet, —

§ 971. **Exceptional Forfeitures.** — Connected with this common-law doctrine of forfeitures, there may be provisions so differing in nature from the rest as not to deserve the disfavor with which the ordinary common-law forfeitures are in this country regarded, and so not to be rejected like them. Thus, —

Forfeiture of Office — (Pardon). — It was held in Virginia, that a conviction of a justice of the peace for felony operates, without the help of any statute, as a forfeiture of his office; of such a nature, too, as for ever after to incapacitate him for acting under his commission, notwithstanding he has the governor's pardon.[2] Now, this kind of forfeiture, so far from being repugnant to our institutions, is in complete accord with them; and our courts should allow it when not in conflict with any provision of the written law.

see Beck *v.* Beck, 36 Missis. 72. As to Delaware, see Cannon *v.* Windsor, 1 Houston, 143. As to California, see Nerac's Estate, 35 Cal. 392.

[1] White *v.* Fort, 3 Hawks, 251; 5 Dane Abr. 3, 4, 11; 2 Kent Com. 386; 4 Ib. 426; ante, § 616.

[2] Commonwealth *v.* Fugate, 2 Leigh, 724. Brockenbrough, J., in delivering the opinion of the court, said: "In 1 Plow. 381, a case is stated in which it was decided, that, where a grant had been made to two persons for the term of their lives, and for the life of the survivor of them, of the sheriffwick of Cheshire, and one of them was attainted of treason, the whole office was forfeited, because the office was entire, and could not be severed. This decision is founded on the postulate, that an attainder of treason produces a forfeiture of a freehold office which concerns the administration of justice. In another case it was decided, that a *cestui que trust* of a grant for years of the license of wines, who had committed felony, had forfeited said office. 13 Vin. Abr. Forfeiture, H. pl. 2, p. 445." And he goes on to say, that, in England, this question cannot often arise, since felonies are there generally punished capitally. But, what was very important in this case, the judge considered, that, even if there were no English authorities on the question, the forfeiture of judicial office must, on the ordinary principles of the jurisprudence of the State, follow a conviction for felony. For neither the people nor the legislature could be presumed to have intended, "that the bench of justice should be contaminated by the presence of a convicted and attainted felon." p. 725, 726. The doctrine of this case was affirmed and followed in The State *v.* Carson, 27 Ark. 469. In The State *v.* Pritchard, 7 Vroom, 101, it was held, following Page *v.* Hardin, 8 B. Monr. 648, that the removal of an officer for malfeasance is a judicial act, not competent to the governor.

§ 972. **Incapacity to be a Witness.** — Not particularly as flowing from attainder, which concerns merely treason and felony, but as a consequence of the final judgment for treason, or felony, or any misdemeanor of the sort known by the term *crimen falsi*, whereof all are commonly called infamous crimes, we have the doctrine, that persons convicted of any of these, are not permitted to testify, when objected to, as witnesses in our courts. They are supposed to be so regardless of truth that it would be unjust to compel litigants to suffer from what they might assert, even under oath.[1] Yet —

§ 973. **The Parties themselves.** — The parties themselves, if in this situation, are usually allowed to make the same affidavits in their causes as other men are;[2] for such affidavits are always against the general policy of the law, and are permitted only from necessity, or from considerations of convenience in the despatch of business, — reasons which apply as well when the party is infamous as when he is not.

§ 974. **What Crimes disqualify.** — Some embarrassment attends the attempt to particularize the crimes which are infamous, within this rule. Larceny is,[3] because it is a felony; so is the knowingly receiving of stolen goods;[4] and so, at the common law, is even petit larceny. But the rule as to petit larceny is, in some of our States, changed by the operation of statutes which render it no longer infamous.[5] So forgery,[6] perjury,[7] "subornation of perjury,[8] suppression of testimony by bribery, or a conspiracy[9] to

[1] 1 Greenl. Ev. § 372, 373; People *v.* Whipple, 9 Cow. 707; Commonwealth *v.* Green, 17 Mass. 515, 542; United States *v.* Brockins, 3 Wash. C. C. 99; Reg. *v.* Alternun, 1 Gale & D. 261, 10 A. & E. 699; Schuylkill *v.* Copely, 17 Smith, Pa. 386; Reg. *v.* Webb, 11 Cox C. C. 133. See The State *v.* Harston, 63 N. C. 294.

[2] 1 Greenl. Ev. § 374.

[3] The State *v.* Gardner, 1 Root, 485. But otherwise of horse-stealing in Tennessee, Wilcox *v.* The State, 3 Heisk. 110.

[4] Commonwealth *v.* Rogers, 7 Met. 500. But otherwise in Pennsylvania, where this offence is misdemeanor. Commonwealth *v.* Murphy, 3 Pa. Law Jour. Rep. 290.

[5] Rex *v.* Davis, 5 Mod. 75, in notes; Pendock *v.* Mackinder, Willes, 665; Carpenter *v.* Nixon, 5 Hill, N. Y. 260; Shay *v.* People, 4 Parker, C. C. 353; Pruitt *v.* Miller, 3 Ind. 16. See ante, § 679. And see Commonwealth *v.* Keith, 8 Met. 531; Uhl *v.* Commonwealth, 6 Grat. 706. In New Hampshire, a person convicted of petit larceny cannot be a witness. Lyford *v.* Farrar, 11 Fost. N. H. 314.

[6] 2 East P. C. 1003; Rex *v.* Davis, 5 Mod. 74; Poage *v.* The State, 3 Ohio State, 229; The State *v.* Candler, 3 Hawks, 393.

[7] Anonymous, 3 Salk. 155; 1 Greenl. Ev. § 373. See Rex *v.* Teal, 11 East, 307; Heward *v.* Shipley, 4 East, 180.

[8] In re Sawyer, 2 Gale & D. 141; Ex parte Hannen, 6 Jur. 669.

[9] Rex *v.* Priddle, 1 Leach, 4th ed. 442; Bushel *v.* Barrett, 1 Ryan & Moody, N. P. 434.

procure the absence of a witness, or other conspiracy to accuse one of a crime, and barratry,"[1] — are offences which disqualify as being infamous. But it seems that the mere attempt, not amounting to a conspiracy, to procure the absence of a witness, is not infamous, though indictable.[2] Likewise the keeping of gaming-houses[3] and of bawdy-houses,[4] the commission of adultery,[5] common prostitution,[6] cutting wood contrary to the New Jersey timber act,[7] "deceits in the quality of provisions, deceits by false weights and measures, conspiracy[8] to defraud by spreading false news,"[9] and the like, do not disqualify.[10] And probably the test is to inquire, whether the crime shows such depravity in the perpetrator, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath, — the difficulty being in the application of this test.[11]

§ 975. **Judgment necessary.** — Guilt is ascertainable only on a direct proceeding for its punishment. Therefore, unless the crime of the witness has been established in this way, it works no infamy; for practically the infamy, like the common-law forfeiture,[12] comes neither from the mere crime,[13] nor from the plea or verdict of guilty, nor from the punishment, nor from the infamous

[1] 1 Greenl. Ev. § 373; Rex *v.* Priddle, 1 Leach, 4th ed. 442.

[2] The State *v.* Keyes, 8 Vt. 57.

[3] Rex *v.* Grant, 1 Ryan & Moody, N. P. 270.

[4] Deer *v.* The State, 14 Misso. 348.

[5] Little *v.* Gibson, 39 N. H. 505.

[6] The State *v.* Randolph, 24 Conn. 363.

[7] Holler *v.* Ffirth, Penning. 2d ed. 531.

[8] Crowther *v.* Hopwood, 3 Stark, 21.

[9] 1 Greenl. Ev. § 373.

[10] And see United States *v.* Brockius, 3 Wash. C. C. 99; Clarke *v.* Hall, 2 Har. & McH. 378; Cole *v.* Cole, 1 Har. & J. 572.

[11] In Massachusetts, a judgment on conviction for maliciously obstructing cars on a railroad is held not to disqualify. Metcalf, J., observed: "It is said in the text-books, that persons convicted of treason, felony, or the *crimen falsi*, are incompetent to be witnesses. But the offence here was neither of these three; and we nowhere find, that a conviction for any other offence renders the convict incompetent to testify." Commonwealth *v.* Dame, 8 Cush. 384. Likewise, in this State, the obtaining of goods by false pretences is not an offence which renders the party an incompetent witness; nor can the record of such conviction be given in evidence as affecting his credibility. The court deemed that the question had not been adjudicated, and Wilde, J., said: "On principle, we cannot think the offence of obtaining goods by false pretences is of so grave and aggravated a character as to render a witness unworthy of belief in a court of justice." Utley *v.* Merrick, 11 Met. 302, 303. In Pennsylvania, embezzlement is not infamous within this doctrine. Schuylkill *v.* Copeley, 17 Smith, Pa. 386. See, as to the New York law, People *v.* Park, 41 N. Y. 21, 1 Lans. 263.

[12] Ante, § 967; Wells *v.* Martin, 2 Bay, 20; Foxley's Case, 5 Co. 109 *a*.

[13] Free *v.* The State, 1 McMullan, 494. And see United States *v.* Maurice, 2 Brock. 96.

nature of the punishment,[1] but from the final judgment of the court.[2] Until judgment rendered, the person indicted, or even convicted, is competent to testify.[3] But, —

Erroneous Judgment, where Jurisdiction. — Though the judgment is erroneous, reversible on writ of error, still it is sufficient until vacated,[4] if pronounced by a tribunal having jurisdiction,[5] to exclude the defendant from being a witness.

§ 976. **Judgment of Foreign Court — Sister State.** — Whether the judgment of a foreign tribunal, the same as of a domestic one, disqualifies from being a witness, is a question on which opinions are conflicting. The view best sustained by reason, and probably by authority, is, that it does not;[6] for laws do not have extra-territorial force.[7] Perhaps, in the provisions of the United States Constitution concerning the effect of judgments as between the States, some ground may exist for treating our sister States as not foreign within this rule. Practically we have three variant doctrines, — first, to give a record of conviction in another State the same effect as one in our own;[8] secondly, to reject it altogether;[9] thirdly, to admit it to impair the credibility, not the competency, of the witness.[10] To determine whether the crime of which the witness was convicted abroad is to be deemed infamous, the court looks to the laws of its own State, and not to the

[1] Rex *v.* Crosby, 2 Salk. 689, 690; Rex *v.* Warden of the Fleet, 12 Mod. 337, 341; People *v.* Whipple, 9 Cow. 707; Pendock *v.* Mackinder, Willes, 655; s. c. nom. Pendock *v.* Mackender, 2 Wils. 18; The State *v.* Kearney, 1 Hawks, 53, 54; Rex *v.* Jeffry, 1 Leach, 4th ed. 443, note.

[2] The State *v.* Valentine, 7 Ire. 225; Skinner *v.* Perot, 1 Ashm. 57; Fitch *v.* Smalbrook, T. Raym. 32; Lee *v.* Gansel, Cowp. 1; s. c. nom. Lee *v.* Gansell, Lofft. 374; Rex *v.* Castell Careinion, 8 East, 77. So the proof of the crime can only be by the record of conviction. Commonwealth *v.* Quin, 5 Gray, 478.

[3] United States *v.* Dickinson, 2 McLean, 325; Gibbs *v.* Osborn, 2 Wend. 555; People *v.* Whipple, 9 Cow. 707; Barber *v.* Gingell, 3 Esp. 60; Dawley *v.* The State, 4 Ind. 128.

[4] Commonwealth *v.* Keith, 8 Met. 531.

[5] Cooke *v.* Maxwell, 2 Stark. 183.

[6] 1 Greenl. Ev. § 376.

[7] Ante, § 109; Wheaton International Law, 6th ed. 181.

[8] The State *v.* Candler, 3 Hawks, 393; Chase *v.* Blodgett, 10 N. H. 22.

[9] Uhl *v.* Commonwealth, 6 Grat. 706; Campbell *v.* The State, 23 Ala. 44.

[10] Commonwealth *v.* Knapp, 9 Pick. 496; Commonwealth *v.* Green, 17 Mass. 515. A North Carolina case holds, that a witness may be asked, on cross-examination, whether he has not committed perjury in another State, the object being to discredit him. Battle, J., observes: "Our courts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked whether he had not violated them." The State *v.* March, 1 Jones, N. C. 526. And see, as to this State, The State *v.* Harston, 63 N. C. 294.

foreign laws, consequently the transcript of the record should set out the indictment.[1]

Legislative Changes. — Changes in the law, as to witnesses, have been made in some of our States. Thus, in some, infamy is no longer a ground of exclusion, but it may be shown to impair their credibility.[2]

§ 977. **Other Consequences.** — There are other indirect consequences of a judgment against the defendant, not of much importance. For example, —

Juror. — A person infamous, as before described,[3] cannot be a juror, if indeed the disqualification of infamy does not extend to more crimes in jurors than in witnesses.[4] So, —

Record as Admission. — When a defendant has pleaded guilty to an indictment, the record may be produced against him in any civil suit wherein he is charged with the same act; because it contains his admission of what is thus alleged.[5] And —

Statutory Incapacities. — Statutes in some of our States have created still other incapacities, consequent on conviction either for crime generally, or for some particular crime.[6]

[1] Kirschner *v.* The State, 9 Wis. 140.

[2] And see Commonwealth *v.* Hall, 4 Allen, 305; Johnson *v.* Commonwealth, 2 Grat. 581; Curtis *v.* Cochran, 50 N. H. 242.

[3] Ante, § 972-974.

[4] 1 Co. Lit. 6 *b*; 2 Hale P. C. 115; 1 Duncomb Trials per Pais, 104; Crim. Proced. I. § 924.

[5] Reg. *v.* Fontaine Moreau, 11 Q. B. 1028, 12 Jur. 626, 17 Law J. N. S. Q. B. 187; 1 Greenl. Ev. § 527 *a*; 2 Bishop Mar. & Div. § 638, note.

[6] Barker *v.* People, 3 Cow. 686.

CHAPTER LXIII.

NO SECOND PROSECUTION FOR THE SAME OFFENCE.[1]

§ 978. **Doctrine and Scope of this Chapter.** — The purpose of this chapter is to explain and illustrate the doctrine, that, after one has been prosecuted for a particular offence, whether successfully or not, he is exempt from any fresh prosecution for the same offence. The practice, evidence, and pleading, by which the right to be thus exempt is made available, are for "Criminal Procedure."

§ 979. **How the Chapter divided.** — We shall consider, I. Some General Propositions and Views; II. Waiver, by Defendants, of their Rights; III. Ineffectual and Sham Prosecutions procured by Defendants; IV. Rules to determine when there has been a Jeopardy; V. Rules to determine when the Two Offences are the Same; VI. The Doctrine of *Autrefois Attaint*.

I. *Some General Propositions and Views.*

§ 980. **Not Twice adjudicate same Issue.** — It is a principle in probably every system of jurisprudence, certainly in ours, that a controversy once conducted to final judgment cannot be renewed in a fresh suit between the same parties;[2] though, in some circumstances, there may be a retrial of the issue in the original cause.

[1] For the procedure relating to the subject of this chapter, see Crim. Proced. I. § 805 et seq.

[2] Broom Leg. Max. 2d ed. 241 et seq.

Not Twice in Jeopardy. — In the criminal law, in England, this doctrine has received form in the maxim "that," as Blackstone expresses it, "no man is to be brought into jeopardy of his life more than once for the same offence."[1] Yet a comparison of the English adjudications, not speaking now of *dicta* of judges, with this maxim, will probably show that it is not quite supported by them.

§ 981. **How of Twice in Jeopardy with us — (Constitutional Provision).** — In this country, we have taken the maxim itself for our unbending rule, superseding thereby the common law as adjudged, if really differing from it. The Constitution of the United States provides, that "no person shall be . . . subject, for the same offence, to be twice put in jeopardy of life or limb."[2] And though this provision binds only the United States, not extending to the States, — a question on which judicial opinions formerly differed,[3] — the constitutions of nearly all the States have the same provision; and the courts of all receive it as expressive of the true common-law rule.

§ 982. **Not in mere Affirmance of Common Law.** — Some of our judges appear to have assumed, without much consideration, that this provision merely affirms the common law; to which, therefore, they have looked to ascertain its interpretation and true application.[4] But, in England, the maxim is a mere deduction, made by some judge or text-writer, from the adjudications, which must govern if found in conflict with it. With us, the constitutional provision is supreme, and it must be the controlling power, though the result should be to overturn decisions.[5] In England, the maxim is, in the language of Cockburn, C. J., "Not one of those principles that lie at the foundation of our law, — such as the maxim that judges shall decide questions of law, and juries

[1] 4 Bl. Com. 335.

[2] Const. U. S. amendm. art. 5.

[3] That it does bind the States, see The State *v.* Moor, Walk. Missis. 134; People *v.* Goodwin, 18 Johns. 187, 201; Commonwealth *v.* Purchase, 2 Pick. 521. That it does not bind the States, see United States *v.* Keen, 1 McLean, 429, 437, 438; United States *v.* Gibert, 2 Sumner, 19, 48, 51, 52, 53; Wood *v.* Wood, 2 Cow. 819, 820, note; Livingston *v.* New York, 8 Wend. 85, 100; Colt *v.* Eves, 12 Conn. 243; Barker *v.* People, 3 Cow. 686, 701; Fox *v.* Ohio, 5 How. U. S. 410. In Hoffman *v.* The State, 20 Md. 425, a case not well considered, the learned court seem to have assumed, without reflection, that it was the Constitution of the United States, not of Maryland, upon which they were passing.

[4] See United States *v.* Gibert, 2 Sumner 19, 38; Commonwealth *v.* Cook, 6 S. & R. 577; Commonwealth *v.* Olds, 5 Litt. 187.

[5] See The State *v.* Norvell, 2 Yerg. 24.

questions of fact, or that the verdict of the jury, in order to be binding, must be unanimous;" but it is "a matter of practice, which has fluctuated at various times, and which, even at the present day, may perhaps not be considered as finally settled."[1] Not thus is the constitutional provision regarded in the United States, where it is fundamental in our criminal jurisprudence. Nor is it within the rule,[2] that words of established legal meaning take, in a new law, the signification they bore in the old. And the reason is, that this maxim was never a law in England, or a thing which the English law interpreted; being itself a mere interpretation of a judicial practice not entirely uniform. Still the American courts are not quite agreed as to the weight, on this subject, to be given the English decisions; and, in various respects, our own adjudications are in a good deal of conflict. It is, therefore, over an uneven way that we are to travel in this chapter. Let it be in a direction indicating what, of the discordant doctrines, are to be preferred.

§ 983. *How as to Jeopardy in a Foreign Country, in another State, and between the United States and the States:* —

In General of Foreign Jeopardy. — It results from obvious principles,[3] that neither the common-law maxim nor our constitutional provision can span country and country, rendering a jeopardy in one country a bar to a trial in another. If such a rule prevails, it must proceed from international law, not from the written constitution of one country, or the practice of the courts of another.

§ 984. **Rule of International Law.** — Not often is the same act an offence against the criminal laws of two countries. Yet it may be; as, for example, where the party in a foreign country is one of our citizens, and our law is extended over him,[4] while the law of the place contains the same inhibition with our own. Now, though such a case is not within the letter of our constitutions, yet, on general principles of international jurisprudence, as laid down by some writers, if a valid sentence of acquittal or conviction were "pronounced under the municipal law of the state where the supposed crime was committed, or to which the sup

[1] Winsor *v.* Reg., Law Rep. 1 Q. B. 289, 303; s. c. more fully in all its stages, nom. Reg. *v.* Winsor, 10 Cox C. C. 276; s. c. Winsor *v.* Reg., 7 B. & S. 490.

[2] Stat. Crimes, § 242.

[3] Ante, § 99 et seq.

[4] Ante, § 109–123.

posed offender owed allegiance," it would, in the language of Wheaton, "be an effectual bar to a prosecution in any other state. If pronounced in any other foreign state than that where the offence is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity."[1] Thus, —

§ 985. **Offences equally against all Nations — (Piracy).** — "Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt, that the plea of *autrefois acquit* would be good in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state."[2] This proposition results from the same reason as the ordinary common-law doctrine of *autrefois convict* and *autrefois acquit*. If one judicial tribunal has brought a person into legal jeopardy for an alleged crime, no other will afterward entertain the accusation. And, since the courts of the several nations take cognizance, each of what the other does, in things which concern all, the case must be the same in whatever country the jeopardy arises; provided it is a real jeopardy, for the identical offence, viewed as the law views it, not merely as it might be viewed by an uninformed person. But, —

§ 986. **Same Act a Real Grievance to Two Nations.** — While the foregoing doctrine is in reason just in its application to the cases specified, where a citizen abroad has done something which in its essence offends merely the local jurisdiction, or where the crime is no more prejudicial to the peace of one nation than of every other, there are other cases in which, in reason, it is of doubtful applicability. If a man equally offends each of two governmental powers which bind him, and one punishes him for the wrong done to it, no substantial reason appears why the wrong to the other, which is a different thing, should not be redressed also. These are two distinct offences; and, though both should be committed by the one act, neither is included in the other. Still, though the strict rule would be so, yet, as a sort of merciful dispensation, the courts would undoubtedly exercise any discretion favorably to a

[1] Wheaton International Law, 6th ed. 184. See, as between our States, and as creating some doubt about this doctrine, The State *v.* Adams, 14 Ala. 486; The State *v.* Brown, 1 Hayw. 100; The State *v.* Seay, 3 Stew. 123, 129; People *v.* Burke, 11 Wend. 129, ante, § 179.

[2] Johnson, J., in United States *v.* Pirates, 5 Wheat. 184, 197.

defendant who had been punished for the same wrongful volition in a foreign country. Accordingly, —

As between the States. — There is authority for the proposition, that a trial and conviction in one of our States, for an act violating its laws, does not prevent a prosecution in another State, for the same act, viewed as a violation of the laws of the latter.[1]

§ 987. **Acts violating both United States and State Laws.** — An act committed within the territorial limits of a State may be contrary to a statute of the United States; and, at the same time, contrary to the law, statutory or common, of the State. And the question arises, whether a prosecution under one of these governments will bar proceedings for the same act in the tribunals of the other. This question divides itself into two parts, — first, whether, if the laws so stand apparently, both are valid, or whether the power of the one government, which in the particular thing may be superior, supersedes that of the other. Secondly, assuming both laws to be valid, whether a prosecution in the courts of one of the governments bars a prosecution for the same act in those of the other.

§ 988. **Continued.** — The former branch of the inquiry is considered in other connections.[2] And it will be seen that ordinarily both laws may be valid. As to the latter, —

In General — Obstructing Officer — Assault — Riot — Homicide — Uttering Counterfeits — Counterfeiting. — Grier, J., sitting in the Supreme Court of the United States, observed: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment, and the same act may be also a gross breach of the peace of the State, — a riot, assault, or a murder, — and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred, that the offender has been twice punished for the same offence; but

[1] Phillips *v.* People, 55 Ill. 429, 433.

[2] Ante, § 178, 179.

only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar of a conviction by the other: consequently this court has decided,[1] that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practised on its citizens; and[2] that Congress, in the proper exercise of its authority, may punish the same act, as an offence against the United States."[3] Yet, —

§ 989. **Giving Effect to Former Prosecution.** — While the law is plainly so, as to the right, the greater number of our tribunals have manifested a disposition, in the absence of any express command of the legislature, to accept a prosecution in one of these jurisdictions as a ground for declining to institute a prosecution for the same wrongful act in the other, or for suspending the prosecution if instituted, or for permitting the accused person to avail himself in some way of this matter.[4] At the same time, there is just weight in the consideration, that, if a man, though by one act, has violated the laws of two governmental powers, it is proper both should punish him.

§ 990. *To what Classes of Offences this Rule of Constitutional Law applies:* —

Treason and Felony. — The reader has observed the terms of this constitutional provision; namely, that there shall be no second jeopardy of "*life or limb.*" The construction of which is, that properly the rule extends to treason and all felonies, not to misdemeanors.[1] Yet, —

Misdemeanor — Penal Actions — Sureties of Peace. — Practically and wisely, the courts by an equitable interpretation apply it to all indictable offences, including misdemeanors;[2] but not to actions for the recovery of penalties,[3] because these are not criminal proceedings,[4] nor to applications for sureties of the peace.[5]

Interpretation varying with Offence. — There is, however, an apparent tendency in some of the courts to hold the doctrine more strictly in the higher crimes, especially those punishable with death, than in ordinary misdemeanors.[6]

§ 991. **Liberally Interpreted — (Misdemeanor, again).** — We have seen elsewhere,[7] that, while statutes are to be strictly interpreted as against persons charged with crime, provisions introduced in their favor should be construed liberally; and the same distinction applies to a written constitution. Therefore the constitutional provision now under consideration should be liberally interpreted; extending to cases within its reason, though not within its words. On which principle, plainly the courts should, as we have seen they generally do, hold it applicable to misdemeanor,[8] the same as to treason and felony.

§ 992. *Defendants and the Government distinguished as respects this Constitutional Provision:* —

Defendants waive, not Government. — Under the next sub-title, we shall consider the right of defendants to waive this constitutional provision. But the government cannot waive it, or by any act escape its force. To illustrate, —

[1] Fox *v.* Ohio, 5 How. U. S. 410, 432.

[2] United States *v.* Marigold, 9 How. U. S. 560.

[3] Moore *v.* Illinois, 14 How. U. S. 13, 20.

[4] See Commonwealth *v.* Fuller, 8 Met. 313; Harlan *v.* People, 1 Doug. Mich. 207, 212; Houston *v.* Moore, 5 Wheat. 1, 81, 35; People *v.* Weatchester, 1 Parker C. C. 659. But see The State *v.* Pitman, 1 Brev. 32; Hendrick *v.* Commonwealth, 5 Leigh, 707; Manley *v.* People, 3 Seld. 295, 302, 303; Fox *v.* Ohio, 5 How. U. S. 410, 430; ante, § 179. See also Commonwealth *v.* Barry, 116 Mass. 1. In a case on circuit, before the late Chief Justice Taney of the Supreme Court, where there was a conviction for robbing the United States mail, this learned judge said: "As these letters, with the money within them, were stolen in Virginia, the party might undoubtedly have been punished in the State tribunals, according to the laws of the State, without any reference to the Post-Office or the Act of Congress; because, from the nature of our government, the same act may be an offence against the laws of the United States, and also of a State, and be punishable in both. . . . And the punishment in one sovereignty is no bar to his punishment in the other. Yet in all civilized countries it is recognized as a fundamental principle of justice, that a man ought not to be punished twice for the same offence. And if this party had been punished for the larceny by a State tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a *nolle prosequi*, or granting a pardon." United States *v.* Amy, 14 Md. 149, note 152.

[1] People *v.* Goodwin, 18 Johns. 187, 201; United States *v.* Gibert, 2 Sumner, 19, 45. And see The State *v.* Spear, 6 Misso. 644.

[2] Commonwealth *v.* Olds, 5 Litt. 137; McCauley *v.* The State, 26 Ala. 135; Day *v.* Commonwealth, 23 Grat. 915; The State *v.* Lee, 10 R. I. 494; Jones *v.* The State, 15 Ark. 261; The State *v.* Lavinia, 25 Ga. 311; Ex Parte Brown, 2 Bailey, 323. See Campbell *v.* The State, 11 Ga. 353; The State *v.* Weaver, 13 Ire. 203; The State *v.* Rankin, 4 Coldw. 145.

[3] Pruden *v.* Northrup, 1 Root, 93; Hylliard *v.* Nickols, 2 Root, 176; Hannaball *v.* Spalding, 1 Root, 86; United States *v.* Halberstadt, Gilpin, 262; Lawyer *v.* Smith, 1 Denio, 207.

[4] Ante, § 82.

[5] The State *v.* Vankirk, 27 Ind. 121.

[6] People *v.* Olcott, 2 Johns. Cas. 301; Commonwealth *v.* Cook, 6 S. & R. 577; Williams *v.* Commonwealth, 2 Grat. 567, compared with Dye *v.* Commonwealth, 7 Grat. 662; United States *v.* Morris, 1 Curt. C. C. 23. And see post, § 1084.

[7] Stat. Crimes, § 190, 226 et seq.

[8] And see Winsor *v.* Reg., Law Rep. 1 Q. B. 289, 307; s. c. in all its stages, nom. Reg. *v.* Winsor, 10 Cox C. C. 276.

New Trials. — While, as we shall see,[1] a defendant, by waiving the protection of this constitutional guaranty, may in proper circumstances have a new trial in a cause, the government cannot. *After the jeopardy has attached* to the party,[2] it can take no step in the proceedings against him backward. If, through a misdirection of the judge on a question of law, or a mistake of the jury, or their refusal to obey the instructions of the court, or any other like cause, a verdict of acquittal is improperly rendered, the verdict can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted.[3]

§ 993. **Continued — (In Misdemeanor — Penal Action — Civil Right in Criminal).** — This doctrine applies as well in misdemeanor as in felony.[4] It does not apply strictly in penal actions, civil in form;[5] yet new trials are not commonly granted to plaintiffs in such actions.[6] But the English law seems to be, that a new trial may be given to the prosecutor in a criminal proceeding where a civil

[1] Post, § 1001-1004.

[2] Post, § 1012-1016.

[3] Rex *v.* Praed, 4 Bur. 2257; Rex *v.* Silverton, 1 Wils. 298; Anonymous, Lofft, 451; Rex *v.* Fenwick, 1 Sid. 153; Rex *v.* Jackson, 1 Lev. 124; Rex *v.* Mann, 4 M. & S. 337; Rex *v.* Brice, 1 Chit. 352; People *v.* Mather, 4 Wend. 229, 263, 266, in which case, as in one or two others, a query, shown in other cases to be without foundation, is raised, whether a new trial may not be granted the State where the acquittal is through misdirection of the judge in matter of law; Slaughter *v.* The State, 6 Humph. 410; Commonwealth *v.* Cummings, 3 Cush. 212; The State *v.* Kittle, 2 Tyler, 471; The State *v.* Jones, 7 Ga. 422; The State *v.* Dark, 8 Blackf. 526; The State *v.* Johnson, 8 Blackf. 533; The State *v.* Davis, 4 Blackf. 345; The State *v.* Fields, Mart. & Yerg. 137; Esmond *v.* The State, 1 Swan, Tenn. 14; The State *v.* Taylor, 1 Hawks, 462; The State *v.* Martin, 3 Hawks, 381; The State *v.* Kanouse, Spencer, 115; The State *v.* Wright, 3 Brev. 421, 2 Tread. 517; The State *v.* Hand, 1 Eng. 169; The State *v.* Denton, 1 Eng. 259; The State *v.* Spear, 6 Misso. 644; Rex *v.* Jones, 3 Mod. 201, 208; Reg. *v.* Challicombe, 6 Jur. 481; Rex *v.* Cohen, 1 Stark. 516; Rex *v.* Sutton, 5 B. & Ad. 52, 2 Nev. & M. 57; Rex *v.* Wandsworth, 1 B. & Ald. 63, 2 Chit. 282; Anonymous, Lofft, 451; Rex *v.* Reynell, 6 East, 315, 2 Smith, 406; The State *v.* Reily, 2 Brev. 444; The State *v.* Burris, 8 Texas, 118; The State *v.* De Hart, 2 Halst. 172; The State *v.* McKee, 1 Bailey, 651; The State *v.* Brown, 16 Conn. 54; The State *v.* Anderson, 3 Sm. & M. 751; The State *v.* Reynolds, 4 Hayw. 109; People *v.* Webb, 38 Cal. 467; The State *v.* Phillips, 66 N. C. 646; The State *v.* Freeman, 66 N. C. 647; The State *v.* McGrorty, 2 Minn. 224; The State *v.* West, 71 N. C. 263; The State *v.* Credle, 63 N. C. 506; The State *v.* Nicholas, 2 Strob. 278.

[4] Rex *v.* Davis, 12 Mod. 9; Rex *v.* Bennett, 1 Stra. 101; and cases cited in the last note. But see The State *v.* Grider, 18 Ark. 297; The State *v.* Goff, 20 Ark. 289.

[5] United States *v.* Halberstadt, Gilpin, 262; Pruden *v.* Northrup, 1 Root, 93; Hannaball *v.* Spaulding, 1 Root, 86; Hylliard *v.* Nickols, 2 Root, 176.

[6] Lawyer *v.* Smith, 1 Denio, 207; Steel *v.* Roach, 1 Bay, 63; Rex *v.* Bear, 2 Salk. 646 and note.

right is enforced.[1] In an ordinary criminal case, however, even where the issue which the prisoner tenders is that of a former acquittal; and, without evidence, against the direction of the court, this issue is found by the jury in his favor; the verdict must stand.[2]

§ 994. **No Fresh Indictment.** — *A fortiori*, after an acquittal[3] or a conviction[4] on the merits, or a plea of guilty,[5] no fresh indictment for the same offence can be maintained. But the views of these sections will be further unfolded in subsequent sub-titles.

II. *Waiver, by Defendants, of their Rights.*

§ 995. **In General.** — It is a general doctrine governing judicial proceedings, that a party may waive any rights which the law provides for his advantage. If, for example, in civil jurisprudence, a statute directs in what county a man shall be sued, he may still, if sued in another county, answer in the latter to the action on its merits; whereby he relinquishes his opportunity to object.[6] And, both in civil jurisprudence and in criminal, one may waive the benefit of a constitutional provision.[7] Therefore he may waive his rights under the provision now being considered. The general doctrine of waiver, by persons proceeded against for crime, is, with its exceptions, made the subject of a chapter in "Criminal Procedure."[8]

§ 996. **Further of Waiver in General.** — This law of waiver comes from the principle of natural justice, that one is not entitled to complain of that to which he consented. Still, for the protection of the defendant, the court will under some circumstances refuse to allow him to make the waiver; or, if he makes it, will refuse to hold him to its consequences; though there is some apparent, and perhaps real, difference of judicial opinion on this proposition.[9] Anciently, persons on trial for treason or felony were

[1] Reg. *v.* Russell, 3 Ellis & B. 942, 23 Law J. N. s. M. C. 173, 18 Jur. 1022, 26 Eng. L. & Eq. 230; Rex *v.* Burbon, 5 M. & S. 392.

[2] Rex *v.* Lea, 2 Moody, 9.

[3] The State *v.* Spear, 6 Misso. 644; Campbell *v.* The State, 9 Yerg. 333.

[4] United States *v.* Keen, 1 McLean, 429; The State *v.* Benham, 7 Conn. 414; Mount *v.* The State, 14 Ohio, 295; The State *v.* Norvell, 2 Yerg. 24.

[5] People *v.* Goldstein, 32 Cal. 432.

[6] Brown *v.* Webber, 6 Cush. 560.

[7] 1 Bishop Mar. & Div. § 677; The State *v.* Gurney, 37 Maine, 156.

[8] Crim. Proced. I. § 117 et seq.

[9] "In capital cases, I think the court is so far of counsel with the prisoner

denied counsel before the jury; and then the judges counselled them to the extent of preventing their doing things prejudicial, except to plead guilty. When counsel became allowable, it was decided, not without some differences of opinion, that, even in capital trials, defendants, acting by legal advice, under the supervision of the tribunals, might so consent to an arrangement manifestly for their benefit as to be afterward bound by it.[1] And thus far the better doctrine now goes; probably, further. To illustrate, —

§ 997. **Waiver as to Jury (Grand and Petit).** — The courts will refuse to hear objections to the persons composing the grand jury, or to the manner in which it is empanelled, after the case has been tried by the petit jury; or, indeed, after proceedings earlier than the trial.[2] And, if, while the petit jury is being empanelled, the prisoner knows of a cause of challenge against one of them, or the whole, but declines to interfere then, he cannot afterward bring forward the objection.[3] According to the doctrine of some courts, though the contrary is also maintained, if he consents to a separation of the jury before the verdict is reached, he cannot object to it on the ground of the separation.[4] So, —

Waiver of Copy of Indictment. — If a defendant suffers himself to go to trial without having received a copy of the indictment, even where the law expressly directs such copy to be furnished him, he cannot afterward take the objection that it was not furnished.[5] Likewise, —

Inadmissible Evidence. — One who permits illegal testimony to

that it should not suffer him to consent to any thing manifestly wrong, and to his own prejudice." Foster, 31.

[1] Kinloch's Case, Foster, 16, 27, 31. And see The State *v.* Slack, 6 Ala. 676; Commonwealth *v.* Cook, 6 S. & R. 577.

[2] The State *v.* Ward, 2 Hawks, 443; The State *v.* Martin, 2 Ire. 101; The State *v.* Lamon, 3 Hawks, 175; People *v.* Griffin, 2 Barb. 427; The State *v.* Seaborn, 4 Dev. 305. See, for a fuller statement of doctrines, Crim. Proced. I. § 871-889.

[3] Lisle *v.* The State, 6 Misso. 426; The State *v.* Underwood, 6 Ire. 96; The State *v.* Duncan, 6 Ire. 98; Brown *v.* The State, 7 Eng. 623; Hallock *v.* Franklin, 2 Met. 558; Barlow *v.* The State, 2 Blackf. 114; Glover *v.* Woolsey, Dudley, Ga. 85; Billis *v.* The State, 2 McCord, 12; Anonymous, cited 1 Pick. 41; Guykowskie *v.* People, 1 Scam. 476; Crim. Proced. I. § 946.

[4] The State *v.* Mix, 15 Misso. 153; Wesley *v.* The State, 11 Humph. 502; Crim. Proced. I. § 998.

[5] Smith *v.* The State, 8 Ohio, 294, 296; Lisle *v.* The State, 6 Misso. 426; The State *v.* Johnson, Walk. Missis. 392; Loper *v.* The State, 3 How. Missis. 429. **Names of Witnesses.** — So where, under a statute, the names of the witnesses are to be noted on the indictment, one who suffers the case to be tried without making the objection, is too late afterward Ray *v.* The State, 1 Greene, Iowa, 316.

be given to the jury, as shown by his making no objection to it, cannot afterward claim any privilege on account of its admission.[1] And, —

Matter in Abatement. — As a general proposition, whatever is pleadable in abatement is waived by the plea in bar of not guilty.[2]

Other Illustrations. — There are other illustrations,[3] but these will sufficiently explain the general doctrine. And thus we are prepared to consider, through the remainder of this sub-title, the law of the —

§ 998. *Waiver of the Objection to a Second Jeopardy:* —

Express or Implied. — The foregoing explanations show, that a waiver may be either express or implied. But, in practice, the waiver of the right to object to a second jeopardy is nearly always implied; though it may be expressly made,[4] it seldom is. To illustrate, —

Discharge of Jury. — If, during a trial, the jury is discharged with the prisoner's concurrence, this consent to the discharge is, by implication, a waiver of any objection to being tried anew, and he may be so tried.[5] Even the consent to the discharge may

[1] Bishop *v.* The State, 9 Ga. 121.

[2] McQuillin *v.* The State, 8 Sm. & M. 587. See Crim. Proced. I. § 744 et seq.

[3] See Commonwealth *v.* Battis, 1 Mass. 95; The State *v.* Cross, 34 Maine, 594; Commonwealth *v.* Andrews, 3 Mass. 126; People *v.* Scates, 3 Scam. 351; Armstrong *v.* The State, Minor, 160; Cravens *v.* Grant, 2 T. B. Monr. 117; s. c. nom. Cravins *v.* Gant, 4 T. B. Monr. 126; People *v.* Rathbun, 21 Wend. 509, 542; Hazen *v.* Commonwealth, 11 Harris, Pa. 355; Brooks *v.* Davis, 17 Pick. 148; Brooks *v.* Daniels, 22 Pick. 498; Gracie *v.* Palmer, 8 Wheat. 699; Prine *v.* Commonwealth, 6 Harris, Pa. 103. **Promise of Continuance.** — In one case, the State, before going to trial, asked for a continuance; but the prisoner consented to proceed, and let the case be withdrawn from the jury on the happening of a certain contingency. The contingency occurred, and the court held that he was bound by his undertaking; so that, though he objected to fulfilling it, he was liable to be convicted on a second trial. Hughes *v.* The State, 35 Ala. 351.

[4] Commonwealth *v.* Andrews, 3 Mass. 126.

[5] Elijah *v.* The State, 1 Humph. 102; Williams *v.* Commonwealth, 2 Grat. 567; Dye *v.* Commonwealth, 7 Grat. 662; Ferrare's Case, T. Raym. 84; Kinloch's Case, Foster, 16, 27; s. c. nom. Rex *v.* Kinlock, 1 Wils. 157; Rex *v.* Stokes, 6 Car. & P. 151; Reg. *v.* Deane, 5 Cox C. C. 501; The State *v.* McKee, 1 Bailey, 651, 654; Spencer *v.* The State, 15 Ga. 562; Commonwealth *v.* Sholes, 13 Allen, 554. And see Commonwealth *v.* Nix, 11 Leigh, 636. Where a juror, after the panel was full, rose, and stated a fact showing his own incompetency, and the prisoner objected to proceeding to trial with the jury thus constituted, but said he would not waive any of his legal rights, and the court discharged the jury and impanelled a new one, this was held to be an act done at the instance of the defendant, of which he could not afterward take advantage. Stewart *v.* The State, 15 Ohio State, 155. Contra, Rex *v.* Perkins, Holt, 403, where Holt, C. J., said: "It was the opinion of all the judges of England, upon debate

appear by implication from the circumstances, as well as by express words.[1] Again, —

Verdict Incomplete. — Should the verdict be so imperfect in form that no judgment can be entered upon it, the consent of both parties to this will be presumed; because either was entitled to have it perfected when rendered.[2] Therefore the prisoner may be tried anew.[3] But if the indictment will sustain a sentence, the court must pronounce it instead of ordering a new trial.[4] And, —

Absent at Verdict. — Where a person on trial absents himself from court when he should be present at the rendition of the verdict,[5] it is competent for the judge to order the cause to stand for another jury; what has been done amounting only to a mistrial.[6] He waives, by his absence when his presence is required by law, his right to treat the transaction as a jeopardy. Finally, —

Procuring Verdict or Judgment vacated. — Whenever a verdict, whether valid in form or not, has been rendered on an indictment either good or bad, and the defendant moves in arrest of judgment, or applies to the court to vacate a judgment already entered, for any cause, as for many causes he may, he will be presumed to

between them, that, in all capital cases, a juror cannot be withdrawn, though the parties consent to it; that, in criminal cases not capital, a juror may be withdrawn, if both parties consent, but not otherwise." And see Rex v. Kell, 1 Crawf. & Dix C. C. 151.

[1] Stewart v. The State, 15 Ohio State, 155; Morgan v. The State, 3 Sneed, 475. And see Lancton v. The State, 14 Ga. 426; Moore v. The State, 3 Heisk. 493; and the cases in the last note; Crim. Proced. I. § 946.

[2] Crim. Proced. I. § 1004; Sargent v. The State, 11 Ohio, 472; The State v. Underwood, 2 Ala. 744; The State v. Sutton, 4 Gill, 494.

[3] Wright v. The State, 5 Ind. 527; Reg. v. Woodfall, 5 Bur. 2661; Rex v. Hayes, 2 Ld. Raym. 1518; Rex v. Simons, Say. 34, 36; Wilson v. The State, 20 Ohio, 26; Gibson v. Commonwealth, 2 Va. Cas. 111; Commonwealth v. Smith, 2 Va. Cas. 327; The State v. Sutton, 4 Gill, 494; Webber v. The State, 10 Misso. 4; The State v. Valentine, 6 Yerg. 583; The State v. Town, Wright, 75; Campbell v. Reg., 11 Q. B. 799; The State v. Spurgin, 1 McCord, 252; Marshall v. Commonwealth, 5 Grat. 663; Commonwealth v. Hatton, 3 Grat. 623; The State v. Redman, 17 Iowa, 329; Turner v. The State, 40 Ala. 21; Waller v. The State, 40 Ala. 325; Commonwealth v. Gibson, 2 Va. Cas. 70; The State v. Walters, 16 La. An. 400; Murphy v. The State, 7 Coldw. 516. And see United States v. Bird, 2 Brev. 85.

[4] Page v. Commonwealth, 9 Leigh, 683; Commonwealth v. Fischblatt, 4 Met. 354; The State v. Arrington, 3 Murph. 571. See Morman v. The State, 24 Missis. 54.

[5] Crim. Proced. I. § 271-274.

[6] The State v. Battle, 7 Ala. 259; The State v. Hughes, 2 Ala. 102. See, for other views on this point, Crim. Proced. I. § 272.

waive any objection to being put a second time in jeopardy; and so he may ordinarily be tried anew.[1]

§ 999. **Wrong Verdict produced by Error of Court.** — If the verdict against a prisoner is wrong, and it was produced by some error of the court to which he objected, a just view of the constitutional guaranty would permit him to have the error corrected without waiving his right to object to a second jeopardy.[2] Still the practice in most cases has been otherwise.

§ 1000. **Judgment wrongly arrested on Good Indictment.** — When the indictment is good, yet the court, supposing it not good, erroneously arrests judgment on the defendant's application; if the prosecutor may have this judgment of arrest reversed for the error, he cannot maintain a new indictment; because the prisoner is still in jeopardy under the old, which is liable to be revived by a reversal of the judgment of arrest.[3] But in States where the erroneous judgment of arrest cannot be called in question, the prisoner's jeopardy has ceased, at his own request, and for his own benefit, therefore he may be proceeded against anew.[4]

§ 1001. **New Trial on Prayer of Convicted Person.** — We have seen,[5] that, after the jeopardy of the constitution has attached to the defendant, the government is not permitted to take any step backward; in consequence of which, a new trial cannot be granted it, should a verdict of acquittal be improperly rendered. But, though the prosecuting power cannot waive this provision, which is for the benefit of defendants, the latter can; so that new trials may be granted on their prayer. To explain, —

English Practice in Felony. — In felony, not in misdemeanor, the practice of the English courts from the earliest times has been

[1] Reg. v. Reid, 1 Eng. L. & Eq. 595; Campbell v. Reg., 11 Q. B. 799; Monroe v. The State, 5 Ga. 85; Sutcliffe v. The State, 18 Ohio, 469; Reg. v. Drury, 3 Car. & K. 193, 18 Law J. N. S. M. C. 189; Sellers v. The State, 1 Gilman, 183; Hines v. The State, 8 Humph. 597; Lane v. People, 5 Gilman, 305, 308; Allen v. Commonwealth, 2 Leigh, 727; The State v. Hughes, 2 Ala. 102; The State v. Thompson, R. M. Charl. 80; The State v. Battle, 7 Ala. 259; The State v. Abram, 4 Ala. 272; Clark v. The State, 4 Humph. 254; The State v. Phil, 1 Stew. 31; Cobia v. The State, 16 Ala. 781; People v. McKay, 18 Johns. 212; Epes's Case, 5 Grat. 676; Lane v. People, 5 Gilman, 305; Joy v. The State, 14 Ind. 139; Cochrane v. The State, 6 Md. 400; Younger v. The State, 2 W. Va. 579; The State v. Knouse, 33 Iowa, 365; People v. Barric, 49 Cal. 342.

[2] Post, § 1041.

[3] The State v. Norvell, 2 Yerg. 24.

[4] People v. Casborus, 13 Johns. 351; Gerard v. People, 3 Scam. 362; Commonwealth v. Gould, 12 Gray, 171. See Black v. The State, 36 Ga. 447.

[5] Ante, § 992, 993.

to recommend the prisoner to a pardon — granted as of course — whenever it appeared that the judge at the trial had committed an error to his prejudice. And concurrently with this practice the doctrine has become established, that a new trial will never be given to one convicted of felony; the recommendation of pardon being, in all cases of felony, ordered instead.[1] But a *venire de novo* may be awarded for an irregularity in the proceedings, as well in felony as in misdemeanor.[2]

§ 1002. **English Practice in Misdemeanor.** — In misdemeanor, the English rule has always been to grant to the defendant a new trial, instead of recommending a pardon.[3]

§ 1003. **New Trials to Defendants in United States.** — One would suppose that, after the constitutional provision now under consid-

[1] Reg. *v.* Frost, 2 Moody, 140, 171; United States *v.* Gibert, 2 Sumner, 19, 44–46; United States *v.* Keen, 1 McLean, 429, 432; Rex *v.* Mawbey, 6 T. R. 619, 638; Tinkler's Case, 13 East, 416, note; Archb. New Crim. Proced. 177. While this doctrine was generally accepted as undoubted law, a case was decided in the Court of Queen's Bench, which seemed to establish the practice of granting a new trial to the defendant, instead of a recommendation of pardon, when evidence had been improperly admitted to the jury. Reg. *v.* Scaife, 2 Den. C. C. 281, 17 Q. B. 238; Archb. Crim. Plead. & Ev. 13th London ed. 154. But in a later case before the Privy Council, on a Colonial Appeal, this Queen's Bench decision was shown not to be really an authority for the new doctrine, which was thereupon discarded, and the immemorial usage of the courts was confirmed as law. Reg. *v.* Bertrand, Law Rep. 1 P. C. 520, 10 Cox C. C. 618. In the subsequent case of Reg. *v.* Murphy, Law Rep. 2 P. C. 535, the Privy Council followed, without question, this case of Reg. *v.* Bertrand.

[2] Archb. Crim. Plead. & Ev. 18th ed. 188 et seq.; 1 Chit. Crim. Law, 654. In a New York case, Sutherland, J., observed as follows: "By the common law, a new trial could be granted in a case of felony, when there had been a mistrial relating to the regularity of the organization of the court, or of the impanelling of the jury, or, perhaps, conduct of the jury. Thus, in Arundel's Case, 6 Co. 14, when the defendant had been tried by a jury returned from a certain city instead of a certain parish, and had been convicted, and moved in arrest of judgment on that ground, it was adjudged that the jury ought to have come from the parish, and not the city, and that the trial was insufficient, and a new venire was awarded to try the issue again. So, in the case of The People *v.* McKay, 18 Johns. 212, where the defendant was indicted, tried, and convicted of murder, and moved in arrest of judgment on the ground that the venire which had been issued was a nullity, and the court adjudged that it was a nullity, and a new trial was ordered." Shepherd *v.* People, 25 N. Y. 406, 417.

[3] Rex *v.* Curril, Lofft, 156; Rex *v.* Simmons, 1 Wils. 329; Rex *v.* Smith, 2 Show. 165; Rex *v.* Read, 1 Lev. 9; Rex *v.* Bear, 2 Salk. 646; Rex *v.* Mawbey, 6 T. R. 619, 638; Rex *v.* Simons, Say, 34; Rex *v.* Tremaine, 7 D. & R. 684; s. c. nom. Rex *v.* Tremearne, 5 B. & C. 254; Rex *v.* Gough, 2 Doug. 791; Rex *v.* Askew, 3 M. & S. 9. But see Read *v.* Dawson, 1 Sid. 49. "A court of oyer and terminer or general jail delivery, however, or the court of quarter-sessions, have no power to grant a new trial; at least such is generally understood to be the case." Archb. New Crim. Proced. 177. And see Rex *v.* Fowler, 4 B. & Ald. 273.

eration had become universal in this country, our courts would, at least, have made no departures in retrograde from the English practice in protecting defendants from a second jeopardy, and, therefore, when a prisoner was convicted of felony through an erroneous ruling at his trial, they would either have discharged him, or recommended a pardon as in England. But neither practice was ever adopted with us; and, on the other hand, there was a time when some American judges denied that, in felony, an erroneously convicted person could even have a new trial, by applying for which he waives the protection of the Constitution. Yet it is now, and for a long time has been, settled by universal consent, that with us, new trials may be allowed alike in treason, felony, and misdemeanor.[1] As just said, —

Waiving Protection of Constitution. — The erroneously convicted applicant for a new trial waives, in point of law, his constitutional protection against a second jeopardy, by the act of asking to have his wrongs redressed. And while the imposing of this condition upon him is, in principle, not justifiable where he suffered from a positive violation of law by the judge at his trial, against which he protested; still, even on principle, there are cases in which a discretionary power might be exercised in favor of defendants, where they could not strictly claim rights; and, in such cases, the remedy should be a new trial instead of a discharge.[2]

§ 1004. **Extent of Waiver implied in New Trial.** — The waiver of the constitutional right, implied in an application for a new trial, is construed to extend only to the precise thing concerning which relief is sought. Thus, —

[1] United States *v.* Conner, 3 McLean, 573; United States *v.* Keen, 1 McLean, 429; Grayson *v.* Commonwealth, 6 Grat. 712; Weinzorpflin *v.* The State, 7 Blackf. 186; United States *v.* Fries, 3 Dall. 515; The State *v.* Prescott, 7 N. H. 287; The State *v.* Slack, 6 Ala. 676; Lane *v.* People, 5 Gilman, 305, 308; The State *v.* Wood, 1 Mill, 29; The State *v.* Sims, Dudley, Ga. 213; Allen *v.* Commonwealth, 2 Leigh, 727; The State *v.* Larumbo, Harper, 183; The State *v.* Merrill, 2 Dev. 269; Commonwealth *v.* Green, 17 Mass. 515; Commonwealth *v.* Roby, 12 Pick. 496; United States *v.* Halberstadt, Gilpin, 262; People *v.* Morrison, 1 Parker C. C. 625; United States *v.* Macomb, 5 McLean, 286; Ball *v.* Commonwealth, 8 Leigh, 726; United States *v.* Harding, 1 Wal. Jr. 127. Contra, United States *v.* Gibert, 2 Sumner, 19; People *v.* Comstock, 8 Wend. 549; The State *v.* Douglass, 63 N. C. 500; United States *v.* Williams, 1 Clif. 5. The right to grant a new trial, however, is not everywhere held to attach to every inferior court. And see People *v.* Judges of Dutchess Oyer and Terminer, 2 Barb. 282; People *v.* Stone, 5 Wend. 39; McDaniel *v.* Coleman, 14 Ark. 545.

[2] Commonwealth *v.* Green, 17 Mass. 515.

Guilty of Part and not guilty of Residue. — If the verdict is, that the prisoner is guilty of a part of what is charged in the indictment, and not guilty of another part,[1] — as, guilty on one count, and not guilty on another;[2] or, there being but one count, guilty of manslaughter, and not guilty of murder;[3] and a new trial is granted him, — he cannot be convicted, on the second trial, of the matter of which he was acquitted on the first.[4] But there is some authority contrary, at least in a degree, to this doctrine. For example, —

§ 1005. **Continued.** — In Ohio it is held, that, where one offence is in different forms charged in separate counts, and there is a verdict of guilty on a part of the counts and not guilty on the others, then, if a new trial is granted, the entire indictment is opened.[5] And, in a later and much considered case in the same State, the indictment being in a single count for murder in the first degree, and the finding of the jury being that the defendant is not guilty of murder in the first degree, but is guilty of murder in the second degree, it was held that the effect of an order for a new trial, granted upon his motion, was to set aside the entire verdict, and the cause should be retried on the same issues as before. "If," said White, J., "the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it." Again: "The principle [that only the part of the verdict which was against the defendant was set aside, while the rest remained undisturbed] contended for on behalf of the defendant, would equally apply to the setting aside of a verdict finding a defendant guilty of petit larceny, where the indictment is for grand larceny. The effect of the principle would be,

[1] Crim. Proced. I. § 1009, 1010.

[2] Campbell *v.* The State, 9 Yerg. 333; The State *v.* Kittle, 2 Tyler, 471; Esmon *v.* The State, 1 Swan, Tenn. 14; The State *v.* Kattlemann, 35 Misso. 105. And see The State *v.* Dark, 8 Blackf. 526.

[3] Slaughter *v.* The State, 6 Humph. 410. See Livingston *v.* Commonwealth, 14 Grat. 592; The State *v.* Flannigan, 6 Md. 167; The State *v.* Tweedy, 11 Iowa, 350.

[4] Lithgow *v.* Commonwealth, 2 Va. Cas. 297; The State *v.* Martin, 30 Wis. 216; The State *v.* Belden, 33 Wis. 120; The State *v.* Hill, 30 Wis. 416; People *v.* Gilmore, 4 Cal. 376; The State *v.* Smith, 53 Misso. 139; The State *v.* Malling, 11 Iowa, 239; The State *v.* Ross, 29 Misso. 32; Major *v.* The State, 4 Sneed, 597.

[5] Jarvis *v.* The State, 19 Ohio State, 585; Leslie *v.* The State, 18 Ohio State, 390. And there are cases in other States which hold, that, where a defendant is acquitted upon one count in an indictment and convicted on another, at least where the verdict is silent as to the other, if on his motion a *venire de novo* is awarded, it should be to retry the whole case. The State *v.* Stanton, 1 Ire. 424; The State *v.* The Commissioners, 3 Hill, S. C. 239.

that, while the fact as to the body of the offence would be open to investigation on the second trial, yet the circumstance as to the value of the property would be *res judicata*, and conclusively settled by the first verdict." The result was stated as follows: "Upon mature consideration we are of opinion, that the verdict is severable only when there is a conviction or an acquittal on different counts for separate and distinct offences, or where there are several defendants; but that, where there is but one defendant, and, in fact, but one offence, the verdict is entire."[1] In a carefully considered case in Wisconsin, on facts in substance identical with these, the court refused to follow this Ohio decision; holding, that, on the second trial, there could not be a conviction for murder in the first degree.[2]

§ 1006. **Guilty of Part and Silent as to Residue.** — Where the verdict is, that the defendant is guilty of a part of the charge, which it specifies, making no mention of the rest, the courts are not agreed as to its effect.[3] There is authority for holding, that it is too incomplete to sustain any judgment;[4] there is authority for treating it as an acquittal of the part on which it is silent;[5] authority for allowing the prosecuting officer to *nol. pros.* the part not responded to;[6] and still other authority for disregarding such part altogether, and proceeding to judgment for that on which the voice of the jury is distinct.[7] There seems to be no objection, in principle, to permitting the prosecuting officer to claim judgment on so much of the verdict as is distinct; and, when he does, the defendant, who has been in jeopardy on the whole, is

[1] The State *v.* Behimer, 20 Ohio State, 572, 578–580. To the like effect are Bailey *v.* The State, 26 Ga. 579; and Mitchell *v.* The State, 8 Yerg. 514.

[2] The State *v.* Belden, 33 Wis. 120; following The State *v.* Martin, 30 Wis. 216. To the like effect are The State *v.* Smith, 53 Misso. 139; and The State *v.* Ross, 29 Misso. 32.

[3] See Crim. Proced. I. § 1011; 1 Stark. Crim. Plead. 2d ed. 646–650.

[4] The State *v.* Sutton, 4 Gill, 494. Contra, Brooks *v.* The State, 3 Humph. 25; Stoltz *v.* People, 4 Scam. 168.

[5] Kirk *v.* Commonwealth, 9 Leigh, 627; Weinzorpflin *v.* The State, 7 Blackf. 186; Brooks *v.* The State, 3 Humph. 25; Morris *v.* The State, 8 Sm. & M. 762; Chambers *v.* People, 4 Scam. 351; Stoltz *v.* People, 4 Scam. 168; Brennan *v.* People 15 Ill. 511, 517; The State *v.* Tweedy, 11 Iowa, 350; The State *v.* Lessing, 16 Minn. 75; Commonwealth *v.* Bennet, 2 Va. Cas. 235; The State *v.* Payson, 37 Maine, 361; The State *v.* Hill, 30 Wis. 416; The State *v.* Belden, 33 Wis. 120. Contra, United States *v.* Keen, 1 McLean, 429. See also Jones *v.* The State, 13 Texas, 168; The State *v.* Smith, 5 Day, 175.

[6] United States *v.* Keen, supra; Commonwealth *v.* Stedman, 12 Met. 444.

[7] The State *v.* Coleman, 8 Ala. 14; Nabors *v.* The State, 6 Ala. 200; Swinney *v.* The State, 8 Sm. & M. 576; Weinzorpflin *v.* The State, 7 Blackf. 186.

protected by the constitution from any further prosecution for the rest of the charge. But this is where there is no waiver of the constitutional provision by a proceeding for a new trial. If the defendant has a new trial after the imperfect finding and without the *nol. pros.*, he seems in principle to stand, in respect to those parts of the allegation on which the jury were silent, in the same position as if the verdict were too defective in form to sustain any judgment,[1] liable to be retried on the whole.[2] But the authorities are not uniform to the latter effect: the greater number of cases seem to favor the extending of the new trial only to those parts of the indictment found expressly against the defendant.[3]

§ 1007. **How it should be.** — In practice, the court and the parties ought to require the jury to pass distinctly on the whole indictment where it is possible for them to agree on the whole. But, if this is not done, and even if it is, plainly it is competent for the court which grants a new trial to require the waiver to be express and specific, extending as far as justice in the particular case demands, and then to specify in its order what part of the verdict is set aside, and what stands. Then no question can afterward arise. And, to the writer, it appears always best that the judge who bestows the favor of a new trial should do it in this way. There may be circumstances in which it would be so much a matter of right that terms could not properly be imposed.

III. *Ineffectual and Sham Prosecutions procured by Defendants.*

§ 1008. **Fraud in Judicial Proceedings in General.** — The common-law doctrine is familiar, that fraud vitiates every transaction into which it enters.[4] It renders null or voidable judicial proceedings; yet, to set them aside for fraud, one must take the steps required by established rules. Therefore, —

False Testimony — Rehearing. — On general principles, without resorting to the doctrine of the criminal law that a man shall not be twice put in jeopardy for the same offence, — if proceedings in a civil suit, for instance, are fair and good up to the time of the

[1] Ante, § 998, 1004.

[2] The majority of the court so held, in The State *v.* Commissioners, Riley, 278, 3 Hill, S. C. 289.

[3] See Crim. Proced. I. § 1011; The State *v.* Belden, 33 Wis. 120; The State *v.* Hill, 30 Wis. 416.

[4] Bishop First Book, § 66–69, 124, 125.

hearing, the party beaten cannot, in any other case, have the judgment held void as obtained by false testimony, or other fraud practised upon him at the trial. His only remedy is to apply for a rehearing, and within the time and according to the rules prescribed by law; for that will give him relief in respect to every part of the transaction into which the fraud has entered.[1]

§ 1009. **Fraud at Trial of Criminal Cause — (New Trial).** — In criminal cases, it is plain, that, if fraud is practised at the trial by the prosecutor, producing a conviction, a new trial will be granted on the defendant's prayer. And there is even direct English authority,[2] and there are numerous judicial *dicta*, English and American,[3] that, if the defendant's fraud at the hearing brings about his acquittal, the prosecutor may have a new trial. This latter proposition is perhaps not beyond controversy; but, on principle, it would seem, that, if the defendant's fraud was of such nature or extent as necessarily to prevent a conviction, whatever the evidence at the prosecutor's command, there was no jeopardy, and so the new trial should be granted to the prosecutor; while, on the other hand, if it did not go so far, there was jeopardy. And, since the proceeding which worked the jeopardy was the act of the law, not of the defendant, the rule forbidding a man to rely on his own wrong would not estop him to set up this jeopardy. In other words, looking at this question as one of principle, if the fraud prevented any jeopardy, then the rule forbidding a second jeopardy would not prevent the court from granting to the State a new trial, the same as new trials are granted to plaintiffs in civil causes. But if, notwithstanding the fraud, there was legal danger of a valid conviction, then, as the defendant on being convicted could not rely on his own fraud as ground for a new trial, the jeopardy of the law attached, notwithstanding the fraud; and he should be protected from a second jeopardy.

§ 1010. **One procuring own Prosecution.** — If one procures him-

[1] Greene *v.* Greene, 2 Gray, 361, 4 Am. Law Reg. 42; Homer *v.* Fish, 1 Pick. 435. And see the article in 4 Am. Law Reg. 1.

[2] Rex *v.* Furser, Say. 90. And it has been held in Connecticut, that in such cases a new trial will be granted the prosecutor on a penal statute. Pruden *v.* Northrup, 1 Root, 93; Hylliard *v.* Nichols, 2 Root, 176; Hannaball *v.* Spaulding, 1 Root, 86.

[3] Rex *v.* Davis, 12 Mod. 9; Rex *v.* Bear, 2 Salk. 646; The State *v.* Jones, 7 Ga. 422; The State *v.* Wright, 2 Tread. 517; The State *v.* Brown, 16 Conn. 54; The State *v.* Davis, 4 Blackf. 345; 1 Chit. Crim. Law, 657.

self to be prosecuted for an offence which he has committed, thinking to get off with a slight punishment and to bar any future prosecution carried on in good faith, — if the proceeding is really managed by himself, either directly or through the agency of another, — he is, while thus holding his fate in his own hand, in no jeopardy. The plaintiff State is no party in fact, but only such in name; the judge is imposed upon indeed, yet in point of law adjudicates nothing; "all is a mere puppet-show, and every wire moved by the defendant himself."[1] The judgment therefore is a nullity, and is no bar to a real prosecution.[2] But —

Full Penalty inflicted. — It would seem that here,[3] if the legal penalty was an exact one, and the person thus carrying on the cause against himself had borne it in full, not merely in part, the State would have suffered nothing, therefore the judgment would not be deemed in law fraudulent.[4]

§ 1011. **Suggestions.** — The law of fraud in judicial proceedings, civil and criminal, is not well defined; and, when it is complicated with the constitutional rule discussed in this chapter, it presents peculiar difficulties. But, —

Part or all Unsound. — In principle, when a proceeding is entirely fraudulent, having no sound part whatever, there is no collateral or direct effect to be given it; it is as though it had not been; except that a party to the fraud is not permitted to rely on this imperfection. But practically most frauds relate only to some particular in the proceeding, — not vitiating, therefore, the whole. And when a question of this sort comes before us, we are to inquire how broad and deep the fraud was, and in what way it must be taken advantage of. This suggestion points simply to the path of inquiry, which every investigator is to pursue for himself.

[1] Woodbury, J., in The State *v.* Little, 1 N. H. 257.

[2] The State *v.* Little, supra; Commonwealth *v.* Jackson, 2 Va. Cas. 501; The State *v.* Atkinson, 9 Humph. 677; The State *v.* Lowry, 1 Swan, Tenn. 34; The State *v.* Clenny, 1 Head, 270; Commonwealth *v.* Alderman, 4 Mass. 477; The State *v.* Colvin, 11 Humph. 599; The State *v.* Yarborough, 1 Hawks, 78; The State *v.* Green, 16 Iowa, 239; The State *v.* Cole, 48 Misso. 70; Commonwealth *v.* Dascom, 111 Mass. 404; The State *v.* Reed, 26 Conn. 202. And see 4 Am. Law Reg. 1; 2 Bishop, Mar. & Div. § 761. **Bail through Fraud.** — Where a person accused of a criminal offence has, by collusion and contrivance of the witnesses, the complainant, and justice of the peace, been arrested and discharged on bail, he may be again arrested by a warrant issued by another justice, and required to give bail in a larger amount for the same offence. Bulson *v.* People, 31 Ill. 409.

[3] Watkins *v.* The State, 68 Ind. 427.

[4] Hamilton *v.* Williams, 1 Tyler, 15; The State *v.* Little, 1 N. H. 257; Commonwealth *v.* Alderman, 4 Mass. 477; The State *v.* Atkinson, 9 Humph. 677. See Raynham *v.* Rounseville, 9 Pick. 44; Commonwealth *v.* Loud, 3 Met. 328; post, § 1023. In North Carolina, after one was indicted for assault and battery in the Superior Court, he, knowing of the indictment, yet not being arrested, procured himself to be indicted for the same offence in the County Court, and there made his submission and paid the fine; and this proceeding was held to bar the earlier. "Certainly," said Battle, J., "it is no fraud on the law for a man who has violated it, to come forward and voluntarily submit to the judgment of a court having full jurisdiction of the offence." The State *v.* Casey, Busbee, 209. In Texas, however, where a like proceeding, pending a prior indictment, was had before a justice of the peace, the pendency of the indictment was held to take away the justice's jurisdiction, so that what was done before him was a nullity. Burdett *v.* The State, 9 Texas, 43.

IV. *Rules to determine when there has been a Jeopardy.*

§ 1012. **Subject Difficult.** — The subject of this sub-title is, in its nature, difficult and intricate. It is rendered more so by many conflicts of judicial opinion appearing in the reports. But —

Constitution superior to Decisions. — It will be helpful to bear in mind, that this investigation relates to constitutional law, in the American sense; and that, though the courts should have wandered, still the ever present power of the Constitution has remained over them. Our guide, therefore, is the Constitution; and the decisions occupy the subordinate place of giving light to what leads us, instead of leading us themselves. True, it is the habit to look at decisions upon constitutional law much as at those on other subjects. But, reflecting, we see that our constitutions provide the way in which they may be amended, and it does *not* consist of judicial decision. Doubtless no court, however enlightened, will overrule a prior adjudication on constitutional law without perceiving very clearly that it was wrong. But in a plain case, where there is neither doubt nor room for doubt, a bench of judges to-day is not justified in violating the Constitution because a bench of judges yesterday did the same thing. Let us, then, begin our investigations under this sub-title with the inquiry —

§ 1013. *At what Stage, in a Criminal Cause, does the Jeopardy of the Constitution first Attach?* —

Effect of Jeopardy Attaching. — If, in a particular case, the jeopardy has attached, though for an instant only, and there is afterward such a lapse in the proceedings as requires a new jeopardy, in distinction from a continuation of the old, to produce a con-

viction, the defendant has thereby obtained the right to demand his discharge; and neither can the proceedings be carried on against him further, nor new proceedings be instituted; because he cannot be brought into jeopardy twice.[1]

§ 1014. **Proceedings which do not amount to Jeopardy.** — There is a sense in which a person is in jeopardy from the moment when he incurs legal guilt; since he is then liable to be indicted. Clearly, however, the constitutional guaranty does not refer to the jeopardy created by the crime, which the defendant commits himself; but by the prosecution, which is carried on by another power. And the mere commencing of the proceedings does not put him in jeopardy, while there is no jury, who alone can decide the question of guilt. Therefore, —

Discharge by Magistrate — By Grand Jury — Proceedings before Trial. — After a man is arrested, and by the committing magistrate discharged;[2] or after the grand jury has refused to find an indictment against him;[3] or after he is indicted and has even pleaded to the indictment, which is still pending;[4] or after any other proceedings, pending or not, down to the time of the trial;[5] he is still, for the same offence, liable to a new indictment, to which what has been done is no bar. Consequently, —

Two or more Indictments together. — A man may be held on two or more indictments at the same time for one offence, and the pendency of one will be no bar to proceedings on another;[6]

[1] O'Brian *v.* Commonwealth, 9 Bush, 333; King *v.* People, 5 Hun, 297; Hines *v.* The State, 24 Ohio State, 134; People *v.* Cage, 48 Cal. 323; People *v.* Webb, 38 Cal. 467; Gruber *v.* The State, 3 W. Va. 699; The State *v.* Lennig, 42 Ind. 541; Lee *v.* The State, 26 Ark. 260; Bell *v.* The State, 44 Ala. 393; The State *v.* Callendine, 8 Iowa, 288.

[2] Marston *v.* Jenness, 11 N. H. 156; Commonwealth *v.* Myers, 1 Va. Cas. 188, 248; McCann *v.* Commonwealth, 14 Grat. 570; Reg. *v.* Waters, 12 Cox C. C. 390, 5 Eng Rep. 469. See Sorrell's Case, 1 Va. Cas. 253; Bailey's Case, 1 Va. Cas. 258.

[3] Commonwealth *v.* Miller, 2 Ashm. 61; Reg. *v.* Newton, 2 Moody & R. 503; The State *v.* Ross, 14 La. An. 864; Rex *v.* Walbourne, W. Kel. 68.

[4] Commonwealth *v.* Dunham, Thacher Crim. Cas. 513; Commonwealth *v.* Drew, 3 Cush. 279; People *v.* Fisher, 14 Wend. 9.

[5] And see Brown *v.* The State, 5 Eng. 607; Commonwealth *v.* Thompson, 7 Litt. 284; The State *v.* Fley, 2 Brev. 338, 348; Harriman *v.* The State, 2 Greene, Iowa, 270; The State *v.* Barbour, 17 Ind. 526.

[6] O'Meara *v.* The State, 17 Ohio State, 515; The State *v.* Lambert, 9 Nev. 321; Miazza *v.* The State, 36 Missis. 613; Commonwealth *v.* Golding, 14 Gray, 49; Commonwealth *v.* Berry, 5 Gray, 93; People *v.* Monroe Oyer and Terminer, 20 Wend. 108. But the doctrine seems to be, that, where two tribunals have concurrent jurisdiction of the cause, the one first taking it is entitled to retain it (1 Bishop Mar. Women, § 634); so that, if there is an indictment pending in one of them, and then an indictment is found in the other, for the same offence, the latter may be abated by plea. The State *v.* Yarbrough, 1 Hawks, 78. See also Burdett *v.* State, 9 Texas, 43; The State *v.* Casey, Busbee, 209; Commonwealth *v.* Harris, 8 Gray, 470; Commonwealth *v.* Golding, supra; Mize *v.* The State, 49 Ga. 375.

though, if justice to him requires, the court in its discretion will quash one or more of them.[1] Again, —

Nolle Prosequi before Trial. — Without prejudice to any fresh prosecution, the attorney for the State may *nol. pros.* — that is, discontinue — an indictment, at any time after it is found, previous to the moment when, the defendant having pleaded — that is, made answer — to it, a traverse jury is impanelled and sworn to try the cause.[2]

When Jeopardy begins. — Then, on the completing and swearing of the panel, the jeopardy of the accused begins;[3] and it begins only when the panel is full. Until full, the jeopardy is not perfect.[4] In other words, —

§ 1015. **Continued.** — Without a jury, set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury, being full, is sworn, and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him.[5]

§ 1016. **Nolle Prosequi during Trial — Or withdrawing Juror.** —

[1] Crim. Proced. I. § 770; People *v.* Monroe Oyer and Terminer, supra; Rex *v.* Chamberlain, 6 Car. & P. 93. See, as to Arkansas, The State *v.* Barkman, 2 Eng. 387.

[2] Commonwealth *v.* Tuck, 20 Pick. 356, 364; Clarke *v.* The State, 23 Missis. 261; The State *v.* McKee, 1 Bailey, 651; The State *v.* Blackwell, 9 Ala. 79; Lindsay *v.* Commonwealth, 2 Va. Cas. 345; Wortham *v.* Commonwealth, 5 Rand. 669; Commonwealth *v.* Wheeler, 2 Mass. 172; United States *v.* Stowell, 2 Curt. C. C. 153, 170; The State *v.* Thornton, 13 Ire. 256; The State *v.* Thompson, 3 Hawks, 613. And see Rex *v.* Roper, 1 Crawf. & Dix C. C. 185; Rex *v.* Wade, 1 Moody, 86. The cases of Newsom *v.* The State, 2 Kelly, 60, Reynolds *v.* The State, 3 Kelly, 53, and Durham *v.* The State, 9 Ga. 306, were decided under a Georgia statute.

[3] Commonwealth *v.* Cook, 6 S. & R. 577; The State *v.* McKee, 1 Bailey, 651; Weinzorpflin *v.* The State, 7 Blackf. 186; Cobia *v.* The State, 16 Ala. 781, 784; In re Spier, 1 Dev. 491; Wright *v.* The State, 5 Ind. 290; McFadden *v.* Commonwealth, 11 Harris, Pa. 12; Morgan *v.* The State, 13 Ind. 215; The State *v.* Redman, 17 Iowa, 329, 333; The State *v.* Walker, 26 Ind. 346; People *v.* Webb, 38 Cal. 467; Grogan *v.* The State, 44 Ala. 9, 14; Bell *v.* The State, 44 Ala. 393.

[4] The State *v.* Burket, 2 Mill, 155; People *v.* Damon, 13 Wend. 351.

[5] McKenzie *v.* The State, 26 Ark. 334; Bell *v.* The State, 44 Ala. 393; Lee *v.* The State, 26 Ark. 260; Gruber *v.* The State, 3 W. Va. 699; People *v.* Webb, 38 Cal. 467; People *v.* Cage, 48 Cal. 323; Hines *v.* The State, 24 Ohio State, 134; King *v.* People, 5 Hun, 297; O'Brian *v.* Commonwealth, 9 Bush, 333; Joy *v.* The State, 14 Ind. 139.

The jeopardy having thus attached, the prosecuting officer is not entitled during the trial to enter a *nol. pros.*[1] or if he enters it even with the consent of the judge, or if he withdraws a juror and so stops the hearing, the legal effect is an acquittal.[2] The defendant is entitled to have a verdict of not guilty returned by the jury; but, if this is not done, he may still claim his discharge, and he is not to be brought again in jeopardy for the same offence.[3]

§ 1017. **Nolle Prosequi after Verdict.** — After a conviction, and before judgment, the officer may *nol. pros.* a part[4] or even the whole[5] of the indictment;[6] but there is no doubt, that, in such a case, the prisoner cannot be prosecuted for the same matter anew.

"Submitted to Jury." — By a statute in Georgia, "no *nolle prosequi* shall be entered on any bill of indictment after the case has been submitted to a jury, except by the consent of the defendant." And it was held, that a case is submitted to the jury when the prisoner is arraigned, the plea of not guilty filed, and the jury impanelled and sworn.[7]

§ 1018. **Another View as to when Jeopardy begins.** — While the vastly greater number of the decisions clearly sustain the propositions of the last few paragraphs, there are a few cases in which it is laid down, at least in *dicta*, that the jeopardy begins only after verdict rendered. The meaning of the Constitution, it is

[1] The State *v.* Kreps, 8 Ala. 951; The State *v.* I. S. S., 1 Tyler, 178; The State *v.* Roe, 12 Vt. 93, 109. See The State *v.* Davis, 4 Blackf. 345; Commonwealth *v.* Goodenough, Thacher Crim. Cas. 132. If, after the evidence is in, and before verdict, the prosecuting officer enters, by leave of court, a *nol. pros.* as to a part of the charge only, the jury may pass upon what remains. Baker *v.* The State, 12 Ohio State, 214. See Commonwealth *v.* Kimball, 7 Gray, 328.

[2] And see cases cited ante, § 1014. And see Klock *v.* People, 2 Parker C. C. 676. But see Swindel *v.* The State, 32 Texas, 102; Taylor *v.* The State, 35 Texas, 97.

[3] United States *v.* Shoemaker, 2 McLean, 114; Mount *v.* The State, 14 Ohio, 295, 305; Reynolds *v.* The State, 3 Kelly, 58; Harker *v.* The State, 8 Blackf. 540; People *v.* Barrett, 2 Caines, 304; Commonwealth *v.* Tuck, 20 Pick. 356; Reg. *v.* Oulaghan, Jebb, 270; Wright *v.* The State, 5 Ind. 290; Ward *v.* The State, 1 Humph. 253; Gruber *v.* The State, 3 W. Va. 699; Lee *v.* The State, 26 Ark. 260; Bell *v.* The State, 44 Ala. 393. And see Grable *v.* The State, 2 Greene, Iowa, 559.

[4] Anonymous, 31 Maine, 592; Commonwealth *v.* Briggs, 7 Pick. 177; Commonwealth *v.* Tuck, 20 Pick. 356; The State *v.* Roe, 12 Vt. 93; The State *v.* Whittier, 21 Maine, 341; The State *v.* Bruce, 24 Maine, 71; Commonwealth *v.* Jenks, 1 Gray, 490; The State *v.* Burke, 38 Maine, 574. See Flanagan *v.* The State, 19 Ala. 546.

[5] The State *v.* Fleming, 7 Humph. 152.

[6] But see Weinzorpflin *v.* The State, 7 Blackf. 186.

[7] Newsom *v.* The State, 2 Kelly, 60.

said, is, "that no man shall be twice *tried* for the same offence."[1] But the adjudications, even of these judges, hardly sustain this proposition; and the plain difference between the danger, or jeopardy, of a thing, and the thing itself,[2] indicates the error on which these observations proceed. Indeed, thus to substitute a word not in the Constitution for the word in it, is to take with it great liberties. And still other considerations are of the like tendency. Thus, —

§ 1019. **How in Principle.** — If the jeopardy began only on the rendition of the verdict, the constitutional provision could have no force against a statute enacted to override it. Should the legislature direct (what the court might as well do without the direction), that, whenever the evidence appeared to the judge to be insufficient to convict, he should discharge the jury without taking a verdict, and hold the defendant to answer before another jury, no protection against any number of trials and any amount of harassment would be afforded to defendants, so long as this interpretation of the Constitution prevailed.

§ 1020. *Preliminary Things of Record:* —

Essential to Jeopardy. — As already intimated,[3] for the swearing in of the jury in a cause to create a jeopardy, the preliminary things of record, as we have termed them, must be complete. Let us look at some imperfections in them.

§ 1021. **Insufficient Indictment.** — When the indictment is in form so defective that the defendant, if found guilty, will be entitled to have any judgment entered thereon against him reversed for error, he is not in jeopardy; and, should he be acquitted, he will be liable to be tried on a new and valid indictment.[4] And it is the same where the indictment, though in form

[1] People *v.* Goodwin, 18 Johns. 187, 202, 206; Commonwealth *v.* Olds, 5 Litt. 137; The State *v.* Moor, Walk. Missis. 134; United States *v.* Gibert, 2 Sumner, 19, 60; United States *v.* Perez, 9 Wheat. 579; People *v.* Westchester, 1 Parker C. C. 659; Swindel *v.* The State, 32 Texas, 102, 104; Taylor *v.* The State, 35 Texas, 97; O'Brian *v.* Commonwealth, 6 Bush, 563; Wilson *v.* Commonwealth, 3 Bush, 105. Contra, O'Brian *v.* Commonwealth, 9 Bush, 333, disapproving Commonwealth *v.* Olds, and O'Brian *v.* Commonwealth, supra

[2] "There is a wide difference," said Duncan, J., "between a verdict given and the jeopardy of a verdict. Hazard, peril, danger, jeopardy of a verdict, cannot mean a verdict given." Commonwealth *v.* Cook, 6 S. & R. 577, 596.

[3] Ante, § 1015.

[4] 2 Hale P. C. 248; People *v.* Barrett, 1 Johns. 66; Vaux's Case, 4 Co. 44 *a*, 3 Inst. 214; Reg. *v.* Richmond, 1 Car. & K. 240; The State *v.* Ray, Rice, 1; Rex *v.* Wildey, 1 M. & S. 183; Commonwealth *v.* Loud, 3 Met. 328; Commonwealth *v.* Keith, 8 Met. 531; The State *v.* Williams,

correct, is void because of the illegal organization of the grand jury.[1] But, —

Voidable Judgment on Insufficient Indictment. — If there is a verdict of guilty on such an indictment, and the court enters judgment upon it, the defendant will be protected while the judgment remains unreversed;[2] not because he has been in jeopardy, but because an erroneous final judgment, rendered by a competent tribunal having jurisdiction over the subject-matter, is voidable only, and, while it stands, is of the same effect as a valid one.[3] It must, let us repeat, be a final judgment: a mere verdict of guilty will not do; and, therefore, in localities where the benefit of clergy is allowed,[4] such verdict, and the prisoner's discharge on prayer of clergy, where the indictment is insufficient, furnish no protection against a fresh prosecution.[5] Whence it follows, though we have few adjudications on the point, that, —

Nolle Prosequi of Insufficient Indictment. — In our practice, if, on the verdict coming in, the prosecuting officer discovers a defect in the indictment, he may, instead of moving for sentence, enter a *nol. pros.*[6] and indict anew. The Tennessee court, without passing upon this exact proposition, held, "that a *nol. pros.* entered with the assent of the court, even after the jury is impanelled and proof heard, where the indictment is bad, does not operate as an acquittal, as there was no *legal* jeopardy."[7] Indeed, it is plain, that, since there is no jeopardy on an invalid indictment, a discontinuance of it, at any time when there is no subsisting final judgment upon it against the defendant, is no bar to a subsequent prosecution for the same offence.[8] And, —

§ 1022. **Judgment arrested on Prayer of State.** — Even where the

5 Md. 82; Pritchett *v.* The State, 2 Sneed, 285; Black *v.* The State, 36 Ga. 447; Calvin *v.* The State, 25 Texas, 789; White *v.* The State, 49 Ala. 344. And see Burgess *v.* Sugg, 2 Stew. & P. 341; Commonwealth *v.* Chichester, 1 Va. Cas. 312; People *v.* March, 6 Cal. 543. By the present New York statutes, if a party is tried and *acquitted upon the merits*, it will be a bar. Burns *v.* People, 1 Parker C. C. 182, 184. **Quashed on Demurrer.** — When a prisoner demurs to an invalid indictment, and is discharged on judgment being rendered in his favor, a second and valid proceeding may be instituted against him. Cochrane *v.* The State, 6 Md. 400, 406.

[1] Kohlheimer *v.* The State, 39 Missis. 548.

[2] Vaux's Case, 4 Co. 44 *a*; 2 Hale P. C. 248.

[3] And see ante, § 930, 975.

[4] Ante, § 937, 938.

[5] 2 Hawk. P. C. Curw. ed. p. 528, § 15.

[6] Ante, § 1014–1017.

[7] Walton *v.* The State, 3 Sneed, 687.

[8] White *v.* The State, 49 Ala. 344. And see People *v.* March, 6 Cal. 543; Cochrane *v.* The State, 6 Md. 400.

case, on an erroneous indictment, has proceeded to final judgment against the defendant, there is no constitutional objection to the prosecutor's procuring its reversal, should he choose, as generally he will not, and bringing forward a fresh indictment.[1]

§ 1023. **Punishment suffered on Erroneous Judgment.** — If the defendant has suffered the full punishment of the law, a different principle will indicate that future proceedings cannot be carried on against him; though probably they would not be an infringement of this constitutional guaranty. Such proceedings would resemble a civil suit to recover a debt already paid.[2] Still it is held, that one cannot plead *autrefois convict* if his former conviction was reversed on his own prayer, notwithstanding he had, before the reversal, served out a part of his term of imprisonment.[3]

§ 1024. **Rights of State to have Proceedings reversed.** — In England, writs of error, the practical object of which is generally to bring whatever appears of record under the review of a higher tribunal, seem to be allowable to the Crown in criminal causes;[4] but the courts of most of our States refuse them, and refuse the right of appeal, to the State or Commonwealth,[5] except where expressly authorized by statute, as in some States they are.[6] In Maryland, the State may have a writ of error at common law, to reverse a judgment given on demurrer in favor of a defendant.

[1] Reg. *v.* Houston, 2 Crawf. & Dix C. C. 310; People *v.* Corning, 2 Comst. 9; People *v.* March, 6 Cal. 543. And see Jones *v.* The State, 15 Ark. 261.

[2] See Commonwealth *v.* Loud, 3 Met. 328; ante, § 1010.

[3] Jeffries *v.* The State, 40 Ala. 381; Cochrane *v.* The State, 6 Md. 400.

[4] Reg. *v.* Chadwick, 11 Q. B. 205; Reg. *v.* Houston, 2 Crawf. & Dix C. C. 310; Reg. *v.* Millis, 10 Cl. & F. 534. See Reg. *v.* Russell, 3 Ellis & B. 942.

[5] The State *v.* Jones, 7 Ga. 422; Commonwealth *v.* Cummings, 3 Cush. 212; The State *v.* Daugherty, 5 Texas, 1; People *v.* Corning, 2 Comst. 9; United States *v.* More, 3 Cranch, 159; Commonwealth *v.* Harrison, 2 Va. Cas. 202; The State *v.* Reynolds, 4 Hayw. 109; People *v.* Royal, 1 Scam. 557; People *v.* Dill, 1 Scam. 257; Martin *v.* People, 13 Ill. 341; The State *v.* Jones, 1 Murph. 257; Commonwealth *v.* Sanford, 5 Litt. 289; The State *v.* Solomons, 6 Yerg. 360; The State *v.* Kemp, 17 Wis. 669; The State *v.* Phillips, 66 N. C. 646; The State *v.* Freeman, 66 N. C. 647; The State *v.* West, 71 N. C. 262. And see The State *v.* Spear, 6 Misso. 644; Commonwealth *v.* Jefferson, 6 B. Monr. 318; The State *v.* Davis, 4 Blackf. 345; The State *v.* Heatherley, 4 Misso. 478.

[6] The State *v.* Douglass, 1 Greene, Iowa, 550; The State *v.* Hicklin, 5 Pike, 190; Jones *v.* The State, 15 Ark. 261; The State *v.* Fields, Mart. & Yerg. 137; The State *v.* Norvell, 2 Yerg. 24; The State *v.* Dark, 8 Blackf. 526; Commonwealth *v.* Jefferson, 6 B. Monr. 318; Commonwealth *v.* Scott, 10 Grat. 749, 754; The State *v.* Manning, 14 Texas, 402; Commonwealth *v.* Anthony, 2 Met. Ky. 399; Commonwealth *v.* Van Tuyl, 1 Met. Ky. 1, 3. See Commonwealth *v.* Thompson, 13 B. Monr. 159.

[7] The State *v.* Buchanan, 5 Har. & J. 317. See The State *v.* Graham, 1 Pike,

And in some other States questions of law may, without specific statutory direction, be reviewed by this proceeding, or by appeal, on prayer of the State.[1] The question is not free from difficulty; but probably some judges have refused the writ to the State, from not distinguishing sufficiently between cases in which the rehearing would violate the Constitution, and cases in which the prosecuting power has the same inherent right to a rehearing as a plaintiff has in a civil suit.

§ 1025. **Common-law Impediments to Rehearing.** — It should be borne in mind, that the constitutional provision under consideration is not the only impediment to the rehearing of a criminal cause.[2] It is the only one not removable by legislation; but, when legislation has not interfered, and the question depends on common-law principles, there may be various other absolute bars to a further trial.

§ 1026. **Validity of Statute authorizing Rehearings.** — Whatever the terms of a statute providing for the retrial of criminal causes, or a re-examination of the proceedings, it will not ordinarily be interpreted,[3] and will never have force, to violate the constitutional provision under consideration. If the jeopardy has once attached, there can be no second jeopardy without the consent of the defendant,[4] whatever the statute may direct. It will apply only where it constitutionally may.[5] Thus, —

Reversal by State after Trial. — A statute which undertakes to give to the State the right of appeal, to retry the party after acquittal on a valid indictment, is void.[6] And no writ of error, or other proceeding, allowed to the State, can constitutionally open anew the question of guilt, after the jeopardy has attached. Even though an acquittal has been produced by an erroneous direction of the judge at the trial, the result is the same.[7] But, —

428; The State *v.* Hadcock, 2 Hayw. 162; Crim. Proced. I. § 1363.

[1] This question is, in all the States, more or less affected by the terms of the statutes. Consult The State *v.* Tait, 22 Iowa, 140; The State *v.* Ellis, 12 La. An. 390; The State *v.* Ross, 14 La. An. 364, 366 (Cole, J., observed: "There does not appear to be any reason why the State should not be entitled, as a private individual, to an appeal from one of her inferior courts to a superior tribunal"); The State *v.* Dorman, 11 Misso. 635; The State *v.* Thompson, 41 Texas, 523.

[2] See ante, § 988, 1021.

[3] Stat. Crimes, § 89, 90.

[4] Ante, § 992–994, 1015, 1016.

[5] People *v.* Webb, 38 Cal. 467.

[6] The State *v.* Van Horton, 26 Iowa, 402. And see The State *v.* West, 71 N. C. 268; The State *v.* Phillips, 66 N. C. 646; The State *v.* Freeman, 66 N. C. 647.

[7] Black *v.* The State, 36 Ga. 447; O'Brian *v.* Commonwealth, 9 Bush, 333;

§ 1027. **Reversal before Jeopardy.** — Before jeopardy, any reversal of proceedings, whether on prayer of the State or of the defendant, may be had without prejudice to a fresh prosecution. Thus, —

Valid Indictment Quashed — Judgment on Invalid. — If, without a trial, the court quashes a valid indictment, or enters judgment for the defendant on his demurrer, believing it invalid, a trial may be had after the prosecutor has procured the reversal of these proceedings;[1] because, as we have seen, the prisoner is not in jeopardy until the jury is impanelled and sworn. And the same consequence follows where a judgment of conviction has been rendered on an invalid indictment.[2] But, —

Proceedings Regular down to Trial. — Where the indictment is sufficient, and the proceedings are regular, before a tribunal having jurisdiction, down to the time when the jeopardy attaches, there can be no second jeopardy allowed in favor of the State, on account of any lapse or error at a later stage.[3] This doctrine should be considered in connection with what was said under our last sub-title; else it may be misapplied. For example, —

Quashed at Defendant's Prayer. — If, at any stage of the proceedings, a defendant procures an indictment to be quashed, he cannot be heard to assert, in bar to a new one, that the first was good, and he was in jeopardy under it.[4]

§ 1028. **Court without Authority.** — If the court has no jurisdiction over the offence,[5] or derives its existence from an unconstitutional statute,[6] or is holding a term not authorized,[7] or is otherwise without authority in the premises,[8] the defendant is not in jeop-

The State *v.* Leunig, 42 Ind. 541; Hines *v.* The State, 24 Ohio State, 134.

[1] Reg. *v.* Houston, 2 Crawf. & Dix C. C. 310.

[2] Ante, § 1021, 1022; Mount *v.* Commonwealth, 2 Duvall, 93.

[3] Ante, § 992; The State *v.* Fields, Mart. & Yerg. 137; The State *v.* Hand, 1 Eng. 169; The State *v.* Denton, 1 Eng. 259; The State *v.* Dark, 8 Blackf. 526; The State *v.* Davis, 4 Blackf. 345.

[4] Joy *v.* The State, 14 Ind. 139.

[5] The State *v.* Odell, 4 Blackf. 156; Commonwealth *v.* Hyde, Thacher Crim. Cas. 112; Commonwealth *v.* Peters, 12 Met. 387; Commonwealth *v.* Goddard, 13 Mass. 455, 457; The State *v.* Payne, 4 Misso. 376; The State *v.* McCory, 2 Blackf. 5; Marston *v.* Jenness, 11 N. H. 156; Commonwealth *v.* Myers, 1 Va. Cas. 188, 248; Flournoy *v.* The State, 16 Texas, 80; Norton *v.* The State, 14 Texas, 387; Wilson *v.* The State, 16 Texas, 246; O'Brian *v.* The State, 12 Ind. 369; The State *v.* Hodgkins, 42 N. H. 474; Hodges *v.* The State, 5 Coldw. 7, overruled in Mikels *v.* The State, 3 Heisk. 321.

[6] Rector *v.* The State, 1 Eng. 187. See McGinnis *v.* The State, 9 Humph. 43.

[7] Dunn *v.* The State, 2 Pike, 229; Rex *v.* Bowman, 6 Car. & P. 337.

[8] The State *v.* Atkinson, 9 Humph. 677; Commonwealth *v.* Alderman, 4

ardy, however far the tribunal proceeds. In most or all of these circumstances, the final judgment is not voidable, as mentioned in a previous section,[1] but void; so that his unreversed conviction[2] is no more a bar to another prosecution than his acquittal.

§ 1029. **Concurrent Jurisdiction — (Magistrate's — Court-Martial).** — But if the tribunal has authority, concurrent with another, or exclusive, — whether it is an inferior one, as a justice's court, a court-martial, or the court of a municipal corporation, or is a superior one, — a conviction or acquittal in it will be a bar to subsequent proceedings in whatever court undertaken.[3]

§ 1029 *a*. **The Plea.** — The plea, usually put in at the arraignment, is an essential part of the proceedings.[4] And, until an indicted person has pleaded, he is not in jeopardy, though a jury has been sworn to try him, or even though there has been an actual trial.[5] But the *similiter* appears not to be essential.[6]

§ 1030. *Impossibilities not of Record:* —

Foregoing Defects and these compared. — The foregoing may be termed "defects of record." In their nature, they are such as may be known before trial; but, in fact, they are generally not known to the prosecuting officer, because of his oversight, or mistaking the law. If the defendant discovers them, he may choose not to take the objection till after trial. But we come now to

Mass. 477; Reg. *v.* Sullivan, 15 U. C. Q. B. 198.

[1] Ante, § 1021.

[2] Commonwealth *v.* Hyde, Thacher Crim. Cas. 112; Commonwealth *v.* Goddard, 13 Mass. 455; The State *v.* Payne, 4 Misso. 376; The State *v.* McCory, 2 Blackf. 5; Rex *v.* Bowman, 6 Car. & P. 337. But see McGinnis *v.* The State, 9 Humph. 48.

[3] Commonwealth *v.* Cunningham, 18 Mass. 245; The State *v.* McCory, 2 Blackf. 5; Stevens *v.* Fassett, 27 Maine, 266; The State *v.* Plunkett, 3 Harrison, 5; Commonwealth *v.* Miller, 5 Dana, 320; The State *v.* Simonds, 3 Misso. 414; Wilkes *v.* Dinsman, 7 How. U. S. 89, 123; The State *v.* Davis, 1 Southard, 311; Commonwealth *v.* Goddard, 13 Mass. 455; Trittipo *v.* The State, 13 Ind. 360; Bruce *v.* The State, 9 Ind. 206; Trittipo *v.* The State, 10 Ind. 343. **Court-martial.** — There is an opinion by Attorney-General Cushing, that the military offence and the civil so differ as to allow of a prosecution in the military tribunal, after the case has been disposed of in the civil. Steiner's Case, 6 Opin. Att. Gen. 413. S. P. by Att. Gen. Legare, 3 Opin. Att. Gen. 749. And see post, § 1067. See also, as to courts-martial, Brown *v.* Wadsworth, 15 Vt. 170. It was held in Tennessee, that an acquittal by a court-martial established under the Act of Congress of March 2, 1863, for punishing offences committed by persons in the service of the United States, is no bar to an indictment for murder under the laws of the State. The State *v.* Rankin, 4 Coldw. 145.

[4] Crim. Proced. I. § 796, 797, 801.

[5] Link *v.* The State, 3 Heisk. 252; United States *v.* Riley, 6 Blatch. 204.

[6] Crim. Proced. I. § 796, 1354.

other defects, which, though no man can discover them in advance, and only the evolutions of time bring them to light, as truly adhere to the cause as those; rendering a valid verdict impossible, and therefore preventing the jeopardy from attaching. Let us call to mind some of them.

§ 1031. **Term of Court ending before Verdict.** — It is in the nature of things certain how much time a trial will consume; while yet the time is ascertainable only by the development of the event. If, therefore, before the cause is finished by the bringing in of the verdict, the term of the court closes, this result shows that the prisoner was never in jeopardy; though he believed himself, and others believed him, to be. Consequently he may be tried again.[1]

§ 1032. **Sickness — (Judge — Juror — Prisoner).** — Sickness may come, unknown till it arrives. And if, while the cause is on trial, it falls on the judge[2] or a juror[3] or the prisoner,[4] to interrupt the proceeding before verdict, this result shows that no jeopardy existed in fact, though believed to exist; and the prisoner may be required to answer anew.

[1] The State *v.* McLemore, 2 Hill, S. C. 680; The State *v.* Battle, 7 Ala. 259; Lore *v.* The State, 4 Ala. 173; Ned *v.* The State, 7 Port. 187; Wright *v.* The State, 5 Ind. 290; The State *v.* Moore, Walk. Missis. 134; Commonwealth *v.* Thompson, 1 Va. Cas. 319; The State *v.* Brooks, 3 Humph. 70; Powell *v.* The State, 19 Ala. 577; Reg. *v.* Davison, 2 Fost. & F. 250; People *v.* Cage, 48 Cal. 323; Josephine *v.* The State, 39 Missis. 613. Contra, In re Spier, 1 Dev. 491. And see United States *v.* Shoemaker, 2 McLean, 114; Commonwealth *v.* Olds, 5 Litt. 137. **Defendant left at Large.** — Where one was put upon trial for larceny, and the term expired before the jury could agree on a verdict, and they left their room and dispersed without agreeing, and the defendant was suffered to go at large, it was held that the solicitor might, without leave of court, cause a *capias* to issue against him, and bring him again to trial. The State *v.* Tilletson, 7 Jones, N. C. 114.

[2] Nugent *v.* The State, 4 Stew. & P. 72.

[3] Fletcher *v.* The State, 6 Humph. 249; Commonwealth *v.* Merrill, Thacher Crim. Cas. 1; The State *v.* Curtis, 5 Humph. 601; Rex *v.* Barrett, Jebb, 103; Rex *v.* Delany, Jebb, 106; Rex *v.* Edwards, 4 Taunt. 309, Russ. & Ry. 224, 3 Camp. 207; Rex *v.* Scalbert, 2 Leach, 4th ed. 620; Reg. *v.* Leary, 3 Crawf. & Dix C. C. 212; Reg. *v.* Beere, 2 Moody & R. 472; Hector *v.* The State, 2 Misso. 166; Commonwealth *v.* Fells, 9 Leigh, 613. The sickness must be such as cannot be removed by refreshments. Commonwealth *v.* Clue, 3 Rawle, 498. And proper evidence of the sickness must be produced, Rulo *v.* The State, 19 Ind. 298. As to **Sickness of Prosecuting Officer**, see United States *v.* Watson, 3 Ben. 1.

[4] Rex *v.* Stevenson, 2 Leach, 4th ed. 546; Rex *v.* Streek, 2 Car. & P. 413; Rex *v.* Kell, 1 Crawf. & Dix C. C. 151; People *v.* Goodwin, 18 Johns. 187; The State *v.* McKee, 1 Bailey, 651; Foster, 34; Brown *v.* The State, 38 Texas, 482; The State *v.* Wiseman, 68 N. C. 203; Lee *v.* The State, 26 Ark. 260.

Death or Insanity. — Of course, the death or insanity of a juror or the judge will produce the same effect.[1]

§ 1033. **Jury failing to agree.** — While the doctrine thus far is plain and accepted by all the tribunals, they are divided upon the effect of the inability of the jury to agree on their verdict. It is commonly asserted that anciently in England, if the jury could not come to a verdict before the end of the term, they were carted after the judges into, or to the border of, the next adjoining county.[2] In this country, no such practice has prevailed; yet some of our tribunals have held, that the evidence of time alone can determine their inability to agree during the term of the court, and that, therefore, if they are earlier discharged, on any other testimony whatever, the prisoner is exempt from being tried again.[3] But in England[4] and Ireland,[5] at present, and in the greater part,[6] not all, of our States, when a reasonable period

[1] People v. Webb, 38 Cal. 467. See Bescher v. The State, 82 Ind. 480; Ex parte McLaughlin, 41. Cal. 211.

[2] Rex v. Ledgingham, 1 Vent. 97; 3 Inst. 110; Co. Lit. 227; Foster, 31 et seq. See The State v. Hall, 4 Halst. 256, 261; United States v. Gibert, 2 Sumner, 19, 42; Reg. v. Leary, 3 Crawf. & Dix C. C. 212. As to this, Cockburn, C. J., in the Court of Queen's Bench, observed: "It was said by the prisoner's counsel that it was competent to judges, and the duty of judges, to carry with them in carts a jury, who could not agree, to the confines of the county where the trial was had, or even beyond the county. I doubt whether there is authority for this assertion. The dicta that are to be found in the Book of Assize (19 Ass. pl. 6; 41 Ass. pl. 11) have been copied servilely by text-writers, and that has given rise to this opinion. I question very much whether such a practice ever existed; I am sure it has not in modern times. But suppose it to have been so, we, nowadays, look upon the principles on which juries are to act, I hope, in a different light. We do not desire that the unanimity of a jury should be the result of any thing but the unanimity of conviction." Winsor v. Reg., Law Rep. 1 Q. B. 289, 305, 7 B. & S. 490; s. c. in all its stages, nom. Reg. v. Winsor, 10 Cox C. C. 276.

[3] Ned v. The State, 7 Port. 187; Ex parte Vincent, 43 Ala. 402; Williams v. Commonwealth, 2 Grat. 567, compared with Dye v. Commonwealth, 7 Grat. 662, where it appears that the rule is applied only in felonies; Commonwealth v. Cook, 6 S. & R. 577; Mahala v. The State, 10 Yerg. 532. And see Josephine v. The State, 39 Missis. 613.

[4] Winsor v. Reg., supra; In re Newton, 13 Q. B. 716, 13 Jur. 606, 18 Law J. N. S. M. C. 201; s. c. nom. Reg. v. Newton, 8 Car. & K. 85, 86, 3 Cox C. C. 489; Archb. New Crim. Proced. 172. See Conway v. Reg., 7 Ir. Law, 149, 13 Q. B. 735, note, 1 Cox C. C. 210; Rex v. Shields, 28 Howell St. Tr. 619, 646, 647.

[5] Reg. v. Barrett, Ir. Rep. 4 C. L. 285.

[6] Commonwealth v. Bowden, 9 Mass. 494; Commonwealth v. Purchase, 2 Pick. 521; Commonwealth v. Townsend, 5 Allen, 216; The State v. Updike, 4 Harring. Del. 581; People v. Olcott, 2 Johns. Cas. 301; United States v. Perez, 9 Wheat. 579; The State v. McKee, 1 Bailey, 651; People v. Goodwin, 18 Johns. 187, 206; The State v. Woodruff, 2 Day, 504; Hurley v. The State, 6 Ohio, 399; People v. Green, 13 Wend. 56; The State v. Hall, 4 Halst. 256; Wright v. The State, 5 Ind. 290 (but see Miller v. The State, 8 Ind. 325; Reese v. The State, 8 Ind. 416); Shaffer v. The State, 27 Ind. 131. People v. Shotwell, 27 Cal. 394; Dobbins v. The State, 14 Ohio State, 493; The State v. Walker, 26 Ind. 346; The State v. Nelson, 26 Ind. 366; The State v. Crane, 4 Wis. 400; Barrett v. The State, 35 Ala. 406; McCreary v. The State, 5 Casey, 323; Avery v. The State, 26 Ga. 233; Vanderwerker v. People, 5 Wend. 530; Williford v. The State, 23 Ga. 1; Lester v. The State, 33 Ga. 329; Lee v. The State, 26 Ark. 260; People v. Cage, 48 Cal. 323; The State v. Bullock, 63 N. C. 570; The State v. Alman, 64 N. C. 364; The State v. Jefferson, 66 N. C. 309; Ex parte McLaughlin, 41 Cal. 211; The State v. Vaughan, 29 Iowa, 286; Crookham v. The State, 5 W. Va. 510; Moseley v. The State, 33 Texas, 671. See Morgan v. The State, 8 Sneed, 475.

for discussion and reflection has been given the jury, and they have in open court declared themselves unable to come to an agreement, and the judge is satisfied of the truth of the declaration, they may be discharged, and the prisoner held to be tried anew. And this doctrine is applied as well in felony as in misdemeanor. But —

§ 1034. **Continued.** — There is, in practice, some difference in the form of applying this general and better doctrine. The view best sustained in principle is, that, when the record shows an apparent jeopardy, it must contain also matter negativing the jeopardy in the particular instance, or, in the absence of a conviction, the prisoner will be entitled to his discharge. In pursuance of which view, it is in many of the cases held that the court must make the inability of the jury to agree matter of express adjudication, and it must appear of record, else their discharge without giving a verdict will entitle the defendant to be discharged.[1] But this doctrine is not recognized in all the cases. Thus, some judges have distinguished between felony and misdemeanor;[2] holding to the necessity of the adjudication, or even denying altogether the right of discharge under the circum-

[1] See cases cited to the last section; also Poage v. The State, 3 Ohio State, 229, 238; Hines v. The State, 24 Ohio State, 134; Ex parte Cage, 45 Cal. 248; People v. Cage, 48 Cal. 323; Ex parte McLaughlin, 41 Cal. 211; The State v. Jefferson, 66 N. C. 309; People v. Lightner, 49 Cal. 226; The State v. Ephraim, 2 Dev. & Bat. 162; Ned v. The State, 7 Port. 187; Powell v. The State, 19 Ala. 577. And see the observations of Ranney, J., in Dobbins v. The State, 14 Ohio State, 493, 501, 502. In an Indiana case, Elliott, J., observed: "The discretionary power [to discharge the jury] is not that absolute discretion depending upon the mere will of the judge, but is a sound judicial discretion, to be exercised only upon sufficient reasons, and subject to the supervision of an appellate court." The State v. Walker, 26 Ind. 346, 353. See further, on this point, Price v. The State, 36 Missis. 531; Atkins v. The State, 16 Ark. 568. In England, the right to discharge the jury, because unable to agree, seems to be regarded as a discretionary power, reposing in the breast of the presiding judge, and not to be passed upon in review by the higher tribunal. Still, the record in the case wherein it was so laid down, showed the facts. Winsor v. Reg., Law Rep. 1 Q. B. 289, 390. See also post, § 1035.

[2] Ante, § 990.

stances mentioned, in all trials for felony; yet maintaining, that, in misdemeanor, the discharge is mere matter of discretion with the individual judge.[1] Others have deemed the mere discretionary power, in distinction from the right to adjudicate the fact, to exist in cases of felony, even in capital felonies;[2] especially, therefore, in misdemeanor.[3] Again, —

§ 1035. **Continued — (Necessity).** — Some judges put this doctrine, of discharging a jury who cannot agree, on necessity.[4] And we have seen,[5] that necessity is a great power in the law, overriding even the letter of a statute. Doubtless, therefore, it might create an exception to a constitutional provision also. But the necessity of producing a conviction could not be ingrafted, by construction, on a clause intended to shield prisoners from conviction, without doing violence to sound principles of interpretation. And the necessity of a jury's agreeing on a verdict does not differ from the necessity of a conviction.

§ 1036. **How in Principle.** — The better view of this entire question of discharging the jury after being selected and sworn

[1] The State *v.* Morrison, 3 Dev. & Bat. 115.

[2] People *v.* Green, 13 Wend. 55; The State *v.* Waterhouse, Mart. & Yerg. 278. But see contra, decided in the same State with the last, Mahala *v.* The State, 10 Yerg. 532. See Commonwealth *v.* Fells, 9 Leigh, 613.

[3] People *v.* Denton, 2 Johns. Cas. 275; People *v.* Olcott, 2 Johns. Cas. 301; People *v.* Ellis, 15 Wend. 371. And see People *v.* The Judges, 8 Cow. 127. In Massachusetts, a practice prevails in wide departure from the general and better American doctrine. Thus, a case being submitted to the jury in the evening, it was arranged between the parties, that, if the jury agreed upon a verdict, they might reduce it to writing, seal it up, and return it into court in the morning. The judge then told the officer to discharge them if they did not agree in seven hours. The time having elapsed, without an actual agreement, the officer told them they were discharged, while protesting that they should agree in a few minutes, which they did. They sealed up their verdict, and returned it into court; but it was set aside, because rendered after they were lawfully discharged. Yet Metcalf, J., observed: "While we do not doubt the authority of the court, in its discretion, to order the discharge of a jury after seven hours' disagreement, yet a much preferable course would be to direct the officer, who has charge of them, that, if they should not agree by a certain hour, he should inquire of them whether they were likely to agree, and, if told by them that they were not, then to discharge them. Such is the course adopted by the members of this court, in cases like this, whenever they give any order to the officer, as to discharging the jury before they have applied to the court, through the officer, to be discharged." Commonwealth *v.* Townsend, 5 Allen, 216, 218. See, in contrast to this case, The State *v.* Alman, 64 N. C. 364.

[4] The State *v.* Ephraim, 2 Dev. & Bat. 162; Powell *v.* The State, 19 Ala. 577; Commonwealth *v.* Clue, 3 Rawle, 498, United States *v.* Coolidge, 2 Gallis. 364; Wright *v.* The State, 5 Ind. 290. And see United States *v.* Watson, 3 Ben. 1; The State *v.* Wiseman, 68 N. C. 203; The State *v.* Leunig, 42 Ind. 541; The State *v.* Wamire, 16 Ind. 357.

[5] Ante, § 346 et seq.

in a case is the following: Whenever, either in felony or misdemeanor, the judge discovers any thing which will render a verdict against the prisoner void, or subject to be avoided by him, or will render it impossible that a verdict should be reached, — any thing, in other words, establishing that no jeopardy has really attached to the prisoner, and that any further progressing in the trial will be fruitless, — he may adjudge the fact, put the adjudication on record, and discharge the jury. Then, the apparent jeopardy appearing of record, matter nullifying it will appear also, and the defendant will be properly held for further proceedings. But, if the jeopardy appears without the nullifying matter, the defendant may claim to be dismissed from the cause, and be no more prosecuted for the same offence. This leads us to the —

§ 1037. *Further Doctrines as to when the Jury may be discharged:* —

In General. — The general doctrine, let it be repeated, is, that if, after the jeopardy already explained has attached, the judge discharges the jury without the prisoner's consent, the prisoner is entitled to be set at liberty, and he is not to be again brought into danger for the same offence.[1] For example, —

Defects in Evidence — (Witness Absent, Sick, &c.). — Where, after the jury is sworn, the evidence is found not sufficient to convict; or a material witness for the prosecution appears to be absent;[2] or such witness is shown to be unacquainted with the nature of an oath, and so to require instruction before testifying;[3] or the witness is suddenly taken too ill to proceed,[4] — no second trial can be had.

§ 1038. **Misconduct of Jury.** — If a juror so conducts that no verdict can be rendered, — as, if he escapes before the verdict is reached, — this does not, like a wrongful discharge of the jury by the judge, entitle the prisoner to go free, or protect him from a second jeopardy.[5] Perhaps the distinction rests on the doc-

[1] Wright *v.* The State, 5 Ind. 290; Hines *v.* The State, 8 Humph. 597; ante, § 992, 1016.

[2] People *v.* Barrett, 2 Caines, 304; United States *v.* Shoemaker, 2 McLean, 114; Harker *v.* The State, 8 Blackf. 540; Foster, 30.

[3] Rex *v.* Wade, 1 Moody, 86; Reg. *v.* Oulaghan, Jebb, 270. See also Anonymous, 1 Leach, 4th ed. 430, note.

[4] Rex *v.* Kell, 1 Crawf. & Dix C. C 151. Compare with ante, § 1032.

[5] The State *v.* Hall, 4 Halst. 256; Hanscom's Case, 2 Hale P. C. 295, 296; The State *v.* McKee, 1 Bailey, 651, 654; Reg. *v.* Ward, 10 Cox C. C 573.

trine, that the judge is the court, rather than the jury, and that to him, not them, is committed the care of constitutional rights; or, the distinction may itself be too refined, though reasonably well sustained by authority. The North Carolina court held, that, if the jury separate by permission merely of the officer in attendance, the judge not being consulted, the prisoner is, by this separation, privileged not to be tried again.[1] The true view seems to be, that, — since the jury without the concurrence of the judge, and even contrary to his express direction, may in all cases acquit the defendant by verdict, — if, without the defendant's consent, they do what puts it out of their power to return a verdict, he may avail himself of this, using it as an implied acquittal. But the case of one man of the panel committing the offence of escape from his fellows seems to stand on a different ground; for no one juror has the power to acquit, though he has to produce a disagreement. And if, after the disagreement, the court can adjudge the impossibility of there being a conviction, and consequently order a new trial, why not do the same thing after the juror has escaped?

§ 1039. **Juror disqualified.** — If, after the trial has commenced, a juror is found not to have been sufficiently sworn,[2] or to be insane,[3] or not of the panel,[4] he may be discharged, or the error may be otherwise corrected, without entitling the prisoner to go free. Some courts have held, that any disqualification, showing him not to be a proper juror in the case, discovered after trial begun, will authorize his discharge, with no protection to the defendant against further proceedings.[5] Yet the better view is to consider, whether the matter is such as the defendant can make ground for a new trial if the verdict is against him; when it is, the juror should be discharged, and the defendant held to be tried anew, because the proceeding put him in no jeopardy;[6] when it is a thing of which the prosecuting power alone can complain, this power has lost its right to complain by submitting the cause for trial, and the prisoner may refuse his consent to the discharge, which, if ordered without his consent, frees him from

[1] The State *v.* Garrigues, 1 Hayw. 241.

[2] Rex *v.* Deleany, Jebb, 88.

[3] United States *v.* Haskell, 4 Wash. C. C. 402.

[4] Reg. *v.* Phillips, 11 Cox C. C. 142.

[5] United States *v.* Morris, 1 Curt. C. C. 23.

[6] Ante, § 1021.

further trial.[1] If a juror is under some legal incompetency, as where he is an alien, unknown to either party when the cause is opened, his discharge does not prevent a new trial.[2]

§ 1040. **Too few Jurors.** — In like manner, one tried by a jury less in number than the law requires, is in no jeopardy, and he may be tried anew.[3] And, —

Pleadings not ready. — We have seen,[4] it is the same when the case is put to the jury before the pleadings are ready.[5] Any verdict rendered against the defendant could be avoided by him.

§ 1041. **Revising Erroneous Discharge of Jury.**[6] — If the judge, having improperly discharged the jury, still refuses to let the prisoner go, but holds him for another trial, — does an appeal lie from his discretion to a revising tribunal?[7] The general doctrine in other cases is, that, when a matter concerns the despatch of business, and is of pure discretion, the steps at the trial are not subjects of review,[8] — a doctrine, however, not strictly held in all the States. But a claim, under the constitution, to be exempt from a second jeopardy, is not, in reason, within this class of questions; though, in some of the cases,[9] observations occur indicating that the judges inconsiderately assumed it to be. Moreover we have the distinction, that the finding of a fact by the judge is final, while his decision of a question of law is open to review. Hence, it would seem, that, when the court concurs with the jury in the conclusion that they cannot agree, and therefore discharges them, the propriety of the discharge under the circumstances cannot be reviewed;[10] but, when the question of

[1] The State *v.* McKee, 1 Bailey, 651; Reg. *v.* Wardle, Car. & M. 647; O'Brian *v.* Commonwealth, 9 Bush, 333.

[2] Stone *v.* People, 2 Scam. 326, 335; The State *v.* Williams, 3 Stew. 454, 478, in which latter case, however, the court deemed the discharge erroneous, and a cause of new trial, but not of release from further trial altogether. And see Brown *v.* The State, 5 Eng. 607; Crim. Proced. I. § 946–949.

[3] Brown *v.* The State, 8 Blackf. 561.

[4] Ante, § 1029 *a*.

[5] The State *v.* Nelson, 7 Ala. 610.

[6] See Crim. Proced. I. § 818–831.

[7] See Ned *v.* The State, 7 Port. 187.

[8] Illustrations of this principle may be seen in Commonwealth *v.* Eastman, 1 Cush. 189; Reg. *v.* Wardle, Car. & M. 144.

[9] United States *v.* Haskell, 4 Wash. C. C. 402; Commonwealth *v.* Olds, 5 Litt. 137; United States *v.* Perez, 9 Wheat. 579; People *v.* Olcott, 2 Johns. Cas. 301; Commonwealth *v.* Purchase, 2 Pick. 521, 524; The State *v.* Shoemaker, 2 McLean, 114; United States *v.* Morris, 1 Curt. C. C. 23. Contra, Commonwealth *v.* Cook, 6 S. & R. 577; Wright *v.* The State, 5 Ind. 290. And see The State *v.* McKee, 1 Bailey, 651, 652.

[10] People *v.* Green, 13 Wend. 55; United States *v.* Perez, 9 Wheat. 579; People *v.* Olcott, 2 Johns. Cas. 301; In re Newton, 13 Q. B. 716, 13 Jur. 606, 18 Law J. N. S. M. C. 201; Winsor *v.* Reg., Law

law arises, whether there was a jeopardy or not, it may be re examined on appeal, or writ of error, or plea of former acquittal, according to the practice of the tribunal,[1] and the nature of the case.

§ 1042. *Views on Principle:* —

Constitution to lead. — In spite of what was laid down at the opening of this sub-title,[2] that, since we are upon constitutional law, we should follow rather the lead of the Constitution than of the decisions, our discussion, conducting us over the field of adjudication, has seemed at places to depart from the Constitution. Let us now, disregarding the paths made for us by the courts, take a few steps where the Constitution goes before.

§ 1043. **Implications in Prohibition of Second Jeopardy.** — When the Constitution declares, that a man shall not be, for one offence, put twice — that is, a second time — in jeopardy, it implies that the jeopardy against which he is thus protected will come, if at all, from the courts. And it implies that, in the absence of any actual consent from him, the courts are forbidden to compel him to the alternative of doing what will be construed into a consent in law, or suffering the loss of life or limb through a violation of law by a judge presiding at his trial. To say to a prisoner, "Be hung contrary to law, or consent to be put in jeopardy a second time," is, it is submitted, utterly to disregard the implications in this provision of the Constitution.

§ 1044. **Misdirection taking away Jeopardy.** — But the decisions go upon the principle, not perhaps mentioned in them in words, that, if the judge commits an error to the prejudice of the prisoner at his trial, he is not in jeopardy; since, should a verdict be rendered against him, he is entitled to have it set aside. This view is specious, but not just. Such a case differs from that of

Rep. 1 Q. B. 289, 7 Best & S. 490; The State *v.* Brooks, 3 Humph. 70. But see Williams *v.* Commonwealth, 2 Grat. 567; The State *v.* Battle, 7 Ala. 269; Wright *v.* The State, 5 Ind. 290; The State *v.* Alman, 64 N. C. 364; The State *v.* Jefferson, 66 N. C. 309.

[1] The State *v.* McKee, 1 Bailey, 651; United States *v.* Shoemaker, 2 McLean, 114; People *v.* Barrett, 2 Caines, 304; Ned *v.* The State, 7 Port. 187; Wright *v.* The State, 5 Ind. 290. And see The State *v.* Benham, 7 Conn. 414; Reg. *v.* Reid, 1 Eng. L. & Eq. 595; Mount *v.* The State, 14 Ohio, 295; The State *v.* Norvell, 2 Yerg. 24; Rex *v.* Wildey, 1 M. & S. 183; 2 Hale P. C. 243; Rex *v.* Bowman, 6 Car. & P. 101. Contra, United States *v.* Morris, 1 Curt. C. C. 23; O'Brian *v.* Commonwealth, 9 Bush, 333; The State *v.* Lennig, 42 Ind. 541. See The State *v.* Waterhouse, Mart. & Yerg. 278.

[2] Ante, § 1012.

an insufficient indictment, or some accident or force interposing outside of the court. The court is the power that brings the jeopardy upon him; and, when the Constitution declares that this power shall not put him in jeopardy twice, it is a mockery to say, that it may bring him into as many jeopardies as it will, provided it violates the law each time. The interpretation which makes a violation of the common or statutory law a good answer to a charge of violating the Constitution, has no parallel in any thing else known in our jurisprudence.

§ 1045. **What, in Principle, is a Jeopardy.** — If the power which is to try a man has, by valid steps, brought him to trial, he is, the instant such trial is ready to commence, in jeopardy, unless something, patent or latent, not under control of the power itself, exists, making it impossible any verdict should be rendered against him which he will not be entitled to have set aside. This, it is believed, is, in principle, the true test. The valid preparation and instantaneous readiness to begin to receive evidence is the jeopardy, — not the verdict, which is the consummation of the proceedings; for the final judgment is a mere formal utterance of the law's approval of what is already done. Now, if the power which brings a man into and controls the jeopardy — namely, the court — proceeds unlawfully after the jeopardy has thus attached, it is not sound in legal reasoning to say, that this unlawful conduct nullifies the jeopardy. If it did, then the process might be repeated for ever, and the constitutional provision be rendered void. After the case was opened to the jury, or at any time before verdict, if the judge saw that there could be no just conviction, and wished to give the State liberty to retry it, he might discharge them without a verdict, or unlawfully direct them to bring in one of guilty, or do something else unlawful, and thus there might be a second trial, and then a third, and so on without end, to the utter overthrow of this constitutional protection. And, we may presume, it was to prevent exactly this sort of thing that the constitutional inhibition was established.

§ 1046. **Failure of Evidence.** — It is admitted, that, if the evidence introduced is inadequate, and the jury render a verdict of not guilty, the prisoner cannot be tried again. There was, by all opinions, a jeopardy. But if, under the same facts, the judge permits the gossip of the neighborhood to be added to the insuf-

ficient legal evidence, and the jury convict the prisoner on this, — has he not equally been in jeopardy? Yes; it is the doctrine of reason, that he has. But, in this instance, it is said, that, as the court violated the law in admitting the gossip, it may be sharp on him, and, to punish him for its own illegal conduct, may compel him either to be hanged for the court's fault, or to waive the right which the Constitution gave him. Happily, in few other things, do the courts thus trifle with constitutional duty.

§ 1047. **Misdirection of Judge protested against by Prisoner.** — These views, expressed in general language, indicate the methods by which some important questions connected with our present sub-title may be solved. They are not meant to retrace in full the discussion. If they are correct, they show that the course of the courts, adopted apparently without consideration, of trying anew defendants wrongly convicted by reason of a misdirection against which they protested at the time, instead of suffering them to go free, violates this constitutional guaranty. If, only on the waiving of their constitutional rights, they can have the error corrected, — if they can be permitted to take their due only on paying the price of surrendering what the Constitution secures to them, — if, after they have struggled against a misdirection in the cause, and been borne down, they can be permitted to come up again, only on giving back what the Constitution of the country gave them, — if, having opposed a conviction improperly ordered, while entitled to an acquittal, they can have the conviction set aside only on submitting to run their chance of being convicted under a different state of facts appearing, when either they will be unprepared for the trial, or the government will have evidence it had not before, — if the wrong done the prisoner is to be set right only on his submitting to the chance of receiving a fresh wrong, — surely this guaranty of the Constitution is worth but little.

Why these Views. — This presentation of the question is made, not because the author supposes, that, in the present condition of legal learning, while a blind reception of mere judicial authority nearly banishes the purer reasonings of the law and true juridical wisdom, many judges will even take the trouble to understand it; but because the question lay in his path, demanding notice. And the consolation is, that, though the practice we are considering violates the Constitution, it is not often attended with much substantial injustice.[1]

V. *Rules to determine when the Two Offences are the Same.*

§ 1048. **Decisions Discordant.** — If, under the last sub-title, we found the decisions to be in a degree conflicting, and not all to be satisfactory, much more shall we under this. Indeed, some of

[1] 1. **The Common Reason.** — In an Ohio case, the learned judge, arguing in support of the common practice, said: "It is not claimed, for the plaintiff in error, that a conviction upon a defective indictment, when the judgment has been afterwards reversed, can be set up as bar to another prosecution. It is conceded by his counsel, that, in such a case, the prisoner may be put again upon his trial. In such a case he says, according to the construction of all the courts, the prisoner never was in jeopardy. But he claims, that, by a trial before a lawful jury, upon a good indictment, and a finding of a verdict by the jury, the prisoner has been put in jeopardy, and cannot therefore be again prosecuted for the same offence. It is not readily perceived how any real distinction can be drawn between the cases. In both, it is but an error in the proceedings; in the first, the error is found in the indictment; in the second, the error is committed by the court, it may be in admitting or rejecting testimony, in charging or refusing to charge the jury, or in determining some other one of the various legal questions arising in the progress of the cause. If it be, that, when a party is convicted on a bad indictment for murder, he may be tried again because his life was not in jeopardy, it may with equal truth be said, under our system of laws, and since the allowance of bills of exceptions and writs of error in criminal prosecutions, he was not in jeopardy in case any other substantial error is found in the proceedings." Sutcliffe *v.* The State, 18 Ohio, 469, 478. This presentation differs from a possible one conducting to the same conclusion, in denying that there is a jeopardy where the judge gives an erroneous direction at the trial. The jeopardy is sometimes admitted, yet it is alleged that the defendant waives the benefit of it when he asks for a new trial. And see, on the same side, the reasoning in People *v.* Olwell, 28 Cal. 456.

2. **A better View.** — There is a New York case, depending, to some extent perhaps, on statutes, yet apparently involving so much of general principle as to show an assimilation of views in the minds of the judges to those stated in the text; though, in this instance, as in some others, the judges seemed not to be aware that their views were contrary to judicial opinions held in other States. The note to the case is: "A prisoner against whom a wrong judgment was pronounced upon a regular trial and conviction cannot be subjected to another trial." A statute provided, that, "if the supreme court shall reverse the judgment rendered, it shall either direct a new trial or that the defendant be absolutely discharged." There was a motion in arrest of judgment and for a new trial; and, the sentence appearing to have been wrong, the court, as the head-note discloses, directed, not a new trial, but a discharge of the prisoner, on the ground that the first trial was a protection against further proceedings for the same offence. Said Sutherland, J.: "The circumstance, that the counsel of the prisoner, on moving in arrest of judgment, also asked for a new trial, I regard of no consequence. The constitutional provision is, 'No person shall be subject to be twice put in jeopardy for the same offence.' This provision may be considered as addressed to courts; and, if the prisoner is within its protection, he ought to be discharged, although his counsel did formally ask for a new trial." Shepherd *v* People, 25 N. Y. 406, 418.

these, like a class of those, are founded on principles which, if adopted throughout, would render practically void the constitutional inhibition.

§ 1049. **"Same Offence."** — The general doctrine is plain, and there are no conflicts of authority upon it, that, in the words of the Constitution itself, to entitle a prisoner to the protection we are considering, the second jeopardy must be for the "same offence" as the first. If, therefore, a man has been either convicted or acquitted of one crime, he may still be prosecuted for another.[1] And —

Convicted by Verdict or Plea. — This doctrine is not limited to convictions and acquittals by the verdict of a jury; but, if a man has pleaded guilty to a valid indictment, the result is the same. The case need not have proceeded to judgment.[2]

§ 1050. **Similarity of Indictments.** — Another proposition about which there is no dispute is, that, to make the offences the same, the two indictments need not be, in exact language, alike.[3] For, to show the identity of the offences, proof outside the indictments is not altogether excluded.[4]

§ 1051. **When, in Reason, Offences the Same.** — Looking further to see when the offences are the same, we have, in reason, the following propositions: They are not the same, first, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, thirdly, when each indictment sets out an offence differing in all its elements from that in the other, though both relate to one transaction, — a proposition of which the exact limits are difficult to define; or, fourthly, when some technical

[1] Reg. *v.* Bird, 2 Den. C. C. 94; 2 Eng. L. & Eq. 439; McQuoid *v.* People, 3 Gilman, 76; Commonwealth *v.* Goodenough, Thacher Crim. Cas. 132; Hite *v.* The State, 9 Yerg. 357; The State *v.* Ainsworth, 11 Vt. 91; Hawkins *v.* The State, 1 Port. 475; Commonwealth *v.* Somerville, 1 Va. Cas. 164; Commonwealth *v.* Mott, 21 Pick. 492; Rex *v.* Phillips, 1 Jur. 427; The State *v.* Herrick, 3 Nev. 259; Methard *v.* The State, 19 Ohio State, 363; The State *v.* Conlin, 27 Vt. 318; post, § 1070.

[2] People *v.* Goldstein, 32 Cal. 432; Shepherd *v.* People, 25 N. Y. 406.

[3] Hite *v.* The State, 9 Yerg. 357; Thomas *v.* The State, 40 Texas, 36.

[4] Rake *v.* Pope, 7 Ala. 161; The State *v.* De Witt, 2 Hill, S. C. 282; Commonwealth *v.* Sutherland, 109 Mass. 342; Hughes *v.* Jones, 2 Md. Ch. 178; Holt *v.* The State, 88 Ga. 187; Crim. Proced. I. § 816.

variance precludes a conviction on the first indictment, but permits it on the second. Yet, fifthly, the offences are the same in all other circumstances wherein the evidence to support one of the indictments sustains also the other. And, sixthly, if the two indictments set out offences which are alike, and relate to one transaction, yet, if one contains more of criminal charge than the other, but upon it there could be a conviction for what is embraced in the other, the offences, though of differing names, are, within the constitutional protection from a second jeopardy, the same. Let us now see what doctrines are derivable from the decisions.

§ 1052. **Variance.** — An indictment does not always set out the offence which the person drawing it intended; as, for example, in cases of variance.[1] If, then, it alleges the forging of a receipt for the use of Hugh *Brison*, and the instrument in evidence is for the use of Hugh *Prison*;[2] or the burning of *Josiah* Thompson's barn, while the true owner was *Josias* Thompson;[3] or of the barn of A & B, while it belonged to A & C;[4] or an attempt to kill *Louisa* Loveland, when the attempt was upon *William P.* Loveland;[5] or larceny of the property of a person named, the proof showing the owner to be unknown,[6] — in these and other like cases,[7] the defendant, being acquitted by reason of the variance, is liable to be prosecuted on a new indictment in which the fact is truly alleged.

The Test — is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be.[8] And —

[1] Crim. Proced. I. § 485–488*e*, 569 et seq.

[2] Pennsylvania *v.* Huffman, Addison, 140.

[3] Commonwealth *v.* Mortimer, 2 Va. Cas. 325.

[4] Commonwealth *v.* Wade, 17 Pick. 395, 400.

[5] People *v.* Warren, 1 Parker C. C. 338; Vaughan *v.* Commonwealth, 2 Va. Cas. 273.

[6] The State *v.* Revels, Busbee, 200.

[7] The State *v.* Risher, 1 Rich. 219; The State *v.* Kreps, 8 Ala. 951; Rex *v.* Coogan, 1 Leach, 4th ed. 448; The State *v.* McCoy, 14 N. H. 364; The State *v.* Standifer, 5 Port. 523; Rex *v.* Emden, 9 East, 437; Rex *v.* Clark, 1 Brod. & B. 473; Martha *v.* The State, 26 Ala. 72; The State *v.* Dunham, 9 Ala. 76; People *v.* McNealy, 17 Cal. 332; The State *v.* Stebbins, 29 Conn. 463; Conway *v.* The State, 4 Ind. 94; Canter *v.* People, 38 How. Pr. 91; Commonwealth *v.* Chesley, 107 Mass. 223; Oneil *v.* The State, 48 Ga. 66.

[8] Hite *v.* The State, 9 Yerg. 357; People *v.* Warren, 1 Parker C. C. 338; People *v.* Allen, 1 Parker C. C. 445; Durham *v.* People, 4 Scam. 172; Commonwealth *v.* Curtis, Thacher Crim. Cas. 202.

§ 1053. **Applicable in other Cases.** — This test is applicable, not alone in these cases of technical variance, but in many others.[1] Thus, —

Wrong County. — If the acquittal is by reason of the indictment being brought in the wrong county, it will not bar fresh proceedings in the right one.[2] So, —

Another Person Injured. — An acquittal on an indictment for the larceny of goods alleged to be the property of one person will not bar an indictment for the larceny of the same goods charged as belonging to another.[3] Again, —

Larceny and False Pretences. — If one is acquitted of petit larceny, then a fresh indictment charges him with obtaining the same goods by false pretences, he may be convicted on the latter, under the former evidence, if incompetent in law to produce a conviction on the former indictment.[4] Also, —

Larceny and Conspiracy — Or Receiving. — One acquitted of larceny may be convicted of obtaining the same goods through a conspiracy with third persons,[5] or of receiving them as stolen goods.[6] And —

Homicide by Differing Means. — An acquittal on an indictment for a murder committed by shooting with powder and shot from a gun is no bar to an indictment for a murder committed by beating upon the head with a gun.[7] Moreover, —

"Overcoats" and "Cloth." — An acquittal of embezzling cloth of which overcoats are made, is no defence to an indictment for embezzling overcoats, though the evidence at both trials is the same; because overcoats and cloth to make them are different

[1] United States *v.* Nickerson, 17 How. U. S. 204, 208; Price *v.* The State, 19 Ohio, 423; Burns *v.* People, 1 Parker C. C. 182; Rex *v.* Vandercomb, 2 Leach, 4th ed. 708; s. c. nom. Rex *v.* Vandercom, 2 East, P. C. 519; Rex *v.* Taylor, 5 D. & R. 422, 3 B. & C. 502; The State *v.* Jesse, 3 Dev. & Bat. 98; Reg. *v.* Henderson, 2 Moody, 192; Rex *v.* Parry, 7 Car. & P. 836; The State *v.* McClintock, 1 Greene, Iowa, 392; Commonwealth *v.* McChord, 2 Dana, 242; Rex *v.* Dann, 1 Moody, 424; Boutelle *v.* Nourse, 4 Mass. 431; Frost *v.* Rowse, 2 Greenl. 130; Hughes *v.* The State, 12 Ala. 458; Rex *v.* Plant, 7 Car. & P. 575; Heikes *v.* Commonwealth, 2 Casey, 513; The State *v.* Birmingham, Busbee, 120; Freeland *v.* People, 16 Ill. 380; The State *v.* Keogh, 13 La. An. 243; Commonwealth *v.* Bakeman, 105 Mass. 53; Morey *v.* Commonwealth, 108 Mass. 433; Commonwealth *v.* Farrell, 105 Mass. 189.

[2] Commonwealth *v.* Call, 21 Pick. 509; Methard *v.* The State, 19 Ohio State, 363.

[3] Morgan *v.* The State, 34 Texas, 677.

[4] Dominick *v.* The State, 40 Ala. 680.

[5] The State *v.* Sias, 17 N. H. 558.

[6] Foster *v.* The State, 39 Ala. 229, 233. And see Commonwealth *v.* Tenney, 97 Mass. 50.

[7] Guedel *v.* People, 43 Ill. 226.

things, and proof of the one will not sustain an allegation of the other.[1]

Limit of the Test. — Probably the test under consideration is always applicable when its effect is to bar proceedings,[2] while still the proceedings may be barred by other principles when this one fails.[3]

§ 1054. **Crime within Crime.** — Where crimes are included within one another, so that a higher comprehends whatever a lower one does and more, as explained in a previous chapter,[4] a conviction for any higher one bars a prosecution for any lower; since, if the defendant is guilty of all, he is necessarily so of each particular part. It is believed that there is no exception to this rule. In general, the same consequence follows an acquittal; because generally there can be a conviction for the lower on an indictment for the higher.[5] But the effect of an acquittal is not, like that of a conviction, universally so. Thus, —

In Liquor-selling. — If one is indicted for being a "common seller of liquor," contrary to a statute, — an offence which consists of specific sales, with other facts,[6] — and is convicted, he cannot afterward be pursued for making a single sale, at the same time, contrary to the provisions of another statute. "For," said Bennett, J., "if the government see fit to go for the offence of being 'a common seller,' and the respondent is adjudged guilty, it must, in a certain sense, be considered as a merger of all the distinct acts of sale, up to the filing of the complaint, and the respondent can be punished but for one offence."[7] But where the jury, instead of convicting the defendant, acquit him, he may then be indicted for a single act of selling during the

[1] Commonwealth *v.* Clair, 7 Allen, 525.

[2] But see, and query, Reg. *v.* Gisson, 2 Car. & K. 781; Reg. *v.* Henderson, Car. & M. 328. See Reg. *v.* Bird, 2 Eng. L. & Eq. 448, 2 Den. C. C. 94, 5 Cox C. C. 20.

[3] See post, § 1057 et seq.

[4] Ante, § 780.

[5] Ante, § 794; The State *v.* Standifer, 5 Port. 523; Rex *v.* Heaps, 2 Salk. 593; Reg. *v.* Gould, 9 Car. & P. 364; Reg. *v.* Bird, 2 Eng. L. & Eq. 448, 2 Den. C. C. 94, 5 Cox C. C. 20; Dinkey *v.* Commonwealth, 5 Harris, Pa. 126; Murphy *v.* Commonwealth, 23 Grat. 960; Thomas *v.* The State, 40 Texas, 36; Hamilton *v.* The State, 36 Ind. 280; Reg. *v.* Smith, 34 U. C. Q. B. 552; Canada *v.* Commonwealth, 22 Grat. 899; The State *v.* Smith, 43 Vt. 324, 326; Reg. *v.* Webster, 9 L. Canada, 196; The State *v.* Pitts, 57 Misso. 85; Fritz *v.* The State, 40 Ind. 18; Wemyss *v.* Hopkins, Law Rep. 10 Q. B. 378; Munford *v.* The State, 39 Missis. 558; The State *v.* Brannon, 55 Misso. 63; Reg. *v.* Elrington, 9 Cox C. C. 86, 90.

[6] Stat. Crimes, § 1018, 1035.

[7] The State *v.* Nutt, 28 Vt. 598, 602, 603. Contra, post, § 1065.

same period; because, in the words of Dewey, J., "such acquittal is entirely consistent with the fact having been shown of one or two single sales by the defendant, but a failure to show a third sale, or evidence sufficient to convict of the offence of being a common seller."[1] Again, —

§ 1055. **Felony and Misdemeanor. — Form of Allegation.** — If, owing to the form of the allegation,[2] or to the lower offence being a misdemeanor while the higher is a felony,[3] there can be no conviction of the former on the indictment for the latter, an acquittal of the latter will not bar a prosecution for the former.[4] A conviction would bar it, because a necessary part of what the conviction covers. But an acquittal may have been produced by the fact, that the defendant simply committed the lower offence with no aggravations, and for this he was not in jeopardy when on trial for the higher. And, where the rules of the English common law prevail, no acquittal for felony can bar a prosecution for misdemeanor.[5] But, —

Robbery and Larceny. — As robbery and larceny are both felonies, and the latter is included in the former, an acquittal for robbery will bar an indictment for the larceny of the same property.[6]

§ 1056. **Conviction on part of Indictment.** — If the indictment covers one of the larger crimes, and there is a conviction of one of the smaller, included in it, the result is a bar to any new prosecution for the larger.[7] For example, —

Murder and Manslaughter. — One indicted for murder, and found guilty of manslaughter, is protected from any further prosecution for the murder.[8]

§ 1057. **Indictment covering Part only.** — Where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes, included, as before mentioned, within a larger, — will it bar fresh proceedings for the larger? If it will not, then

[1] Commonwealth *v.* Hudson, 14 Gray, 11, 12.

[2] Ante, § 794–796, 803. See Severin *v.* People, 37 Ill. 414; Wilson *v.* The State, 24 Conn. 57; Dedieu *v.* People, 22 N. Y. 178.

[3] Ante, § 804 et seq.

[4] Munford *v.* The State, 39 Missis. 558.

[5] Ante, § 804; People *v.* Saunders, 4 Parker, C. C. 196.

[6] People *v.* McGowan, 17 Wend. 386. And see The State *v.* Pitts, 57 Misso. 85.

[7] Ante, § 1006; People *v.* Apgar, 35 Cal. 389; The State *v.* Pitts, 57 Misso. 85.

[8] Brennan *v.* People, 15 Ill. 511, 517; Hurt *v.* The State, 25 Missis. 378.

the prosecutor may begin with the smallest, and obtain successive convictions, ending with the largest; while, if he had begun with the largest, he must there stop, — a conclusion repugnant to good sense. Besides, as a larger includes a smaller, it is impossible one should be convicted of the larger without being also convicted of the smaller; and thus, if he has been found guilty or not guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller offence. Some apparent authority, therefore, English[1] and American,[2] that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle. And, even in authority, the doctrine which holds it to be a bar is sufficiently established in general;[3] though possibly it admits some real or apparent exceptions, as by and by we shall see. Thus, —

§ 1058. **In aggravated Arson and Murder.** — If a man burns a dwelling-house, in which a human being is consumed, he cannot, after a conviction for the arson, be held to answer for the murder.[4] So, —

Murder and Manslaughter. — If, on an indictment for manslaughter, the judge discharges the jury because the proof shows the offence to have been murder, the defendant cannot be afterward brought into jeopardy for the murder.[5] And —

Assaults with their Aggravations. — A person convicted of an assault only is protected thereby from prosecution for the battery; because, said Totten, J., "the one is a necessary part of the other; and, if he be now punished for the battery, he will thereby be twice punished for the assault."[6] And, according to the general and better doctrine, a conviction or acquittal of a common assault will bar proceedings for an assault with intent to do great bodily harm, and other assaults aggravated in like manner.[7]

[1] 2 Hawk. P. C. Curw. ed. p. 518, § 5; Reg. *v.* Button, 11 Q. B. 929, 947, 948, 12 Jur. 1017; 1 Stark. Crim. Plead. 2d ed. 327.

[2] Scott *v.* United States, Morris, 142; Freeland *v.* People, 16 Ill. 380; post, § 1058, note.

[3] Reg. *v.* Walker, 2 Moody & R. 446; The State *v.* Shepard, 7 Conn. 54; Commonwealth *v.* Squire, 1 Met. 258; Commonwealth *v.* Kinney, 2 Va. Cas. 139; Lohman *v.* People, 1 Comst. 379, 2 Barb. 216; The State *v.* Townsend, 2 Harring. Del. 543; Thayer *v.* Boyle, 30 Maine, 475; Hickey *v.* The State, 23 Ind. 21.

[4] The State *v.* Cooper, 1 Green, N. J. 361.

[5] People *v.* Hunckeller, 48 Cal. 381.

[6] The State *v.* Chaffin, 2 Swan, Tenn. 493.

[7] Reg. *v.* Elrington, 9 Cox C. C. 86, 1 B. & S. 688. The State *v.* Smith, 43 Vt. 324, 326. "There is," said Pierpoint, C. J., in the case last cited, "considerable conflict in the authorities upon this subject, but we think the rule is

No Jurisdiction of Higher Offence. — It has been supposed, that, if the tribunal trying the less offence has no jurisdiction over the higher, the case will be different;[1] yet there does not seem to be any just foundation for this distinction.[2] But, —

§ 1059. **Assault and subsequent Death — (Homicide).** — If, after a battery and a conviction for it, the assailed person dies of his wounds, an indictment may be maintained for the homicide; not, it appears, because the battery is the less offence, but because the blow which had not produced death is, when viewed in the light of its results, a thing different from the blow which had produced death.[3]

now well established, that, when one offence is a necessary element in and constitutes an essential part of another offence, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other." In exact opposition to the doctrine of my text and Reg. *v.* Elrington, supra, is an Iowa case in which a conviction for assault and battery is held to be no bar to an indictment for the same with intent to commit great bodily injury. Said Beck, C. J.: "Admitting that the offences of assault and battery, and assault with intent to commit a great bodily injury are degrees of the same offence, it must be conceded that the first named is of a lower degree, and does not include the offence of the higher degree. To this proposition there can be no objection. While an assault, with an intent to commit great bodily injury, may include an assault and battery, it is clear that the assault and battery cannot include the higher assault; the less cannot include the greater. A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offence, or for an offence of a higher degree, and necessarily including the offence for which the accused stands indicted. It follows that a conviction or acquittal for a minor offence is no bar to a prosecution for a greater offence; except in the case of acquittal for manslaughter which would bar an indictment for murder, for the reason if the defendant was innocent of the killing, without malice, he could not be guilty of the killing with malice. Scott *v.* United States, Morris, 142; Hurt *v.* The State, 25 Missis. 378; Burns *v.* People, 1 Parker C. C. 182. This is substantially the rule of section 4720 of the Revision, which is in the following language: 'When the defendant has been convicted or acquitted, upon an indictment for an offence consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offence charged in the former or for any *lower degree of that offence*, or for an offence necessarily included therein.'" The State *v.* Foster, 33 Iowa, 525. And see Prine *v.* The State, 41 Texas, 300.

[1] Commonwealth *v.* Curtis, 11 Pick. 134.

[2] Reg. *v.* Walker, 2 Moody & R. 446.

[3] Commonwealth *v.* Roby, 12 Pick. 496; Commonwealth *v.* Evans, 101 Mass. 25; Burns *v.* People, 1 Parker C. C. 182; Reg. *v.* Salvi, 10 Cox C. C. 481, note. See Wright *v.* The State, 5 Ind. 527. In an English case, it appeared that the prisoner, after committing assault and battery, had, on complaint of the injured person, been convicted thereof, and sentenced to imprisonment, which sentence he had served out. Then the one beaten died, and the prisoner was indicted for manslaughter from the same beating. The statute of 24 & 25 Vict. c. 100, § 45, provides, that, when, on complaint of the aggrieved party, one shall have suffered an awarded imprisonment, "he shall be released from all further or other proceedings, civil or criminal, for the *same cause*." Thereupon the majority of the judges, Kelly, C. B., dissenting, held that what had taken place was not a bar to

§ 1060. **One Transaction, one Act, one Crime, distinguished.** — There may be gleaned from the books passages which seem to indicate, that one act may constitute any number of crimes, for each of which the doer may be prosecuted, and a conviction of one will not bar a prosecution for another.[1] And perhaps, in our complicated system of government, one act may be an offence against both the United States and a particular State, and both may punish it.[2] But, in principle, and according to the better authority, while one act may constitute as many distinct offences as the legislature may choose to direct, for any one of which there may be a conviction without regard to the others,[3] "it is," in the language of Cockburn, C. J., "a fundamental rule of law that out of the same facts a series of charges shall not be preferred."[4] To give our constitutional provision the force evidently meant, and to render it effectual, "the same offence" must be interpreted as equivalent to the same criminal act. And judicial utterances have even gone apparently to the extent, that there can be only one punishment for one criminal transaction.[5] But this is carrying the rule too far the other way.[6] To illustrate the views of this paragraph, —

§ 1061. **One Blow wounding Two — Killing Two.** — If one blow wounds two men, a conviction for the assault and battery, charged to have been committed on one of them, is a bar to an indictment for it as committed on the other.[7] Or, if it kills two men, a person convicted of the homicide of one of them cannot be tried for

the indictment for manslaughter. Reg. *v.* Morris, Law Rep. 1 C. C. 90, 10 Cox C. C. 480. In a Scotch case, decided in accordance with the doctrine of the text, Lord Ardmillan said: "There never can be the crime of murder till the party assaulted dies; the crime has no existence in fact or law till the death of the party assaulted. Therefore it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person's death is not merely a supervening aggravation, but it creates a new crime." Stewart's Case, 5 Irvine, 310, 314.

[1] The State *v.* Inness, 53 Maine, 536; The State *v.* Taylor, 2 Bailey, 49; Commonwealth *v.* Trickey, 13 Allen 559; The State *v.* Rankin, 4 Coldw. 145 Commonwealth *v.* Shea, 14 Gray, 386 See ante, § 779, 782, 798; post, § 1067.

[2] The State *v.* Rankin, supra. See more exactly as to this, ante, § 989.

[3] See, for illustration, Fant *v.* People, 45 Ill. 259; The State *v.* Crummey, 17 Minn. 72; Crocker *v.* The State, 47 Ga. 568; post, § 1068.

[4] Reg. *v.* Elrington, 9 Cox C. C. 86, 90, 1 B. & S. 688.

[5] Holt *v.* The State, 38 Ga. 187; post, § 1064.

[6] Commonwealth *v.* Bakeman, 105 Mass. 53.

[7] The State *v.* Damon, 2 Tyler, 387. And see Crocker *v.* The State, 47 Ga. 568.

the homicide of the other. "If the same act of the defendant resulted in the death of both of them, there was but one crime."[1] Again, —

Non-repair of Streets. In North Carolina, there being a duty to keep the streets of an incorporated town in repair, several indictments were found on the same day for breaches of this duty in respect of as many streets, and it was held, that a conviction on one would bar proceedings on the others.[2] But it is not quite clear that all courts will decide thus, or even follow the doctrine of the last paragraph.[3] Thus, —

In Larceny. — An English judge even ruled, that, where a man stole at one time two pigs belonging to the same person, he might first be convicted of the larceny of the one pig, and afterward of the larceny of the other;[4] and, if the pigs had different owners, there would be American authority the same way.[5] In Kentucky it was held, that an acquittal for the larceny of one article is a bar to an indictment for the larceny of another, belonging to the same person, taken at the same time, and with the same intent.[6] And there is plainly a limit to the right of multiplying indictments,[7] though we may not find, on authority, exactly what it is. For example, while a complete larceny is committed in every county through which the thief carries his stolen goods, clearly he can be convicted in no more than one county.[8]

[1] Clem *v.* The State, 42 Ind. 420, opinion by Downey, J. And see Ben *v.* The State, 22 Ala. 9.

[2] The State *v.* Fayetteville, 2 Murph. 371.

[3] The State *v.* Fife, 1 Bailey, 1; Rex *v.* Champneys, 2 Moody & R. 26, 2 Lewin, 52; Smith *v.* Commonwealth, 7 Grat. 593; The State *v.* Standifer, 5 Port. 523.

[4] Reg. *v.* Brettel, Car. & M. 609.

[5] The State *v.* Thurston, 2 McMullan, 382. And see, on this question, The State *v.* Williams, 10 Humph. 101; Lorton *v.* The State, 7 Misso. 55; Reg. *v.* Bleasdale, 2 Car. & K. 765; The State *v.* Nelson, 29 Maine, 329; Rex *v.* Birdseye, 4 Car. & P. 386. Some of these cases would admit of one indictment only, where the goods were owned by different persons. In Indiana, a prosecution for larceny of a part only of articles is held to bar an indictment for larceny of the remainder. Said Perkins, J.: "The State cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." Jackson *v.* The State, 14 Ind. 327, 328. See Vol. II. § 888.

[6] Fisher *v.* Commonwealth, 1 Bush, 211.

[7] Plumbly *v.* Commonwealth, 2 Met. 413; The State *v.* Johnson, 12 Ala. 840; Hinkle *v.* Commonwealth, 4 Dana, 518. See post, § 1064.

[8] Tippins *v.* The State, 14 Ga. 422; 2 Hawk. P. C. Curw. ed. p. 517, § 4. And see Strickland *v.* Thorpe, Yelv. 126. See further, as illustrating the matter of this section, The State *v.* Parish, 8 Rich. 322; Freeland *v.* People, 16 Ill. 380; Fiddler *v.* The State, 7 Humph. 508; Rex *v.* Carlile, 3 B. & Ald. 161; s. c. nom. Rex *v.* Carlisle, 1 Chit. 451; Copenhaven *v.* The State, 15 Ga. 264; Rex *v.* Britton, 1 Moody & R. 297; Bank Prosecutions, Russ. & Ry. 378; The State *v.* Cameron, 3 Heisk. 78. **Act constituting One Offence and Part of another.** — Some courts maintain that, in the words of Gray, J.: "A single act may be an offence against two statutes; and, if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Morey *v.* Commonwealth, 108 Mass. 433, 434. And see Commonwealth *v.* Bakeman, 105 Mass. 53; Commonwealth *v.* Shea, 14 Gray, 386; Commonwealth *v.* McConnell, 11 Gray, 204. But this question has been, in effect, already considered in the text. Ante, § 1054 et seq. By all the authorities, this would not be so if the conviction was for the larger crime. Ante, § 1054. And on the better reason and better authorities it would not be so if the conviction was for the smaller. Ante, § 1057. But the State could choose under which statute the one prosecution should be.

§ 1062. **Burglary and Larceny.** — If a man in the night breaks and enters a dwelling-house, intending to steal therein, and there does steal, he may be punished for two offences or one, at the election of the prosecuting power. If in a single count the indictment charges him with breaking, entering, and stealing, his offence is single, being burglary committed in a particular manner;[1] but, if a first count sets out the burglary as perpetrated by breaking and entering with intent to steal, then a second count may allege the larceny as a separate thing, and he may be convicted and sentenced for both.[2] Therefore an acquittal on an indictment charging the burglary as committed by breaking and entering with intent to steal is no bar to a prosecution for the actual theft.[3] And a conviction of the latter will not bar an indictment for the former.[4] Such are the decisions; yet, on

[1] The State *v.* Squires, 11 N. H. 37; The State *v.* Moore, 12 N. H. 42; The State *v.* Brady, 14 Vt. 353; Rex *v.* Comer, 1 Leach, 4th ed. 36; Rex *v.* Vandercomb, 2 Leach, 4th ed. 708; s. c. nom. Rex *v.* Vandercom, 2 East P. C. 519; Commonwealth *v.* Brown, 3 Rawle, 207; Jones *v.* The State, 11 N. H. 269; Stoops *v.* Commonwealth, 7 S. & R. 491; Commonwealth *v.* Tuck, 20 Pick. 356; Commonwealth *v.* Hope, 22 Pick. 1. Of course, a conviction for burglary, on such a form of the indictment, will bar a prosecution for the larceny. People *v.* Smith, 57 Barb. 46.

[2] Josslyn *v.* Commonwealth, 6 Met. 236. But see post, § 1064.

[3] The State *v.* Warner, 14 Ind. 572.

[4] Wilson *v.* The State, 24 Conn. 57. In this case, not of common-law burglary, but of statutory shopbreaking, Storrs, J., observed: "It will be seen, that there is a difference in the two offences, charged in the two informations against the prisoner, founded in the very nature and essence of the offences themselves. Theft is a common-law crime, and its definition is well understood. Breaking a shop with intent to steal is a statute offence only, and the act thus made criminal is the act of breaking, — its criminality depending, as in all cases, upon the intent with which it is done, and which, in the present instance, must be a specific intent to steal. The offence is complete, whether the theft is consummated or not." p. 65. Waite, C. J., who dissented from the judgment pronounced by the majority, said: "I take it to be a sound rule of law, founded upon the plainest principles of natural justice, that, where a criminal act has been committed, every part of

principle, we may question whether they do not press more heavily against defendants than the humane policy of our criminal jurisprudence justifies.[1]

§ 1063. **Robbery, Larceny, and Burglary.** — Other complications have been passed upon in North Carolina and Georgia. In each of these States, a man in the night entered a dwelling-house intending to steal in it, and therein committed the larceny by violence from the person of one found therein. The reader will observe, that the breaking and entering with the intent may alone constitute burglary, that the stealing with violence from the person is robbery, and that the taking away of the property is larceny. In North Carolina, the first indictment was for the burglary, accomplished by the actual commission of the larceny; and the conviction on it was for the larceny only. The second indictment was for the robbery, and it was held to be barred by the first.[2] Here the first indictment covered a part — namely, the larceny — of the second; so the case falls within a principle stated a few sections back.[3]

§ 1064. **Continued.** — In the Georgia case, depending on like facts, the first indictment seems — the report being indistinct — to have been for the burglary, as including only the intent to steal; the second, for the robbery, which includes the actual stealing. On the trial of the first, evidence of the robbery was introduced to establish the burglary, a conviction was obtained, and it was held to bar proceedings under the second. And the court laid down the broad doctrine, that a jeopardy on one indictment will bar a second "whenever the proof shows the second

which may be alleged in a single count in an indictment, and proved under it, the act cannot be split into several distinct crimes, and a separate indictment sustained upon each. And whenever there has been a conviction for one part, it will operate as a bar to any subsequent proceedings as to the residue." p. 70. Again: "Whenever, in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations, founded upon the same intent, cannot be maintained." p. 71. Once more: "It has been said, that the prosecuting attorney may elect to join both offences in the same information, or file separate ones. But, in my opinion, the law gives him no power to make two crimes or one out of the same transaction, at his pleasure. The law, and not the attorney, must determine that matter. He may indeed elect to prosecute for the whole, or any part, but he can sustain but one information." p. 72. It would be a very bold thing to say, that, leaving out of the account what has been adjudged by the courts, the weight of reason is not clearly with this dissenting opinion by the Chief Justice.

[1] Compare this with post, § 1064.

[2] The State v. Lewis, 2 Hawks, 98.

[3] Ante, § 1057.

case to be the same transaction with the first."[1] This doctrine, with the decision based upon it, is inconsistent with the proposition — sustained, as the reader has seen, by various other courts[2] — that indictments for burglary and larceny can both be prosecuted to conviction, when a prisoner breaks into a dwelling-house and therein steals.

§ 1065. **Same Evidence to Two Offences.** — The foregoing doctrines should not be confounded with questions of evidence. Cases are numerous in which proof of one crime is received to establish another; but the introduction of such proof does not bar an indictment for the offence not under trial. Thus, —

Liquor Laws. — It is so under the more or less complicated statutes regulating the sale of intoxicating liquors. Not to enter much into these questions, some of which have been solved by the application of principles that would prove, if universally adopted, greatly detrimental, we have, in brief, the following. In Maine it is held,[3] contrary to what was laid down some sections back,[4] that specific sales may be prosecuted under a statute forbidding them, after the party has been convicted, under another statute, for having been at the time of making them a common seller;[5] though the practice is familiar, that such sales were competent evidence to the charge in the first indictment.[6] And it was adjudged in another case, that "to punish a person for keeping a drinking-house and tippling-shop, and also for being a common seller of intoxicating liquors, although the same individual act contribute to make up each offence, is not a violation" of the law which forbids a prisoner to be put in jeopardy twice for the same offence.[7] So in Massachusetts the statutory nuisance of keeping a tenement for the sale of intoxicating liquor is held to be a distinct offence from the statutory one of being a common seller of intoxicating liquor; therefore a conviction of the former is no bar to an indictment for the latter.[8] Neither is an acquittal

[1] Roberts v. The State, 14 Ga. 8. See also Copenhaven v. The State, 15 Ga. 264.

[2] Ante, § 1062. And see ante, § 1060.

[3] See ante, § 782.

[4] Ante, § 1054.

[5] The State v. Maher, 35 Maine, 225; The State v. Coombs, 32 Maine, 529. And see Commonwealth v. Keefe, 7 Gray, 332; Commonwealth v. Hudson, 14 Gray, 11.

[6] Commonwealth v. Tubbs, 1 Cush. 2.

[7] The State v. Inness, 53 Maine, 536, 537, opinion by Walton, J. But see The State v. Layton, 25 Iowa, 198.

[8] Commonwealth v. Hardiman, 9 Allen, 487; Commonwealth v. Bubser, 14 Gray, 83; Commonwealth v. Cutler, 9 Allen, 486. And see Commonwealth v. Lahy, 8 Gray, 459.

a bar to a prosecution for keeping the liquor with intent to sell it.[1] And various other like points have been adjudged under statutes regulating or prohibiting the sale of intoxicating drinks.[2] So, —

§ 1066. **Forgery and Uttering.** — An acquittal for forging a certificate of deposit on one bank is no bar to a prosecution for obtaining money from another bank, by a forged letter enclosing the same certificate.[3] And, in general, an acquittal of forging is no bar to an indictment for uttering the same instrument.[4] Likewise, —

Larceny and Conspiracy. — As we have seen,[5] an acquittal for larceny will not bar an indictment for a conspiracy to obtain unlawfully the same goods which were alleged to have been stolen.[6] And —

Other like Cases. — There are numerous cases resting on this principle.[7]

§ 1067. **Penal Actions and Indictments.** — It seems to be the doctrine, on a question not well illumined by the decisions (alluded to elsewhere[8]), that, as a civil suit for damages and a criminal prosecution may be carried on together or successively for the same act of wrong;[9] so also may the latter, and an action for a penalty, which also is in general a civil proceeding.[10] Thus the New York court held, that, if a statute creates an offence, and imposes a penalty recoverable in an action civil in form, and also declares the offence to be a misdemeanor punishable by fine and imprisonment, there may be both an indictment and a penal action for one violation, neither of which will bar the other.[11] So, —

[1] Commonwealth *v.* McCauley, 105 Mass. 69; Commonwealth *v.* Sheehan, 105 Mass. 192; Commonwealth *v.* Hogan, 97 Mass. 122.

[2] See The State *v.* Andrews, 27 Misso. 267; Sanders *v.* The State, 2 Iowa, 230; The State *v.* Glasgow, Dudley, S. C. 40; The State *v.* Rollins, 12 Rich. 297; The State *v.* Conlin, 27 Vt. 318; Commonwealth *v.* Welch, 97 Mass. 593; Commonwealth *v.* Farrell, 105 Mass. 189; Commonwealth *v.* Connors, 116 Mass. 35.

[3] People *v.* Ward, 15 Wend. 231. And see Commonwealth *v.* Quann, 2 Va. Cas. 89; People *v.* Allen, 1 Parker, C. C. 445; United States *v.* Miner, 11 Blatch. 511.

[4] Harrison *v.* The State, 36 Ala. 248.

[5] Ante, § 1053.

[6] The State *v.* Sias, 17 N. H. 558, Parker, C. J., observing: "The defendant could not have been convicted of a conspiracy on the former indictment. He cannot be convicted of larceny on this." p. 559.

[7] Commonwealth *v.* Chilson, 2 Cush. 15; The State *v.* Jesse, 3 Dev. & Bat. 98; The State *v.* Davis, 19 Ala. 13. See People *v.* Burden, 9 Barb. 467.

[8] Stat. Crimes, § 171 and note.

[9] Ante, § 264 et seq.

[10] Ante, § 32 and note.

[11] People *v.* Stevens, 13 Wend. 341; Blatchley *v.* Moser, 15 Wend. 215.

Proceedings for Contempt and Indictment. — It appears that a prosecution for contempt of court will not bar an indictment for the same act.[1] And —

Other Cases. — There are other cases depending on a like principle; but what, exactly, are the limits of the doctrine they do not enable an author to say.[2]

§ 1068. **Statute and By-law.** — Whether there can be a prosecution for the same act as violating both a statute and a city ordinance, or whether the one bars the other, is a question on which opinions differ, discussed in "Statutory Crimes."[3]

§ 1069. **Civil Suit and Indictment.** — Civil proceedings are no bar to criminal.[4] Therefore, —

Damages for Loss of Life. — It was held in Kentucky, that a statute authorizing the recovery of damages by the representatives of one deprived of life through the defendant's neglect, does not conflict with the constitutional provision we are considering; even though, for the same neglect, an indictment is also provided.[5]

VI. *The Doctrine of Autrefois Attaint.*

§ 1070. **General View.** — By the English law, when this country was settled, a person *attainted* of one felony could not be prosecuted for another,[6] — a doctrine to which there were some exceptions. But this doctrine, though recognized in one or two American cases,[7] is not usually followed in this country.[8] In England it was long ago abolished by act of Parliament.[9] It probably originated in the idea, that, after a man was condemned to death it would be useless to proceed against him for a second capital offence, since he could die only once.

[1] Rex *v.* Lord Ossulston, 2 Stra. 1107.

[2] See The State *v.* Plunkett, 3 Harrison, 5; The State *v.* Sonnerkalb, 2 Nott & McC. 280; Hodges *v.* The State, 8 Ala. 55; The State *v.* Keen, 34 Maine, 500; Simpson *v.* The State, 10 Yerg. 525; The State *v.* Tappan, 15 N. H. 91; The State *v.* Thompson, 2 Strob. 12; ante, § 1029, note.

[3] Stat. Crimes, § 28; The State *v.* Thornton, 37 Misso. 360, 361; The State *v.* Cowan, 29 Misso. 330; Levy *v.* The State, 6 Ind. 281; Waldo *v.* Wallace, 12 Ind. 569; Gardner *v.* People, 20 Ill. 430; Fant *v.* People, 45 Ill. 259.

[4] Ante, § 1067.

[5] Chiles *v.* Drake, 2 Met. Ky. 146.

[6] 4 Bl. Com. 336; 3 Inst. 213; 2 Hale P. C. 252–254; Armstrong *v.* L'Isle, 12 Mod. 109. See Rex *v.* Birkett, Russ. & Ry. 268.

[7] Crenshaw *v.* The State, Mart. & Yerg. 122.

[8] See ante, § 1049.

[9] Stat. 7 & 8 Geo. 4, c. 28, § 4.

BOOK IX.

NUISANCE.

CHAPTER LXIV.

THE GENERAL DOCTRINE OF NUISANCE.[1]

§ 1071. **Course of the Discussion.** — In preceding chapters, we have called to mind many doctrines pertaining to nuisance.[2] And, in the second volume, where the several offences are treated of in their alphabetical order, will be included some of the minor or secondary nuisances.[3] Those which are more purely such will be discussed in chapters next following the present one. In this, we are to consider some general doctrines.

§ 1072. **Nuisance defined.** — A public or common nuisance is any act or neglect the product of which works an annoyance or injury to the entire community; or, the product itself is termed a nuisance.[4]

Further described. — The evil must be of magnitude requiring judicial interposition, and within the reasons on which the decisions of the courts have in times past proceeded; or, the offence may be created and defined by statute.[5] Again, —

§ 1073. **Abatable and Indictable, distinguished.** — The reader should carry in his mind the distinctions, illustrated in a previous chapter, between nuisance abatable and nuisance indictable.[6]

[1] See Crim. Proced. II. § 860 et seq.; and Stat. Crimes, § 20, 21, 156, note, 169, 214, 257, 544–558, 654, 968, 974–976, 1059–1070.

[2] Ante, § 221, 227, 236, 241–246, 265, 316, 341, 419–422, 433, 490, 491, 531, 686, 792, 817–835.

[3] For example, BARRATRY; BLASPHEMY AND PROFANENESS; LIBEL; LORD'S DAY; RIOT; SEPULTURE; THREATENING LETTERS; WAY.

[4] See Stat. Crimes, § 544. Gaston, J., observed in the North Carolina court, that the act "should be an offence so inconvenient and troublesome as to annoy the whole community, and not merely particular persons." The State *v.* Baldwin, 1 Dev. & Bat. 195, 197. As to which see ante, § 243–245; post, § 1077, 1078.

[5] Stat. Crimes, § 552–558; McLaughlin *v.* The State, 45 Ind. 338; The State *v.* Fisher, 52 Misso. 174; Watertown *v.* Mayo, 109 Mass. 315.

[6] Ante, § 821–835.

§ 1074. **Actionable and Indictable, distinguished.** — Like any other offence, a nuisance may be actionable, while it is indictable; yet, as we have seen,[1] an action can be maintained only by one who has suffered a damage special to himself. But, —

Intensity of Evil. — To be indictable, a nuisance need be no more intensely evil than is required to render it actionable.[2] And —

Civil in Essence. — The doctrine, already mentioned,[3] that a criminal proceeding may be in substance and effect civil, and be governed in a degree by the rules of civil suits, has its most apt illustrations in this department. Thus, —

§ 1075. **Obstructing River — (Intent — Acts of Servants).** — In England, one was indicted for the nuisance of obstructing the navigation of a river, in connection with some works which he carried on near the bank. His workmen had deposited rubbish where it had fallen into the river; but, to excuse himself, he offered to show that this was done, not only without his direction, but in violation of his express orders, while still, however, it was done in the course of the general conduct of his business. This evidence, which was of a sort to establish a complete defence in ordinary criminal cases, as showing that there was no criminal intent, the court rejected.[4] "It is quite true," said Mellor, J., "that this, in point of form, is a proceeding of a criminal nature; but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail, with regard to such an act as is charged in this indictment, between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them; but here it is perfectly clear that the only reason for proceeding criminally is, that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. . . . The prosecutor cannot proceed by action, but must proceed by indictment; and, if this were strictly a criminal proceeding, the prosecution would be met with the objection that there was no *mens rea*, that the indictment charged the defendant with a criminal offence, when

[1] Ante, § 265.

[2] Ante, § 236.

[3] Ante, § 33, 264–267, 531, 713, 954–957.

[4] See ante, § 316.

in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular act he is charged with. . . . Inasmuch as the object of this indictment is, not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment."[1]

§ 1076. **Civil in Essence, continued.** — The doctrine of this English case may almost be deemed new in the criminal law, yet there were before some familiar cases lying near it.[2] To what extent this line of adjudication will be followed by our courts, it is not easy to predict. It seems just, if not carried too far, or in improper directions. But if a court were to apply a rule like this where some infamous punishment was to be the consequence of a conviction, or, indeed, where there were to be any consequences not in effect civil, it would wander widely from the path of true principle, as well as of precedent.

§ 1077. **Already discussed.** — In a previous chapter, under the title "The Wrong as a Public in distinction from a Private Injury," several views were presented relating to the present subject.[3] And, further on, in successive chapters on the protection which the criminal law affords to the "Public Health," to "Religion, Public Morals, and Education," to the "Public Wealth and to Population," to the "Public Convenience and Safety," and to the "Public Order and Tranquillity,"[4] the leading doctrines in the law of Nuisance were unfolded.

How many annoy. — In a general way, we have seen how many of the public a nuisance must annoy to render it indictable.[5] Said a learned judge: "Every nuisance is annoying to only a few of the citizens of the particular place. They are the public of that locality. It is a public nuisance if it annoy such part of the public as necessarily come in contact with it."[6] But, —

§ 1078. **In Disorderly House.** — The North Carolina court held, that, where the defendant lived remote from any public road, and loud noises and uproar were often kept up in his house by his five sons when drunk, yet he did not encourage them except

[1] Reg. v. Stephens, Law Rep. 1 Q. B. 702, 708, 709, 710.
[2] See ante, § 219–221, 316, 317.
[3] Ante, § 230 et seq.
[4] Ante, § 489–543.
[5] Ante, § 243–245, 1072 and note.
[6] Stuart, J., in Hackney v. The State, 8 Ind. 494, 495.

by getting drunk himself; while, on the other hand, he would sometimes endeavor to quiet them; and, by the disorder, only two families were disturbed, — the nuisance of keeping a disorderly house was not, in law, committed. "Admit," said the learned judge, "that, if this disorder had been committed in a town, where all the good people of the State had a right to be, and to pass and repass, or on or near a public highway, it would have amounted to a common, as distinguished from a private, nuisance, so as to be indictable, yet it is clearly not so, having been committed in the country, to the disturbance of only two families residing in the vicinity."[1]

§ 1078 *a*. **Prescription and Usage.** — One by committing an offence to-day does not gain the right to commit a like offence to-morrow. And no prescription and no usage can justify crime. In this respect the criminal law does not follow the analogies of the civil. Therefore, as we shall more particularly see by and by,[2] a nuisance is not the less indictable because it is of long standing.[3]

§ 1079. **Misdemeanor.** — At the common law, nuisance is misdemeanor, not felony; punishable, therefore, by fine and imprisonment. And it is believed that none of our statutes raise it to a higher grade. Consequently, —

Participants. — All participants in a nuisance, whether before or at the fact, present or absent, are principal offenders, and to be dealt with as actual doers.[4] We shall see, under the title Bawdy-house, more specifically how this is.[5] But the doctrine applies also to other nuisances.[6]

Abatement by Judicial Order. — When the indictment has the necessary allegations, and it is sustained by the proofs, the final judgment of the court may contain an order that the defendant abate the nuisance,[7] "at," says Hawkins, "his own costs."[8]

[1] The State v. Wright, 6 Jones, N. C. 25, 27, opinion by Pearson, C. J. And see The State v. Hathcock, 7 Ire. 52.
[2] Post, § 1131, 1139–1141.
[3] Douglass v. The State, 4 Wis. 387; Mills v. Hall, 9 Wend. 315; The State v. Franklin Falls Co., 49 N. H. 240; Taylor v. People, 6 Parker, C. C. 347; The State v. Rankin, 3 S. C. 438; People v. Mallory, 4 Thomp. & C. 567.
[4] Ante, § 629–633, 656 et seq., 685–689.
[5] Post, § 1090–1096.
[6] The State v. Potter, 30 Iowa, 587; Edelmath v. McGarren, 4 Daly, 467; Stevens v. People, 67 Ill. 587; Dorman v. Ames, 12 Minn. 451. See United States v. Chenoweth, 6 McLean, 189.
[7] Crim. Proced. II. § 866, 870–872; Munson v. People, 5 Parker, C. C. 16; Smith v. The State, 22 Ohio State, 539; Delaware Division Canal v. Commonwealth, 10 Smith, Pa. 367.
[8] 1 Hawk. P. C. Curw. ed. p. 695, § 14, 15.

This order for abatement is not a necessary part of the judgment, nor is it strictly in the nature of punishment.[1]

Abatement as affecting Punishment. — If the defendant has already abated the nuisance, the court, in exercising its discretion as to the punishment, will take this into account in his favor.[2] Also, —

Acted as Agent. — It will consider favorably, in fixing the punishment, the fact, should it be so, that he acted only as another's agent.[3]

§ 1080. **Abatement by Private Persons in Pais.** — We have seen[4] that, as general doctrine, any person is authorized to abate, with his own hands, without judicial order, a public nuisance. Thus, —

Dog. — If a dog becomes ferocious and dangerous to the public, he is, therefore, a public nuisance, and any one may kill him.[5]

[1] Ante, § 829; Campbell *v.* The State, 16 Ala. 144. And see Willis *v.* Warren, 1 Hilton, 590. An order for the abatement of a nuisance will be made only where the nuisance is alleged to be continuing. The State *v.* Noyes, 10 Fost. N. H. 279; Crim. Proced. I. § 893; II. § 866; Wroe *v.* The State, 8 Md. 416; Munson *v.* People, 5 Parker, C. C. 16; Rex *v.* Stead, 8 T. R. 142. In this last case, Lord Kenyon, C. J., observed: "When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it is so stated in Rex *v.* Pappineau, 1 Stra. 686, 'et adhuc existit'; and, in such case, the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence, and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it." p. 144. A Pennsylvania case holds it to be error to order the sheriff to abate a nuisance in the first instance; the order should be on the defendant, but if he fails to comply the sheriff may be commanded to abate it at his cost. Barclay *v.* Commonwealth, 1 Casey, 503. And see Mayor of Liverpool, 8 Ellis & B. 537. A defendant being found guilty on an indictment for nuisance in maintaining a mill-dam, and a judgment being entered that the mill-dam be removed, and that a writ issue to the sheriff for its removal, the judgment was held to be a final one upon which error would lie. It was held, also, that the power to order such removal could not precede, but must be exercised at the time of, imposing punishment by fine or imprisonment, and form part of the same judgment; and that, no such punishment having been imposed, the order to remove the nuisance was erroneous. Crippen *v.* People, 8 Mich. 117. See also Maxwell *v.* Boyne, 36 Ind. 420. **Cruel and unusual Punishment.** — An order for abatement is not a cruel or unusual punishment. McLaughlin *v.* The State, 45 Ind. 338.

[2] Reg. *v.* Macmichael, 8 Car. & P. 755. See also Rex *v.* Grey, 2 Keny 307; Rex *v.* Green, 1 Keny. 379.

[3] The State *v.* Bell, 5 Port. 365.

[4] Ante, § 490, 828, 829; Stat. Crimes, § 169, 554, 555, 1070 and note.

[5] 1. The question of one's right to kill another's dog, because a public nuisance, is, in the facts of cases, often blended with that of his right to kill the dog for the protection of himself or property. The topic has been very frequently before the courts; and, oddly, the digest-makers have, in some instances, given us the special title *Dog*. Let us look a little at what the courts have held.

2. In an old case it was said by "Holt, C. J., and Turton, J." according to one report, that "there is a great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution that they do no mischief, otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality." Mason *v.* Keeling, 1 Ld. Raym. 606, 608. According to another report of the case, "Holt, C. J.," said: "The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for the hurt done by them without any notice; but, if they are of a tame nature, there must be notice of the ill quality. And the law takes notice, that a dog is not of a fierce nature, but rather the contrary. . . . If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but, if my dog go into another man's soil, no action will lie." Mason *v.* Keeling, 12 Mod. 332, 335. Therefore a man bitten or otherwise injured by a dog cannot recover damages of its owner for the injury, unless the latter had some knowledge or warning of its vicious propensities. Hogan *v.* Sharpe, 7 Car. & P. 755; Thomas *v.* Morgan, 2 Cromp. M. & R. 496, 4 Dowl. P. C. 223; McKone *v.* Wood, 5 Car. & P. 1; Judge *v.* Cox, 1 Stark. 285; Vrooman *v.* Lawyer, 13 Johns. 339.

3. One attacked by another's dog may kill it in self-defence, and the owner can recover no damages. And he may do the same thing for the protection of his property. Leonard *v.* Wilkins, 9 Johns. 233; Brown *v.* Hoburger, 52 Barb. 15; King *v.* Kline, 6 Barr, 318; Barrington *v.* Turner, 3 Lev. 28; Hanway *v.* Boultbee, 4 Car. & P. 350, 1 Moody & R. 15; Janson *v.* Brown, 1 Camp. 41. But where a defendant alleged, in justification of killing the plaintiff's dog, that it ran violently upon his dog and bit him; this was held not to be sufficient, it should have been shown further that he could not otherwise separate the attacking dog from his own. Wright *v.* Ramscot, 1 Saund. 84; s. c. nom. Wright *v.* Rainsear, 1 Sid. 336; s. c. nom. Wright *v.* Wrainscott, 1 Lev. 216; s. c. nom. Wright *v.* Wranscot, 2 Keb. 237. And Lord Denman, C. J., once laid it down in a jury case, that "the circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify shooting him; to justify such a course, the animal must be actually attacking the party at the time." Morris *v.* Nugent, 7 Car. & P. 572. And see Hartley *v.* Harriman, 1 B. & Ald. 620; Clark *v.* Webster, 1 Car. & P. 104; Hanway *v.* Boultbee, 4 Car. & P. 350, 1 Moody & R. 15; Janson *v.* Brown, 1 Camp. 41. Also, when, after the plaintiff's dog had worried some sheep belonging to the defendant, and gone into another field, the latter shot the dog, — Alderson, J., in an action for this killing, directed the jury to find for the plaintiff, saying, "It was clear that the dog was not shot in protection of the defendant's property, as it was after he had left the field in which the sheep were." Wells *v.* Head, 4 Car. & P. 568. In a North Carolina case, where a dog was kept on its owner's premises, and there ran at a person going to the owner's house, but was called off by the family, yet he shot the dog going away; the court held, that a fierce dog, if kept on its owner's premises, is not a nuisance entitling any one to kill him, and that in this instance there was no necessity for the killing, since the dog was driven off. Hence the shooting was not justifiable. Perry *v.* Phipps, 10 Ire. 259.

4. Some of the before-mentioned cases seem to favor the proposition, that, if a dog is dangerous to go at large, still a person whom or whose property he is not molesting is not justified in killing

§ 1081. **Further of Private Abatement.** — The doctrine which authorizes any person to abate a public nuisance, without judicial

authority, is essential to the repose of the community. Without it, one man might put a million in danger, or destroy human lives

him. It is submitted, however, that such is not the law, which is directly the contrary; namely, though a dog may not lawfully be killed by any one, simply on the ground of possessing some vicious propensities, yet, if so vicious as, going at large, to be dangerous to the community, any person may lawfully kill such a dog, whether personally in danger or not, and whether the owner has knowledge of the dog's vicious propensities or not. I will state the cases at hand relating to this proposition, leaving the reader to decide whether or not it is sustained by them. In New York it was laid down, in an action of trespass for killing a dog, that, where the defence of the ferocious character of the animal is set up, if it was in the habit of attacking individuals, this is sufficient, and a *scienter*, on the part of the owner, need not be shown. Said Nelson, C. J.: "If the dog be in fact ferocious, at large, and a terror to the neighborhood, the public should be justified in despatching him at once. It seems to be settled that such proof is not necessary when a dog is in the habit of chasing conies in a warren, or deer in a park, and that he may be killed for the protection of those animals. How much more proper is it, that this should be the rule, and most singular would it be were it otherwise, when the persons and lives of rational beings are in danger!" Maxwell *v.* Palmerton, 21 Wend. 407, 408. In a Pennsylvania case, — where, indeed, the matter adjudged was, that a man might kill his neighbor's dog to protect his own property, — the following dictum was laid down by Coulter, J.: "A dog may be so ferocious as to become a public nuisance; and, in such cases, if his owner permits him to run at large, any person may kill him." King *v.* Kline, 6 Barr, 318. Also we have the following decisions: Trespass, *vi et armis*, for killing a dog. Held, that the dog, having bitten the defendant, was a nuisance, and anybody might abate a nuisance. *Aliter*, if the dog had been set to guard property, and the defendant had interfered. Bowers *v.* Fitzrandolph, Addison, 215. If a dog is so ferocious that, of his own disposition, he will bite men in the street, and is at large, he is a nuisance, and may be killed by any one. Dunlap *v.* Snyder, 17 Barb. 561. No action will lie against one for killing a dangerous dog, which is permitted by its owner to run at large, or escapes through negligent keeping, the owner having notice of its vicious disposition; or for killing a dog bitten by a mad dog. Putnam *v.* Payne, 13 Johns. 312. If a dog attacks persons, or attacks and kills domestic animals on the owner's land, it may be killed as a common nuisance. But if it merely chases and worries cattle, the owner of the cattle may not kill it; his remedy is by action against the owner of the dog, upon proof that he knew the dog to be in the habit of doing thus. Hinckley *v.* Emerson, 4 Cow. 351. A furious dog, accustomed to bite mankind, is a common nuisance. In an action to recover damages for killing such a dog, the defendant need not prove he was obliged to kill it in self-defence. And Redfield, C. J., observed: "Some animals are common nuisances, if suffered to go at large, from their known and uniform instincts and propensities, such as lions and bears, and probably wolves and wild-cats; and domestic animals, from their ferocious and dangerous habits becoming known to their keepers, thus become common nuisances, if not restrained." Brown *v.* Carpenter, 26 Vt. 638, 643. The inhabitants of a dwelling-house may destroy another's dog, that disturbs their quiet, if the disturbance cannot be otherwise prevented; Nelson, C. J., observing: "The demurrer admits, that the dog was in the constant habit of coming on the premises, and about the dwelling of the defendants, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and wilfully neglected to confine him; and that defendants, unable to remove the nuisance in any other way, killed him. No other

by thousands, in the presence of another, who, having the power, would not be permitted by the law to interpose. An infernal machine might be hidden where throngs were passing, a bridge about to be packed with human beings might be so weakened that it would fall, or any number of other dangers might be created, yet, but for this doctrine, they could not be arrested to prevent the calamity. This doctrine is an expression of the better instincts of our nature, which lead men to watch over and shield one another from harm.[1] It is impossible, therefore, to

authority than the experience and observation of every man is necessary to enable him to determine, that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it." Brill *v.* Flagler, 23 Wend. 354, 357. In Massachusetts it was held, that the provision in the R. S. c. 58, § 12, permitting any person to kill any dog found without a collar, does not authorize a person to convert the dog to his own use, but trover by the owner will lie for such conversion; Shaw, C. J., observing: "The object of the statute is, not to confer a benefit on the individual, but to rid society of a nuisance by killing the dog. This object would not be accomplished by a person's taking the dog to himself." Cummings *v.* Perham, 1 Met. 555, 556.

5. In some of the States, there are statutes regulating the custody and restraint of dogs, and they are held to be constitutional. Blair *v.* Forehand, 100 Mass. 136. And see further of these statutes, Commonwealth *v.* Canada, 107 Mass. 405; Commonwealth *v.* Gorman, 16 Gray, 601; Commonwealth *v.* Kelliher, 12 Allen, 480; Kerr *v.* Seaver, 11 Allen, 151; McAneany *v.* Jewett, 10 Allen, 151; Jones *v.* Commonwealth, 15 Gray, 193; Bishop *v.* Fahay, 15 Gray, 61; Tower *v.* Tower, 18 Pick. 262; Commonwealth *v.* Dow, 10 Met. 382; Campbell *v.* Brown, 1 Grant, Pa. 82. And see ante, § 832.

[1] And see Stat. Crimes, § 1070, note. In a New Jersey case, Vice-Chancellor Dodd observed: "At common law, it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. His right to do so depended upon the fact of its being a nuisance. If he assumed to act upon his own adjudication that it was, and such adjudication was afterwards shown to be wrong, he was liable as a wrong-doer for his error, and appropriate damages could be recovered against him. This common-law right still exists in full force. Any citizen, acting either as an individual, or as a public official under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance. In abating it, property may be destroyed, and the owner deprived of it without trial, without notice, and without compensation. Such destruction for the public safety or health is not a taking of private property for public use, without compensation, or due process of law, in the sense of the Constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. These principles are legal maxims or axioms essential to the existence of regulated society. Written constitutions presuppose them, are subordinate to them, and cannot set them aside. They underlie and justify what is termed the *police power* of the State. By virtue of that power, numerous and onerous restrictions and burdens are imposed upon persons and property which, for other purposes or on other grounds, would be prohibited by the constitutional limitations sought to be applied in this

look upon some late cases, in which it seems to be laid down, in broad terms, that no one is entitled to abate a public nuisance unless personally and specially injured by it, as serious utterances of the courts; unless we understand them, as probably we should, to refer merely to the special facts in contemplation.[1] Not every thing, which one might imagine, can be done under the name of abating a public nuisance. Thus we have seen[2] that needless damage should not be done. And it was laid down in Maryland, that "the right to abate a public nuisance belongs to every citizen, yet it cannot be lawfully exercised if its exercise involve a breach of the peace. When such is the case, the party erecting the nuisance must be proceeded against legally."[3] It will undoubtedly, in some circumstances, lend strength to the right of abating a public nuisance that the person abating suffers a special injury from it, because this fact will authorize even the abatement of a private nuisance;[4] yet, when the nuisance is clearly public, it is not, as a general proposition, essential that the person abating should be a special sufferer from the thing abated.[5]

suit." Manhattan Manuf. &c. Co. *v.* Van Keuren, 8 C. E. Green, 251, 255. But see Miller *v.* Forman, 8 Vroom, 55. And see Gunter *v.* Geary, 1 Cal. 462; Reg. *v.* Patton, 13 L. Canada, 311; Reg. *v.* Mathias, 2 Fost. & F. 570; James *v.* Hayward, Cro. Car. 184; Ruff *v.* Phillips, 50 Ga. 130. **By Municipal Corporations.** — As to abatement by municipal corporations, see Yates *v.* Milwaukee, 10 Wal. 497; Weil *v.* Ricord, 9 C. E. Green, 169; Babcock *v.* Buffalo, 56 N. Y. 268.

[1] See Clark *v.* Lake St. Clair, &c. Ice Co., 24 Mich. 508; McGregor *v.* Boyle, 34 Iowa, 268; Brown *v.* Perkins, 12 Gray, 89, 101; Miller *v.* Forman, 8 Vroom, 55; Ruff *v.* Phillips, 50 Ga. 130; The State *v.* Parrott, 71 N. C. 311.

[2] Ante, § 828; The State *v.* Paul, 5 R. I. 185; The State *v.* Keeran, 5 R. I. 497; Roberts *v.* Rose, 3 H. & C. 162.

[3] Day *v.* Day, 4 Md. 262, opinion by LeGrand, C. J. So, although an obstruction in the channel of a navigable river is a nuisance, yet it is not to be abated with total disregard of the rights of others. A raft of timber was driven into the mouth of Bayou Lafourche, which it obstructed. The next morning, the captain of the raft proposed to hire a steamer bound in to tow it out. This offer was refused; and, while the captain of the raft was endeavoring to procure other assistance, the steamer's captain cut it to pieces in order to pass. For this act the boat was held liable. Lallande *v.* The Steamboat C. D., 1 Newb. Adm. 501. Perhaps the true view of this latter case is, that the raft was not to be deemed a nuisance under the circumstances, being driven to the place where it lay by stress of weather, so long as its owner was making all possible exertions to remove it. As to abating a bridge which obstructed navigation, see The State *v.* Parrott, 71 N. C. 311.

[4] Ante, § 828; Gates *v.* Blincoe, 2 Dana, 158. The assent of a party to a nuisance will not take away his right to abate it afterward, if he thinks proper. Pilcher *v.* Hart, 1 Humph. 524.

[5] Ante, § 828, 829, 1080 and note; King *v.* Sanders, 2 Brev. 111. And see the previous notes to this section and the last. Various statutes having declared the Neuse River between certain points navigable, it is a nuisance to build a bridge across it, between those points, so as to prevent the passage of boats; and such nuisance may be abated by any one.

§ 1082. **Municipal Corporation neglecting to abate.** — An indictment lies against a municipal corporation which has, by its charter, power to enact ordinances to preserve the public health and remove nuisances, if it does not cause to be abated a public nuisance, like a slaughter-house, kept, to the detriment of the public health, on land of an inhabitant within the corporate limits.[1]

The State *v.* Dibble, 4 Jones, N. C. 107. Chancery, on a bill by the attorney-general, may enjoin and abate a public nuisance caused by the obstruction of a highway; and the fact that the authorities of the town in which the nuisance is erected are invested with power to abate nuisances within the corporate limits, does not take away the jurisdiction. Hoole *v.* Attorney-General, 22 Ala. 190.

[1] The State *v.* Shelbyville, 4 Sneed, 176; McKinney, J., observing: "By the act of the General Assembly incorporating the town of Shelbyville, it is expressly declared, that said corporation shall have full power and authority to enact all such laws and ordinances as may be necessary and proper 'to preserve the health of the town, prevent and remove nuisances,' &c. Session acts of 1819, c. 16, § 2. Under this provision of the charter, there can be no doubt as to the power of the corporation to 'prevent' or to 'remove' the nuisance charged in the indictment; nor can there be any more doubt as to the positive duty of the corporation to exercise this power in all proper cases. The existence of such a power is indispensable to the public health, and welfare of the town; and the corporation is not at liberty to decline its exercise when demanded by the public interest. An indictment against the corporation is the proper mode of redress by the public for a grievance of this nature."

CHAPTER LXV.

BAWDY-HOUSE.[1]

§ 1083. **How defined.** — A bawdy-house is any place, whether of habitation or temporary sojourn, kept open to the public either generally or under restrictions, for licentious commerce between the sexes.[2]

More particularly. — The term house of ill fame is used in the law to signify nearly or exactly the same thing as bawdy-house. It is one form of disorderly house.[3] The keeping of it is, therefore, an indictable misdemeanor.[4] "For although," says Lord Coke, "adultery and fornication be punishable by the ecclesiastical law, yet the keeping of a house of bawdry, or stews, or brothel-house, being, as it were, a common nuisance, is punishable by the common law; and is the cause of many mischiefs, not only to the overthrow of the bodies, and wasting of their livelihoods, but to the endangering of their souls."[5]

§ 1084. **The Keeper — (Husband and Wife).** — The keeper may be a man or a woman. And a married woman may be indicted with her husband, or alone, for the offence. "Keeping the house does not necessarily import property, but may signify that share of government which the wife has in the family, as well as the husband."[6] So, under a statute authorizing wives to own property and carry on business separate from their husbands, if a wife who owns a house keeps it for bawdry, and receives the profits to her separate use, still the husband who lives with her, and, knowing this, does not exercise his marital power to restrain

[1] For the pleading, practice, and evidence relating to this subject, see Crim. Proced. II. § 104 et seq.

[2] In The State v. Evans, 5 Ire. 603, a bawdy-house is defined to be "a house of ill-fame kept for the resort and convenience of lewd people of both sexes."

[3] Crim. Proced. II. § 106.

[4] Ante, § 500, 734; 4 Bl. Com. 168; 1 Russ. Crimes, 3d Eng. ed. 822.

[5] 3 Inst. 205; Jacobowsky v. People, 6 Hun, 524.

[6] Reg. v. Williams, 10 Mod. 63, 1 Salk. 384; The State v. Bentz, 11 Misso. 27; Commonwealth v. Lewis, 1 Met. 151; Commonwealth v. Cheney, 114 Mass. 281; ante, § 361; Crim. Proced. II. § 109

her, is indictable also as keeper.[1] And, in general, a man who suffers his wife and daughters openly to do the forbidden things, and does not dissent, becomes thereby guilty of the offence.[2]

§ 1085. **The Keeping.** — There must be the keeping of a house. For a woman to be a common bawd, or merely to live alone and receive one man or many, is not to keep a bawdy-house. And more women than one must live or resort together to make such a house.[3] Therefore permitting a single act of illicit intercourse will not alone constitute the offence.[4]

The House. — A single room in a dwelling-house may constitute a bawdy-house.[5] So may a tent,[6] or a boat on a river.[7] And it is not necessary that the place should be used for habitation.[8]

§ 1086. **Lucre.** — It was at one time deemed not certain,[9] but now it is established, that, to constitute a bawdy-house, there is no necessity for it to be kept for lucre. The offence consists in the public nuisance, and the form of corrupt motive is immaterial.[10] And, —

§ 1087. **Outward Indecency.** — To constitute the common-law offence, there need be no indecency, or disorder of any sort, visible from the exterior of the house.[11]

§ 1088. **How under Statutes.** — Statutes, on this subject, have sometimes been drawn in such terms as to modify the doctrines of the common law. Thus, —

[1] Commonwealth v. Wood, 97 Mass. 225. In this case Chapman, J., observed: "It is true that the house they lived in appears to have been owned by her to her sole and separate use, free from the control of her husband. . . . It is also true that under our statute she may carry on a separate trade on her own account. But it has not been decided how far this affects the husband's legal right to control her, nor is it necessary to decide it in this case. These provisions of the statute relate to legitimate business, and not to the keeping of brothels. They do not take away his power to regulate his household so far as to prevent his wife from committing this offence, or relieve him from responsibility if it is committed." p. 229. See ante, § 891 *a*.

[2] Scarborough v. The State, 46 Ga. 26.

[3] The State v. Evans, 5 Ire. 603; Reg. v. Pierson, 1 Salk. 382; s. c. nom. Reg. v. Peirson, 2 Ld. Raym. 1197.

[4] Commonwealth v. Lambert, 12 Allen, 177.

[5] Reg. v. Pierson, supra; The State v. Garity, 46 N. H. 61; The State v. Main, 31 Conn. 572; Commonwealth v. Howe, 13 Gray, 26.

[6] Killman v. The State, 2 Texas Ap. 222.

[7] The State v. Mullen, 35 Iowa, 199.

[8] The State v. Powers, 36 Conn. 77.

[9] Jennings v. Commonwealth, 17 Pick. 80.

[10] Ante, § 500, 734; post, § 1112; The State v. Bailey, 1 Fost. N. H. 343, 345; The State v. Nixon, 18 Vt. 70; Commonwealth v. Wood, 97 Mass. 225; Crim. Proced. II. § 108, 274.

[11] Reg. v. Rice, Law Rep. 1 C. C. 21; Sylvester v. The State, 42 Texas, 496; Crim. Proced. II. § 116.

Reputation of House. — In Connecticut, "keeping a house of ill fame, resorted to for the purpose of prostitution or lewdness," is a statutory offence; and the court holds, that the words "ill fame" refer to the reputation of the house, consequently it must not only be a bawdy-house, but must also be reputed such.[1] This form of words is employed in the statutes of some of the other States; and the common and better interpretation is believed to be, that the term "house of ill fame" is a mere synonyme for "bawdy-house," having no reference to the "fame" of the place, but denoting the fact. Yet, in matter of evidence, some courts allow the proof of the fact to be aided by the fame.[2]

§ 1089. **By-laws.** — The power of municipal corporations to make by-laws is considered in another connection.[3] Under it, ordinances not unfrequently provide penalties for the keeping of houses of ill fame.[4]

§ 1090. *Letting or selling House for Bawdry:* —

General Doctrine. — We have seen, that a mere attempt to commit an offence is usually indictable;[5] and that a solicitation is an attempt of a particular kind.[6] On this principle, the letting of a house to be used as a brothel is an attempt; and, as such, the courts have held it to be indictable.[7] Or, on a principle already brought to view,[8] if the house is afterward kept for bawdry, he who let it for the purpose is indictable as keeper.[9]

§ 1091. **Letting as Attempt — As Accessorial Act.** — We saw, while discussing Attempt,[10] that there are substantive offences so small, or otherwise of such a nature, that a mere attempt to commit them, especially when the attempt is only a solicitation, is not indictable. For which reason, or some other, the New York court has held, that a wrongful letting, where nothing evil is done under the lease, is not, as maintained by other authorities just cited, a crime;[1] but, to be such, the premises must afterward be used for the criminal purpose, in which case the lessor and lessee may be proceeded against jointly for keeping the house.[2] And the Kentucky tribunal, while holding to the general doctrine, seems to favor the opinion that the house must actually be put to the improper use.[3]

§ 1092. **How in Principle.** — There is no conflict between the two propositions, that the letting, though the premises are not used, is indictable as an attempt; and that, when they are used, the lessor and lessee may both be proceeded against for the substantive offence of keeping the house. Now, in principle, we have seen,[4] that one is not indictable for making a mere contract to sell spirits, where only the sale is forbidden; yet he is for procuring an obscene print with the intent to publish it. In other words, an attempt to sell intoxicating liquors contrary to a statute is not pursuable criminally, but an attempt to set up public obscenity is. Plainly, an attempt to establish a bawdy-house is of the latter class; and, consequently, it is indictable.

§ 1093. **Selling House for Bawdry.** — The Kentucky court has seemed to regard the selling of a house for bawdry as no crime.[5] But, if the vendor knows the use contemplated by the purchaser, why should it not be, at least, an attempt? It is difficult to draw a distinction in principle between the sale in fee and a sale for a term of years. The disposition is absolute in both instances, carrying with it the entire present possession.

§ 1094. **Neglect to eject Tenant.** — Should a man innocently let a house which afterward the lessee, without his concurrence, converted into a bawdy-house, he would, on principle, be punishable or not, according as, after ascertaining the fact, he used or not the power of the law, if he had it, to suppress the use. Still there is perhaps some judicial authority, and possibly a shadow of

[1] Cadwell *v.* The State, 17 Conn. 467; The State *v.* Blakesley, 33 Conn. 523. See The State *v.* Main, 31 Conn. 572; The State *v.* Morgan, 40 Conn. 44; Morris *v.* The State, 38 Texas, 603; O'Brien *v.* People, 28 Mich. 213.

[2] Crim. Proced. II. § 112–115; The State *v.* Brunell, 29 Wis. 435; The State *v.* Lyon, 39 Iowa, 379; The State *v.* Boardman, 64 Maine, 523; United States *v.* Jourdine, 4 Cranch C. C. 338; United States *v.* Nailor, 4 Cranch C. C. 372. As to the Massachusetts statutes, see Commonwealth *v.* Davis, 11 Gray, 48.

[3] Stat. Crimes, § 18–26.

[4] Childress *v.* Nashville, 3 Sneed, 347; New Orleans *v.* Costello, 14 La. An. 37; McAlister *v.* Clark, 33 Conn. 91; Stat. Crimes, § 21.

[5] Ante, § 723 et seq.

[6] Ante, § 767, 768.

[7] Commonwealth *v.* Harrington, 3 Pick. 26; Smith *v.* The State, 6 Gill, 425. And see Commonwealth *v.* Moore, 11 Cush. 600; Fish *v.* Dodge, 4 Denio, 311; Commonwealth *v.* Johnson, 4 Pa. Law Jour. Rep. 398; People *v.* Saunders, 29 Mich. 269; The State *v.* Leach, 50 Misso. 535.

[8] Ante, § 1079; Stevens *v.* People, 67 Ill. 587; The State *v.* Potter, 30 Iowa, 587; Wilson *v.* Stewart, 3 B. & S. 913.

[9] And see post, § 1091.

[10] Ante, § 759, 761, 764, 767, 768.

[1] Brockway *v.* People, 2 Hill, N. Y. 558.

[2] People *v.* Erwin, 4 Denio, 129.

[3] Ross *v.* Commonwealth, 2 B. Monr. 417. As to the failure to expel a tenant who keeps a bawdy-house, see Abrahams *v.* The State, 4 Iowa, 541.

[4] Ante, § 761.

[5] Ross *v.* Commonwealth, 2 B. Monr. 417.

reason, for requiring him to go a little further in order to be responsible as keeper of the house.[1]

Agent of Owner. — To bring a person within the doctrines we are considering, he need not be the owner of the house; if he lets it and collects the rents as the owner's agent, he is responsible.[2] And —

Letting for other Unlawful Purposes. — These views apply also to the letting of houses for other disorderly purposes, or to become nuisances of any sort, the same as to letting them for bawdry.[3]

§ 1095. **Late English Doctrine.** — In England, this whole doctrine, which subjects to indictment one who lets a house for bawdry, or for any other disorderly purpose, has of late received a heavy blow, if indeed it has not been overturned. A man who owned a house let it out in rooms to prostitutes, knowing they intended to use the rooms for bawdry, and directly or indirectly consenting. But he did not reside in the house, or retain the keys. He collected the rents weekly, had the power to eject the women but refused, yet received nothing of their earnings other than came from their greater ability to pay the rents. When pressed by complaints of neighbors who were disturbed by noises

[1] The State *v.* Williams, 1 Vroom, 102; See Vason *v.* Augusta, 38 Ga. 542. There is an English case direct against any possible liability of the landlord. But, as we shall see in subsequent sections, the English judges have drifted into what we in this country deem the wrong on this whole subject, therefore our tribunals would not be expected to follow their first move. In this case, the owner was indicted jointly with the ostensible keepers of a bawdy-house; and it appeared that he had let them the house as weekly tenants, that he had been frequently remonstrated with as to the manner in which the house was conducted, and called upon to interfere, but he took no notice of the remonstrances. It was not proved that he obtained any additional rent by reason of the nature of the occupation. The judge at the trial told the jury, "that, if they were satisfied the defendant well knew the purposes for which the house was occupied, and, having the power of removing the tenants by a week's notice, had continuously permitted them to remain," &c., they should find him guilty. The defendant being convicted, the judges, on a case reserved, held the instructions to the jury, and the consequent conviction, to be wrong. Said Pollock, C.B.: "There was no keeping of the house by the defendant. He was only the owner of the house letting it to another, who used it for improper purposes, with which the defendant had nothing to do. He derived no increase of rent from the traffic there carried on, nor had he any thing to do with the immoral part of the transaction, except in knowing that it might or might not be used as a bawdy-house. My brother Williams has well expressed the ground of our decision in saying, that the not giving a notice to quit was not equivalent to keeping a bawdy-house." Reg. *v.* Barrett, Leigh & C. 263, 268, 269.

[2] Lowenstein *v.* People, 54 Barb. 299.

[3] The State *v.* Williams, supra; ante, § 1079.

from the house, he sometimes endeavored to persuade his tenants to be more orderly in behavior. And the judges, on a case reserved, held, that he could not be convicted on an indictment which charged that he "unlawfully did keep and maintain a certain common bawdy-house," &c. Said Pollock, C. B.: "The house was not kept by him. He had no power to admit any one whom he desired to enter the house, or to exclude any one whom he wished not to enter. In fact, he was not the keeper of the house." There was no distinct intimation that the defendant could be held under any other form of the indictment, though the learned judge said, — "Whatever offence against morality or law he may have committed, he did not keep a disorderly house."[1]

§ 1096. **Observations on this.** — If the English judges were as little informed on the criminal law as are the greater part of those American ones who sit under the shadows of our commercial cities, this eclipse of the judicial understanding would not be a remarkable phenomenon. But it is not easily accounted for in them. "He had no power," it was said, "to admit any one whom he desired to enter the house, or to exclude any one whom he wished not to enter. In fact, he was not the keeper." No, he was satisfied to let the opening and shutting of the door be done by the women; while he provided the door for them, and the rooms to which the door led, and every week took so much of the money as it was agreed he should have, and concurred in what the women did; only, being clearer-headed, he advised them to be more discreet in their violations of decency and law! Here, therefore, was a joint operation, where each had his sev-

[1] Reg. *v.* Stannard, Leigh & C. 349, 354. Perhaps the most pertinent of the cases referred to on behalf of the prosecution is Rex *v.* Pedly, 1 A. & E. 822. See ante, § 1090, 1091. And see, for the English doctrine on this subject, 1 Russ. Crimes, 5th Eng. ed. by Prentice, 440–442. As there stated, it seems to be, that, if one creates a permanent nuisance on his land, — as, by the erection of a building which is such, or is likely to become such, — then makes a lease of the land, he is punishable for the nuisance while in the possession of the lessee. Rex *v.* Pedly, supra. And see Russell *v.* Shenton, 3 Q. B. 449; Rich *v.* Basterfield, 4 C. B. 783; Gandy *v.* Jubber, 5 B. & S. 78; Todd *v.* Flight, 9 C. B. N. S. 377. But he is not punishable where the nuisance, like the keeping of a house for bawdry, is the entire act of his lessee, whom he could restrain, but will not, unless he receives an increased rent on account of the unlawful use. Now, according to American doctrine (ante, § 1086), the motive of lucre is unimportant; consequently the question of what rent was paid, or whether or not the letting was gratuitous, could not vary the case.

eral part to perform [1] in carrying out one common object, — the keeping of a bawdy-house. And it is English law, as well as American, that he whose will contributes to an act done by another is, if a felony, to be regarded as a joint doer of it, when done in his presence;[2] or, if, as in this nuisance, it is misdemeanor, he is legally a joint doer whether he is present or absent.[3] Thus, a woman, who has less capacity to penetrate another woman than this man had to open the door of the house, can, by joining her will to that of a man who has the capacity, commit rape.[4] The indictment may, if the pleader chooses, set out the offence according to the legal import of the facts, instead of their outward form.[5] In the same way, a man whose part of the criminal transaction does not consist in passing upon the eligibility of candidates for admission to the house, with its privileges, may, in point of law, keep a bawdy-house. And this doctrine extends through the entire law of crime. But the doctrine of the case under consideration, carried out into its legitimate consequences, would overturn one half of our criminal law. It is impossible, therefore, that it should be accepted in the United States.

[1] See ante, § 630, 632, 638, 650.
[2] Ante, § 647, 648.
[3] Ante, § 685, 686.
[4] Ante, § 639.
[5] Crim. Proced. I. § 332; II. § 949.

CHAPTER LXVI.

COMBUSTIBLE ARTICLES.

§ 1097. **Keeping Gunpowder.** — The keeping of large quantities of gunpowder in populous places, being calculated to endanger the public safety, is indictable.[1]

§ 1098. **Dangerous.** — In New York, the majority of the court were of opinion, that the mere keeping of it near the dwellings of divers citizens, and near a public street, does not come up to the mischief; but, to be a nuisance, it must be in manner and place dangerous.[2] The Tennessee court held, that a powder magazine, in which large quantities of gunpowder are stored, is, when erected in a populous part of a city, *per se* a nuisance.[3]

§ 1099. **Kept before Houses built.** — In an old case it seems to have been held, in analogy to a rule concerning offensive trades,[4] that, if the place in which the gunpowder is kept was used for the purpose before dwelling-houses were built in the neighborhood, it is not indictable.[5] This doctrine is perhaps correct in modern law; yet it should be considered in connection with other discussions.[6]

§ 1100. **Statutes and By-laws.** — There are some statutes and municipal ordinances relating to this subject.[7]

[1] Ante, § 531; Bradley *v.* People, 56 Barb. 72. And see Wier's Appeal, 24 Smith, Pa. 230.
[2] People *v.* Sands, 1 Johns. 78.
[3] Cheatham *v.* Shearon, 1 Swan, Tenn. 213. See also Williams *v.* East India Company, 3 East, 192, 201; Trueman *v.* Casks of Gunpowder, Thacher Crim. Cas. 14; Wier's Appeal, 24 Smith, Pa. 230.
[4] Post, § 1139.
[5] Anonymous, 12 Mod. 342.
[6] See further, on this subject, post, § 1139, note. And see ante, § 1078 *a*.
[7] Williams *v.* Augusta, 4 Ga. 509.

CHAPTER LXVII.

COMMON SCOLD.[1]

§ 1101. **Nature of Offence.** — A common scold is an indictable common-law nuisance.[2] This branch of the common law has been received with us.[3] The offence is generally treated of as being confined to the female sex,[4] though perhaps this has not been directly adjudged.

§ 1102. **How Defined.** — The adjudications are too few to enable an author to define this offence with entire certainty. It is substantially accurate to say, that a common scold is a woman who, by the practice of frequent scolding, disturbs the repose of the neighborhood.

How many Instances. — We shall see, in the next volume,[5] that common barratry requires three distinct acts, at least, for its constitution; whether this rule applies to a common scold is uncertain on the authorities. On principle, the same reason seems applicable, with perhaps this small difference, that, as a single act of barratry is more injurious than one of scolding, possibly there might be required a greater number of repetitions of the scolding than of the barratry. Yet almost the only light we have on the question is a dictum by Buller, J., who said: "In the case of a common scold, it is not necessary to prove the particular expressions used; it is sufficient to prove generally that she is always scolding."[6]

[1] See, for matter relating to this title, ante, § 640, 943. For the pleading, practice, and evidence, see Crim. Proced. II. § 199 et seq.

[2] Ante, § 540; 4 Bl. Com. 168; 1 Hawk. P. C. Curw. ed. p. 693, 695; 1 Russ. Crimes, 3d Eng. ed. 827.

[3] James v. Commonwealth, 12 S. & R. 220; United States v. Royall, 3 Cranch C. C. 620; Commonwealth v. Mohn, 2 Smith, Pa. 243. Contra, as to Pennsylvania, but since overruled. Commonwealth v. Hutchinson, 3 Am. Law Reg. 113. In Commonwealth v. Mohn, supra, Woodward, C. J., said: "As to the unreasonableness of holding women liable to punishment for a too free use of their tongue, it is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable." p. 246.

[4] 4 Bl. Com. 169; 1 Russ. Crimes, 5th Eng. ed. by Prentice, 438.

[5] Vol. II. § 65.

[6] J'Anson v. Stuart, 1 T. R. 748, 754. And see Reg. v. Foxby, 6 Mod. 11.

§ 1103. **Anger.** — The element of anger does not necessarily enter into this offence.[1] But —

"Common Scold." — The indictment charges that the woman is a common scold; and no other words, as that she is a common slanderer, will do.[2]

§ 1104. **Misdemeanor — Punishment.** — This offence is misdemeanor. The punishment, under the English common law, is by the ducking-stool;[3] for which our courts substitute fine and imprisonment.[4]

§ 1105. **Statutes.** — In some of our States, statutes have been enacted affirming this common-law offence, or creating a new one of a like kind. Thus, —

Common Railers and Brawlers. — A statute in Massachusetts makes "common railers and brawlers" punishable.[5] And conduct in the defendant's own house, in altercations and loud outcries, repeated several times each week, attracting to the house crowds and disturbing the neighborhood, was held to justify a conviction. In this instance, the offender was a man.[6]

[1] United States v. Royall, 3 Cranch C. C. 620.

[2] Reg. v. Foxby, 6 Mod. 11.

[3] Ante, § 943; 1 Hawk. P. C. Curw. ed. p. 695, § 14; Reg. v. Foxby, 6 Mod. 11.

[4] Ante, § 943; James v. Commonwealth, 12 S. & R. 220; United States v. Royall, 3 Cranch C. C. 620.

[5] Gen. Stats. c. 165, § 28.

[6] Commonwealth v. Foley, 99 Mass. 497, Hoar, J., observing: "If the defendant, in his own dwelling-house, was in the habit of using loud and violent language, consisting of opprobrious epithets and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood, on Sundays as well as other days, and in the night as well as in the daytime, he was a disturber of the public peace by railing and brawling. And 'occasions when he was betrayed into violent expressions in the heat of an altercation suddenly arising with persons with whom he came in contact, and these expressions aimed at the party with whom he was in altercation,' were properly regarded as furnishing evidence against him, if they were frequent and habitual, and the language so immoderate and vituperative, and uttered so freely, publicly, and continuously, as to disturb the peace of the neighborhood. The evidence tended to show that he had no control over his temper or his tongue, and thereby made himself a nuisance. The merits of his quarrels had little to do with the question before the jury, which chiefly concerned his manner of conducting them." p. 499. By how much less the defendant might have incurred guilt, the opinion cautiously does not attempt to show.

CHAPTER LXVIII.

DISORDERLY HOUSE.[1]

§ 1106. **What Includes.** — The term disorderly house[2] has a wide meaning. It includes bawdy-houses,[3] common gaming-houses,[4] and places of a like character, to which people promiscuously resort for purposes injurious to the public morals,[5] or health,[6] or convenience, or safety;[7] all of which are indictable as public nuisances. But evidently the term does not cover every sort of nuisance indicated by the word house. It cannot include a house kept in so filthy a condition as to be therefore indictable.[8] Consequently, —

Restricted Meaning. — It is better restricted in meaning, and it sometimes is, to denote a house or other like place in which people abide, or to which they resort, disturbing the repose of the neighborhood. In this sense, it is a violation of what is called, in a previous chapter, the public order and tranquillity.[9] Still, in strict law, mere bawdry, for example, is disorder. Thus, —

§ 1107. **Bawdry Disorder.** — An indictment charging the defendant with keeping "a certain common, ill-governed, and disorderly house," specifying acts which show it to be a bawdy-house, is good, and is sustained by proof of bawdry committed within the house, though nothing disorderly appears from without.[10] And, as we have seen,[11] —

Single Room. — It is sufficient that the disorder extends to a single room.[12] So, —

[1] See, for matter relating to this title, ante, § 316, 361, 504. For the pleading, practice, and evidence, see Crim. Proced. II. § 272 et seq.

[2] Ante, § 504.

[3] Ante, § 1088 et seq.; United States v. Gray, 2 Cranch C. C. 675; Commonwealth v. Stewart, 1 S. & R. 342.

[4] Post, § 1135 et seq.

[5] Ante, § 495 et seq.

[6] Ante, § 489 et seq.

[7] Ante, § 530 et seq.

[8] The State v. Purse, 4 McCord, 472.

[9] Ante, § 533 et seq.

[10] Reg. v. Rice, Law Rep. 1 C. C. 21; Crim. Proced. II. § 106; ante, § 1087. And see post, § 1109, 1111.

[11] Ante, § 1085.

[12] The State v. Garity, 46 N. H. 61; Commonwealth v. Bulman, 118 Mass. 456

Disorder Outside. — It may be adequate, though not within the walls of the house, but around it outside.[1]

§ 1108. **Reputation or Fact.** — Nor is it essential that the house be reputed disorderly; it must be so in fact, and no more is required.[2]

§ 1109. **Injure Others than Inmates.** — Though the disturbance need not be perceptible to the eye or hearing from without,[3] yet a house so kept that only its inmates are liable to be disturbed by it, or corrupted in their morals, or the like,[4] is not in law a disorderly house.[5] It is subject in this to the same rules as other nuisances.[6] Therefore a verdict, "that the defendant kept a disorderly house, and disturbed his neighbors," is insufficient.[7] And the indictment must in some way show that the public was affected by the disorder.[8] But —

§ 1110. **Disorderly Inns, &c.** — An inn, or other house of like character, differs from a private one in this, — that, "as all have a right to go there and be entertained, they are not to be annoyed there by disorder. And if the innkeeper permits it, he is subject to be indicted for a nuisance."[9] So that such a place may be a disorderly house, though persons outside are not disturbed, corrupted in their morals, or otherwise injured. Moreover, —

§ 1111. **Open House.** — If the doors of a house are practically open to the public, alluring the young and the unwary into it, to indulge in or witness any thing corrupting to their virtue or sobriety or general good morals, the keeper cannot excuse himself by alleging that the public are not disturbed. To avail himself of such an excuse, he must see that the doors are shut to the outer world while the corrupting practices are carried on.[10]

§ 1112. **Lucre.** — The keeping, to constitute the offence, need not be for lucre.[11]

[1] The State v. Webb, 25 Iowa, 235.

[2] The State v. Foley, 45 N. H. 466. The State v. Maxwell, 33 Conn. 259; ante, § 1088.

[3] Ante, § 1107.

[4] Ante, § 1077.

[5] Hunter v. Commonwealth, 2 S. & R. 298; The State v. Mathews, 2 Dev. & Bat. 424. See United States v. Jourdine, 4 Cranch C. C. 338; ante, § 1106, 1107.

[6] Ante, § 1077.

[7] Hunter v. Commonwealth, supra.

[8] Mains v. The State, 42 Ind. 327.

[9] The State v. Mathews, 2 Dev. & Bat. 424. See United States v. Columbus, 5 Cranch C. C. 304.

[10] See ante, § 1106, 1107.

[11] The State v. Bailey, 1 Fost. N. H. 343; The State v. Williams, 1 Vroom, 102; ante, § 1086. See The State v. Bertheol, 6 Blackf. 474.

§ 1113. *Tippling Shops:* —

General Doctrine. — Aside from statutory inhibitions, it is not a crime to sell intoxicating liquor.[1] But if one keeps a house or shop, open to the public, and there sells such liquor to persons generally, who come together, and, stimulated by it, or otherwise, make disturbance, or commit acts of immorality, or in any manner violate public decency and decorum, his place is a disorderly house, for which he is indictable.[2] And though he has a license to make the sales, it will not protect him on this charge.[3]

§ 1114. **Extent and Nature of Disorder.** — What degree of disorder the seller of liquor must permit to render himself indictable, or what conduct is within this principle, the cases do not clearly show. But —

Lord's Day. — Conduct allowed on Sundays may make the place disorderly, while the same conduct on other days would not;[4] because the Sabbath is set apart for religious observances, for quiet, and for repose. And, —

Slaves formerly. — During slavery, it was particularly reprehensible to draw together in this way congregations of slaves.[5] So —

[1] Ante, § 505.

[2] The State *v.* Thornton, Busbee, 252; Bloomhuff *v.* The State, 8 Blackf. 205; Smith *v.* Commonwealth, 6 B. Monr. 21; Wilson *v.* Commonwealth, 12 B. Monr. 2; The State *v.* Mullikin, 8 Blackf. 260; The State *v.* Bertheol, 6 Blackf. 474; United States *v.* Coulter, 1 Cranch C. C. 203; United States *v.* Prout, 1 Cranch C. C. 203; United States *v.* Lindsay, 1 Cranch C. C. 245; United States *v.* Columbus, 5 Cranch C. C. 304; United States *v.* Bede, 5 Cranch C. C. 305, note; United States *v.* Benner, 5 Cranch C. C. 347; United States *v.* Elder, 4 Cranch C. C. 507; Stephens *v.* Watson, 1 Salk. 45; The State *v.* Burchinal, 4 Harring. Del. 572; ante, § 318. See the civil case of Walker *v.* Brewster, Law Rep. 5 Eq. 25. And see post § 1146, note.

[3] United States *v.* Elder, 4 Cranch C. C. 507, in which Cranch, C. J., observed: "If the defendant had the most favorable license which the law allows, it could not have justified him in suffering idle, disorderly, suspicious, and drunken persons to meet together in and frequent his house; nor to suffer inhabitants of this city, not being lodgers or boarders in his house, to remain there drinking and tippling, for his lucre and gain, at any time; and especially on Sundays." S. P. The State *v.* Mullikin, 8 Blackf. 260, the court saying: "The license to retail is not, in the eye of the law, a license to keep a nuisance." And in a Delaware case it was laid down, that, if one keeping a store and selling liquor, whether lawfully or unlawfully, permits persons to collect in his store or on the sidewalk, in crowds, and, under the influence of the liquor sold, to be noisy and riotous, and cursing and swearing, to the annoyance of the neighborhood, he is guilty of keeping a disorderly house. The State *v.* Buckley, 5 Harring. Del. 508.

[4] United States *v.* Columbus, 5 Cranch C. C. 304; United States *v.* Prout, 1 Cranch C. C. 203; United States *v.* Elder, 4 Cranch C. C. 507; Hall *v.* The State, 4 Harring. Del. 132, 145. And see The State *v.* Williams, 1 Vroom, 102.

[5] United States *v.* Prout, 1 Cranch C. C. 203; Smith *v.* Commonwealth, 6 B. Monr. 21; Wilson *v.* Commonwealth, 12 B. Monr. 2. See also The State *v.* Boyce, 10 Ire. 536.

[1] The State *v.* Bertheol, 6 Blackf. 474. It is perceived that this is an early Indiana case; at present, there are no common-law offences in this State. Ante, § 35.

[2] The State *v.* Mullikin, 8 Blackf. 260; Bloomhuff *v.* The State, 8 Blackf. 205.

[3] The State *v.* Thornton, Busbee, 252. And see a series of cases decided in the District of Columbia; namely, United States *v.* Prout, 1 Cranch C. C. 203; United State *v.* Coulter, 1 Cranch C. C. 203; United States *v.* Lindsay, 1 Cranch C. C. 245; United States *v.* Elder, 4 Cranch C. C. 507; United States *v.* Columbus, 5 Cranch C. C. 304; United States *v.* Bede, 5 Cranch C. C. 305, note; United States *v.* Benner, 5 Cranch C. C. 347.

[4] Ante, § 1077, 1078, and the sections there referred to, and the cases there cited; also, ante, § 1109–1111.

[5] And see post, § 1119–1121.

[6] Stat. Crimes, § 1064–1070.

[7] McLaughlin *v.* The State, 45 Ind. 338; Commonwealth *v.* Howe, 13 Gray, 26; The State *v.* Paul, 5 R. I. 185; The State *v.* Keeran, 5 R. I. 497.

[8] And see Commonwealth *v.* Gallagher, 1 Allen, 592; Wallace *v.* The State, 5 Ind. 555; Robinson *v.* Commonwealth, 6 Dana, 287; The State *v.* Hopkins, 5 R. I. 58; The State *v.* Knott, 5 R. I 293.

§ 1115. **Dissolute Persons.** — A liquor-shop, around and within which dissolute persons are permitted, at night and in the day, to be drinking, tippling, carousing, swearing, hallooing, and the like, has been held to be, in a town, an indictable disorderly house at the common law.[1] And it is the same, though the proprietor of the shop has a license to sell the liquor.[2] Likewise, —

Outside Disturbances. — The keeper of a liquor shop who allows the promiscuous assembling about it of persons disturbing the quiet by loud noises, quarrelling, and swearing, as a consequence which he might know would probably follow his acts, is indictable.[3]

§ 1116. **Place Populous — On Highway — Other Circumstances.** — It is also to be considered whether many or few people reside near, whether the house is on or off a highway, and the like.[4] In fact, the legal result may depend upon complications of circumstances, such as cannot be analyzed in advance, while yet the skilful practitioner will have no difficulty in dealing with them.[5]

§ 1117. **Statutes.** — There are statutory tippling-shops, discussed in another connection.[6] Nor is the legislature prohibited by the constitutions of our States to make it an indictable nuisance to keep a shop for the selling of intoxicating drinks contrary to law.[7] But to discuss the statutes here would be a repeating of what is said elsewhere.[8]

§ 1118. *Disorderly Inns:* —

In General. — A common form of disorderly house is a disorderly

inn.[1] Said a learned judge: "The keeper of an inn, tavern, or house of entertainment, who conducts himself in such a manner — either in the entertainment of travellers or other persons, or in permitting improper assemblages in or about his house on Sunday — as profanes the Lord's day, or violates public order and decorum, or shocks the religious sense or feelings of the neighborhood, is guilty of a nuisance at common law; and may be indicted, fined, imprisoned, and his house suppressed; according to the aggravated nature or enormity of his offence."[2] A peculiarity relating to disorderly houses of this class is noticed in a preceding section.[3]

§ 1119. *House in which Offences are committed:* —

Doctrine Stated. — A doctrine, first developed, it appears, in the Kentucky court, is the following. Whenever a house becomes a common place for the commission of petty offences, such as those punishable by fine, this renders it disorderly, however well it may be otherwise conducted. The original case was an indictment against the keeper of an establishment wherein liquor was habitually sold to slaves, the particular sales being forbidden by law. "The habitual perpetration," said Ewing, C. J., "of the prohibited offences, in a house kept for the purpose, constitutes the house a public nuisance, as it tends in a greater degree to the spread of the evil which was intended to be prohibited by these enactments. There is a specific penalty for fornication and adultery; yet it is an offence, and a much higher grade of offence, to keep a bawdy-house, or a house where those practices are indulged. And, though the single offence may be punished by a specific fine, the keeping of a house where those offences are habitually encouraged and indulged, is an offence of a much higher grade, and is punishable, as such, by an indictment at common law."[4]

§ 1120. **The Principle.** — This doctrine, apparently new, is truly as old as the law itself. If one draws together persons to commit petty offences with him, and renders his house the place of the common commission of them by congregated numbers, surely

[1] Ante, § 504, 505. As to what is an inn, see Stat. Crimes, § 297. As to an innkeeper's refusing to entertain travellers, see ante, § 532.

[2] Booth, C. J., in Hall v. The State, 4 Harring. Del. 132, 145. And see The State v. Mathews, 2 Dev. & Bat. 424; Bloomhuff v. The State, 8 Blackf. 205.

[3] Ante, § 1110.

[4] Smith v. Commonwealth, 6 B. Monr. 21, 23; Wilson v. Commonwealth, 12 B. Monr. 2.

this is to make a "disorderly" use of it, and it becomes a "disorderly house." Such a house disturbs the neighborhood, corrupts the morals of the young, obstructs governmental order, and in other respects is an evil of the same sort with the more familiar forms of disorderly house. And whether the people assemble in a mass, or come one after another, only a single one or two presenting themselves at a time, the effect is the same, the offender's guilt is the same. On this principle proceed many determinations in our books.[1] And —

Judicially Affirmed. — This doctrine, with this application of it, has been expressly affirmed in New Jersey.[2] But, —

§ 1121. **The Individual Acts.** — To bring a case within this principle, the acts done in the house must be either indictable, or, in some sense, unlawful. Therefore, —

Delivery of Pregnant Women. — In England, an indictment was quashed which alleged, that the defendant converted a house into a hospital for taking in and delivering lewd, idle, and disorderly unmarried women, "who, after their delivery, went away, and deserted their children, whereby the children became chargeable to the parish." "By what law," asked Lord Mansfield, "is it criminal to deliver a woman when she is with child?"[3]

[1] And see particularly Vol. II. § 965.

[2] The State v. Williams, 1 Vroom, 102, 110; Meyer v. The State, 13 Vroom, 145, 12 Vroom, 6.

[3] Rex v. McDonald, 3 Bur. 1645.

CHAPTER LXIX.

EAVESDROPPING.[1]

§ 1122. **At Common Law.** — Eavesdropping is indictable at the common law, not only in England but in our States.[2] It is seldom brought to the attention of the courts, and our books contain too few decisions upon it to enable an author to define it with confidence. But with, at least, proximate accuracy, —

How defined. — It may be said to be the common nuisance of hanging about the dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood.

More fully described. — Our books contain nothing on this subject more full than Blackstone's short exposition; namely, that "eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and punishable at the court leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior."[3] And it has been said in one of our courts, that the offence consists, not in peeping or looking, which is not indictable, but in hearking.[4]

§ 1123. **Listening about Grand Jury Room.** — The Tennessee court has held, that one who secretly and stealthily comes near the room of the grand jury, while in the performance of their duties, to overhear what they say and do, commits thereby this offence of eavesdropping.[5]

§ 1124. **Conclusion.** — It is impossible to discuss this offence further, with special profit; because we have not the necessary decisions. It never occupied much space in the law, and it has nearly faded from the legal horizon.

[1] For the pleading, practice, and evidence, see Crim. Proced. II. § 312, 313.

[2] Ante, § 540; The State *v.* Williams, 2 Tenn. 108.

[3] 4 Bl. Com. 168; 1 Hawk. P. C. Curw. ed. p. 695; 1 Russ. Crimes, 3d Eng. ed. 327; 1 Gab. Crim. Law, 319. And see ante, § 544–549.

[4] Commonwealth *v.* Lovett, 4 Pa. Law Jour. Rep. 5, 6.

[5] The State *v.* Pennington, 3 Head, 299.

CHAPTER LXX.

EXPOSURE OF PERSON.[1]

§ 1125. **How defined.** — Exposure of the person is any such intentional exhibition, in a public place, of the naked human body, as is calculated to shock the feelings of chastity in those who witness it, or to corrupt their morals.

Viewed as Public Show. — As judicially observed: "Every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law."[2] Of which sort is exposure of the person.[3]

§ 1126. **Distinguished from other Nuisances.** — This nuisance differs from others in the particular, that, while others are of a nature to create a permanent inconvenience, or other permanent general injury, in the place where they are established, this one is of temporary operation, coming and going at once. Therefore, —

Must be seen. — Though other nuisances — for example, an obstruction in a highway — need not be seen to be indictable, this one must be. The authorities are not quite distinct or harmonious as to the extent to which it must be witnessed, or how liable to meet the public eye. They are as follows: —

§ 1127. **Continued.** — The Irish Court of Criminal Appeal has held it not to be indictable for a man to expose his person to one woman, though in a public way, unless there were other persons in a situation to see him; but the latter circumstance would complete the offence, even though they did not in fact witness what

[1] For matter relating to this title, see ante, § 244, 500. For the pleading, practice, and evidence, see Crim. Proced. II. § 351 et seq.

[2] Knowles *v.* The State, 3 Day, 103, 108.

[3] In The State *v.* Rose, 32 Misso. 560, 561, Bay, J., observed: "The indictment in this case does not allege, in the words of the statute, that the act of public indecency was open and notorious, and is therefore not good under the statute; but the offence charged is indictable at common law, for whatever outrages decency and is injurious to the public morals is a misdemeanor at common law, and punishable as such."

was done.[1] Yet, in an English case, where a man and woman openly committed fornication together, on a common beside a public way, and one passer-by saw them, and others could have seen, but there was no evidence whether or not there were others in situations to see, the court was divided on the question whether the offence was complete, and no judgment was given.[2] Where the proof is simply, that the exhibition was privately made to one person, there is, the authorities concur, no offence.[3] The case of an exposure in the presence of multitudes of people, yet no one seeing it, could not arise; because there would be no witnesses to bring the facts before a court. In North Carolina, an indictment was held to be sufficient which simply alleged, that the defendant exposed his person in "public view in a public place;" the court observing: "It is not necessary to the constitution of the criminal act, that the disgusting exhibition should have been actually seen by the public; it is enough if the circumstances under which it was obtruded were such as to render it probable that it would be publicly seen; thereby endangering a shock to modest feeling, and manifesting a contempt for the laws of decency."[4] Still this case could not have arisen if the fact had not been seen. Moreover, —

§ 1128. **Public Place.** — A strictly private exhibition is not indictable; it must be, certainly according to the English doctrine, in a public place.[5] What is a "public place" under our statutes against gaming, we saw in "Statutory Crimes."[6] In the offence now under consideration, the English courts have held that a public omnibus is such a place, an exposure in which is indictable.[7] So may be a urinal, on a public foot-path, exposed to sight from the windows of dwelling-houses fourteen and a half feet away.[8] And where a man exposed himself from the roof of

[1] Reg. v. Farrell, 9 Cox C. C. 446. And see ante, § 244.

[2] Reg. v. Elliot, Leigh & C. 103.

[3] See, among other cases, Reg. v. Webb, 1 Den. C. C. 338, 2 Car. & K. 933, Temp. & M. 23, 13 Jur. 42, 18 Law J. N. S. M. C. 89; Reg. v. Watson, 20 Eng. L. & Eq. 599, 2 Cox C. C. 376.

[4] The State v. Roper, 1 Dev. & Bat. 208, opinion by Gaston, J. See also The State v. Millard, 18 Vt. 574.

[5] Reg. v. Orchard, 3 Cox C. C. 248, 20 Eng. L. & Eq. 598; Reg. v. Holmes, Dears. 207, 3 Car. & K. 360, 20 Eng. L. & Eq. 597, 22 Law J. N. S. M. C. 122, 17 Jur. 562; Reg. v. Thallman, Leigh & C. 326.

[6] Stat. Crimes, § 298, 878.

[7] Reg. v. Holmes, supra.

[8] Reg. v. Harris, Law Rep. 1 C. C. 282. Said Bovill, C. J., in an opinion in which the other judges concurred: "If the judge was bound to tell the jury that a urinal could not be such a place, of course the conviction was wrong and must be set aside, but not otherwise. Now, it appears that the urinal was open to the public; that it was in Hyde Park, upon a public foot-path; and that the entrance to it was from that foot-path. I think it was just as much a public place, with respect to that portion of the public who use it, as a public highway. Every place must be more or less screened from view on some side, and the size of an enclosure does not necessarily affect the question whether it is a public place or not. We are only bound to decide whether this could be a public place. But I think it clearly was so; and just the sort of public place to which the law ought to be applied." p. 283. In Reg. v. Orchard, supra, before the Central Criminal Court, a urinal situated in an open market, with boxes or divisions for the convenience of the public, was deemed not to be a public place, at which this offence could be committed; but this ruling seemed not to meet with favor in Reg. v. Harris, before the Court of Criminal Appeal.

a house, so situated that he could be seen and was seen by persons at the back windows of several other houses, yet he was not visible from the street, the place was held to be public within the import of this branch of the law, and the conviction was sustained.[1]

§ 1129. **Continued.** — In New York, where six women made an indecent exposure of their persons for hire, in the presence of five men, in a room in a house of prostitution, the doors, windows, and shutters being closed, the place was held to be public, subjecting the women to punishment for the exposure.[2] But, —

Continued — (To how Many). — There are American cases in which it appears not to have been deemed always necessary that the place should be public, or that the exposure should be to more than one. In Vermont, a statute provided a punishment "if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior;" and thereupon an indecent exposure, by a man, of his person to a woman whom he solicited to acts of sexual intercourse, persisting in the solicitation in spite of her denial and remonstrance, was held to be within the statute. The learned judge who delivered the opinion said: "I am not prepared to say, that the conduct of the respondent would not have been indictable at common law, notwithstanding the intimation to the contrary in the case of Fowler v. The State.[3] There is a precedent of an indictment against one Bennett, in 2 Chitty, 41, on which he was convicted,

[1] Reg. v. Thallman, supra. The reporter observes: "This case somewhat resembles Rex v. Crunden, 2 Camp. 89, in which it was held that it is an indictable offence for a man to undress himself on the beach, and to bathe in the sea, near inhabited houses, from which he may be distinctly seen." p. 329, note. Of a like sort with Rex v. Crunden, is Reg. v. Reed, 12 Cox C. C. 1, 2 Eng. Rep. 157. And see post, § 1131.

[2] People v. Bixby, 4 Hun, 636.

[3] Fowler v. The State, 5 Day, 81.

which would have been sustained by the same evidence produced against this respondent. Of the soundness of the decision in Commonwealth *v.* Catlin,[1] we have nothing to say, — and only remark, that, in that case, the lewdness was designed to be private, and it was rather accidental that the offenders were discovered; and, in this particular, the case is essentially different from the one before us."[2] And in Pennsylvania it was decided, that the exhibition of an obscene print need not be public to be indictable; for "an offence may be punishable, if, in its nature and by its example, it tends to the corruption of morals, although it be not committed in public."[3]

§ 1130. **How in Principle.** — In principle, the offence being a nuisance, punishable because injurious to the public, the place should, as a general rule, be public, or the act will be only a private nuisance. Yet a place not permanently public may be so for the occasion.[4] No reasons are apparent rendering it universally necessary that the exhibition should be seen; provided it was publicly made, in the presence of people who could see it, and was meant for their observation. Still the intent to have it seen could not, as before observed, be shown where no person was present to see. And one might innocently do, in a very public place, having ascertained to his satisfaction that no persons were actually present, what he would never do in any place before the eyes of a crowd. When a man puts into the public way or other public place some nuisance without intelligence, and leaves it there, the evil intent springs up in proof out of the fact itself; not so, in respect of the misdemeanor now under discussion.

§ 1131. **Custom of Exposure.** — We have seen,[5] that the right to carry on a public nuisance cannot be prescribed for, or established by usage. If the place has always been used for bathing, yet it is upon a public footway frequented by females, men cannot innocently make there the exposure of their nude bodies necessary for the bath, unprotected by screen or covering.[6] And, where one was indicted for an exposure by bathing in the sea,

[1] Commonwealth *v.* Catlin, 1 Mass. 8.
[2] The State *v.* Millard, 18 Vt. 574, opinion by Williams, C. J.
[3] Commonwealth *v.* Sharpless, 2 S. & R. 91.
[4] Stat. Crimes, § 298.
[5] Ante, § 1078 *a*.
[6] Reg. *v.* Reed, 12 Cox C. C. 1, 2 Eng. Rep. 157.

observable from windows of dwelling-houses, he was not permitted the defence, that, before the houses were built, it was a bathing-place for whole regiments of soldiers. "Whatever place," said McDonald, C. B., "becomes the habitation of civilized man, there the laws of decency must be enforced."[1]

§ 1132. **How Much and what Part Exposed.** — How large a part, and what part, other than the privates of the person, must be exposed to constitute the offence, the cases do not disclose. Ordinarily the exposure is merely of the private member, and this is sufficient. The same follows, where the exposure is of the entire naked body.[2] In an old case, an indictment, says the report, "for running in the common way, naked down to the waist, the defendant being a woman," was quashed; the recorded observation of the court being, that "nothing appears immodest or unlawful."[3] But we should hesitate to say, that a common woman could go thus through a principal street in one of our cities, without subjecting herself to this prosecution.[4]

§ 1133. **Intent.** — The exposure must plainly be other than accidental, as already observed;[5] and a New York case holds, that the evil purpose must be alleged in the indictment, and proved as a fact to the jury.[6]

§ 1134. **"Public Indecency."** — A statute in Indiana having made indictable "notorious lewdness or other public indecency," it was observed: "The term *public indecency* has no fixed legal meaning, is vague and indefinite, and cannot in itself imply a definite offence. And hence, the courts, by a kind of judicial

[1] Rex *v.* Crunden, 2 Camp. 89, 1 Russ. Crimes, 3d Eng. ed. 326; s. c. nom. Rex *v.* Cranden, 1 Gab. Crim. Law, 744, 745.
[2] Rex *v.* Sedley, 17 Howell St. Tr. 155, note; s. c. nom. Rex *v.* Sidley, 1 Sid 168; s. c. nom. Sydlyes Case, 1 Keb. 620 Rex *v.* Crunden, 2 Camp. 89.
Rex *v.* Gallard, W. Kel. 168.
[3] So it seems that, according to the old books, a *man* is not punishable for passing through a thronged public way, stripped merely to the waist. Rex *v.* Tallard, 2 Barn. 328, 345. The counsel for the defendant argued in this case, "that a man's being stripped from the middle upwards could be no indecent sight. If it was so, the legislature would not have ordered that men shall be whipped in that manner, as they have done by several acts of Parliament. The court was of the same opinion," and quashed the indictment. s. c. nom. Rex *v.* Gallard, 1 Sess. Cas. 281. I apprehend, that, at the present day, a court should apply, not the outward shell of the old rule to subvert the modern manners, but its inner substance for sustaining and perfecting the new. Such, in many instances, is the proper use to be made of cases from the old books, decided when modes and fashions of life now antiquated prevailed.
[4] Ante, § 1126, 1130.
[5] Miller *v.* People, 5 Barb. 203.

legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person; the publication, sale, or exhibition of obscene books and prints; or the exhibition of a monster, — acts which have a direct bearing on public morals, and affect the body of society."[1]

[1] McJunkins v. The State, 10 Ind. 140, 145; opinion by Hanna, J.

CHAPTER LXXI.

GAMING-HOUSE.[1]

§ 1135. Indictable and why. — Simple gaming, and no more, is not generally, at the common law, indictable; though, in most of our States, it is, in some circumstances, by statutes.[2] But, even at the common law, a common gaming-house may be a public nuisance, and the keeper punishable, it being deemed a disorderly house.[3] And the reason is, that persons attracted to it, especially youths, are there lured to vice.[4]

[1] For matter relating to this title, see ante, § 504, 974, 975. For the pleading, practice, and evidence, see Crim. Proced. II. § 487 et seq.

[2] Stat. Crimes, § 846 et seq.

[3] Ante, § 504; Bloomhuff v. The State, 8 Blackf. 205; The State v. Haines, 30 Maine, 65; United States v. Dixon, 4 Cranch C. C. 107; The State v. Doon, R. M. Charl. 1; Barada v. The State, 13 Misso. 94; Vanderworker v. The State, 8 Eng. 700; Rex v. Medlor, 2 Show. 36; The State v. Savannah, T. U. P. Charl. 235; Rex v. Dixon, 10 Mod. 335, 336; People v. Jackson, 3 Denio, 101; West v. Commonwealth, 3 J. J. Mar. 641; People v. Sergeant, 8 Cow. 139; Commonwealth v. Tilton, 8 Met. 232, 235; People v. Raynes, 3 Cal. 366. The same has been held, on great consideration, in Scotland. Greenhuff's Case, 2 Swinton, 236.

[4] 1 Hawk. P. C. Curw. ed. p. 693, § 6; Vanderworker v. The State, 8 Eng. 700; The State v. Doon, R. M. Charl. 1; United States v. Dixon, 4 Cranch C. C. 107; Commonwealth v. Stahl, 7 Allen, 304; Lord v. The State, 16 N. H. 325. In an old case, we read: "It is a public nuisance, not for the unlawfulness of the thing itself, but for keeping houses to decoy idle persons and apprentices, and consequently it becomes a means of debauching the youth of the nation; it must be done for lucre's sake [no, post, § 1137]; it must be done often, and not once only." Rex v. Medlor, 2 Show. 36. "It draws together evil disposed persons; encourages excessive gaming, idleness, cheating, and other corrupt practices; and tends to public disorder." Bronson, C. J., in People v. Jackson, 3 Denio, 101. "The hurt or injury to the community, which has occasioned bowling-alleys kept for gain and common use to be regarded as common nuisances, arises from their tendency to withdraw the young and inconsiderate from any useful employment of their time, and to subject them to various temptations; from their affording to the idle and dissolute encouragement to continue in their destructive courses. Clerks, apprentices, and others are induced, not only to appropriate to them hours which should be employed to increase their knowledge and reform their hearts, but too often to violate higher moral duties to obtain means to pay for the indulgence. Other bad habits are in such places often introduced or confirmed. The moral sense, the correct principles, the temperate, regular, and industrious habits, which are the basis of a prosperous and happy community, are

§ 1136. **Quiet Billiard-room and Bowling-alley.** — In a New York case it seems to have been laid down, that keeping a billiard-room, without noise disturbing the neighborhood, does not come within this description of offence.[1] But the reader need only consult the authorities cited to the last section to see, that this is not the general doctrine; for youth may be as effectually lured to vice by a noiseless process as by any other. A bowling-alley is as harmless as a billiard-table; yet the doctrine appears to be, that even a common bowling-alley is a nuisance indictable.[2]

§ 1137. **How Public.** — To constitute a common gaming-house, not all persons need have access to it; if it is open to people generally, that is sufficient.[3]

Lucre. — The language of some of the cases implies, that the house must be kept for lucre;[4] but we have seen,[5] that, by the better doctrine, the motive of lucre is not a necessary ingredient in this class of offences. And —

Ownership. — It is immaterial whether the keeper of the house is the owner of the building or not.[6]

frequently impaired or destroyed. Bowling-alleys, without doubt, may be resorted to by many persons without such injurious results. The inquiry is, not what may be done at such places without injury to persons of fixed habits and principles, but what has been, in the experience of man, their general tendency and result. The law notices the usual effect, the ordinary result of a pursuit or course of conduct, and by that decides upon its character." Shepley, C. J., in The State *v.* Haines, 30 Maine, 66. "Such a house is an encouragement to idleness, cheating, and other corrupt practices; tends to produce public disorder by congregating many people; and to draw the young and unwary from the paths of virtue. A disorderly house is a nuisance, if the persons there assembled annoy the neighborhood by loud noises, cursing, or swearing; a gaming-house is also a nuisance, if it hold out inducements and attractions to bring together persons in such numbers, or so often, as to make it injurious to the public, and dangerous to the neighborhood, by drawing the sober and industrious into habits of idleness and vice, and corrupting the young and unwary." Harrington, J., in The State *v.* Layman, 5 Harring. Del. 510.

[1] People *v.* Sergeant, 8 Cow. 139. But see the State *v.* Layman, 5 Harring. Del. 510.

[2] The State *v.* Haines, 30 Maine, 65. But there seems to have been a statute on the subject. The State *v.* Currier, 23 Maine, 43. In New Jersey, a ten-pin alley, kept for gain in a populous village, and open to public use, is not deemed *per se* a disorderly house, or public nuisance. Nor does the fact of its being kept in connection with a lager-beer saloon make it such. The State *v.* Hall, 3 Vroom, 158. And see, as to billiards, 3 Chit. Crim. Law, 677.

[3] Rice *v.* The State, 10 Texas, 545; Lockhart *v.* The State, 10 Texas, 275.

[4] Rex *v.* Medlor, 2 Show. 36; ante, § 1135, note; The State *v.* Layman, 5 Harring. Del. 510. See The State *v.* Leighton, 3 Fost. N. H. 167; Bloomhuff *v.* The State, 8 Blackf. 205; The State *v.* Haines, 30 Maine, 65; Commonwealth *v.* Tilton, 8 Met. 232, 235.

[5] Ante, § 1086, 1112.

[6] The State *v.* Haines, 30 Maine, 65. See The State *v.* Currier, 23 Maine, 43.

Extent of Gaming. — What extent of gaming is requisite depends perhaps on familiar principles, but they are not much illustrated by decisions.[1]

Misdemeanor. — This offence is misdemeanor.[2]

[1] According to an Indiana case, the jury are to determine whether the fact of the defendant's permitting, in a single instance, a game of roulette in his house, is sufficient evidence that he kept a gaming-house. Said the court: "The question before the jury was, whether the defendant occupied the room for gambling. That was purely a question of fact. If the defendant did so occupy his room, then the law said he should be fined." Armstrong *v.* The State, 4 Blackf. 247.

[2] Ante, § 1079; The State *v.* Crummey, 17 Minn. 72; People *v.* Raynes, 8 Cal. 366; Buford *v.* Commonwealth, 14 B. Monr. 24.

CHAPTER LXXII.

OFFENSIVE TRADES.[1]

§ 1138. **Indictable and Why.** — The carrying on of offensive trades, in populous places, is indictable as injuring the public health,[2] also as a disturbance to the public convenience.[3] Both of these grounds need not exist together; but, —

Noise — Smell — Health. — If the senses, for instance, are offended by the smell,[4] or by the noise,[5] this is sufficient. There is no need the offensiveness should produce disease.[6]

How many injured. — How many persons must be put to inconvenience, or be injured, to render the nuisance indictable, is a question already discussed.[7]

§ 1139. **Useful Trades and Pleasant Homes.** — The community is as much benefited by its members carrying on useful trades, as by their having pleasant homes. And from this proposition comes another, generally but not universally accepted; namely, that, —

Business established before Houses. — Whenever a man has established himself, remote from habitations, in a business which is lawful, and is useful to the community, those who afterward settle near him are not entitled to complain of its offensiveness, and he is not indictable for continuing it.[8] Even if, after the

[1] For the pleading, practice, and evidence, see Crim. Proced. II. § 875–877.

[2] Ante, § 489 et seq.

[3] Ante, § 530 et seq.

[4] Rex *v.* Neil, 2 Car. & P. 485; Rex *v.* White, 1 Bur. 333; Rex *v.* Pierce, 2 Show. 327; Commonwealth *v.* Brown, 13 Met. 365; The State *v.* Wetherall, 5 Harring. Del. 487. And see Aldred's Case, 9 Co. 57 *b*; People *v.* Cunningham, 1 Denio, 524; Rex *v.* Davey, 5 Esp. 217.

[5] Anonymous, stated 2 Show. 327. See The State *v.* Riggs, 22 Vt. 321; Commonwealth *v.* Smith, 6 Cush. 80; Rex *v.* Smith, 1 Stra. 704; Commonwealth *v.* Harris, 101 Mass. 29; The State *v.* Russell, 1 Houst. Crim. 122; Sturges *v.* Bridgman, 11 Ch. D. 852; ante, § 531, 537.

[6] Ashbrook *v.* Commonwealth, 1 Bush, 139. **Livery Stable.** — In a Texas civil case, it was laid down that a livery stable in a town is not necessarily a nuisance; but it may be so located, constructed, or kept, as to be such. And Wheeler, J., said: "What constitutes a nuisance is well defined. The word means, literally, annoyance; in law, it signifies, according to Blackstone, 'any thing that worketh hurt, inconvenience, or damage.'" Burditt *v.* Swenson, 17 Texas, 489, 502.

[7] Ante, § 243–245, 1077, 1078.

[8] Ellis *v.* The State, 7 Blackf. 534; Rex *v.* Cross, 2 Car. & P. 483. **Gunpowder.** — Where one was indicted for the nuisance of keeping several barrels of gunpowder in a house in a village, sometimes for two days, sometimes a week, till they could be conveniently sent to London, "Holt, C. J., resolved: First, that, to support this indictment, there must be apparent danger, or mischief already done. Secondly, though it had been done for fifty or sixty years, yet, if it be a nuisance, time will not make it lawful. Thirdly, if, at the time of setting up this house in which the powder was kept, there had been no houses near enough to be prejudiced by it, but some were built since, it would be at the peril of the builder. Fourthly, though gunpowder be a necessary thing, and for defence of the kingdom, yet, if it be kept in such a place as it is dangerous to the inhabitants or passengers, it will be a nuisance." Anonymous, 12 Mod. 342.

coming of inhabitants, he makes in the form of it slight changes, so as to vary a little its noxious character but not increase it in degree, he may still, it seems, rely on his prior occupancy of the place. And his acquired rights will pass to his successors.[1] According to an English *nisi prius* ruling, a man may set up a new manufactory in the neighborhood of old ones, if the new, though noxious, does not materially enhance the discomfort of persons dwelling near.[2] Where it increases the mischief, the result is otherwise.[3] But without a prior occupancy, the right to carry on an offensive trade cannot be acquired by prescription,[4] — a proposition a little weakened by some English cases.[5] And —

§ 1140. **Limited to Useful Trades.** — This doctrine is limited to useful trades; for, as we have seen,[6] it is, in general, no excuse for one who commits a nuisance to-day that he did the same thing yesterday. Even, as we have also seen,[7] nude bathing in the sea, after inhabitants come to the place, is not justified by a custom of bathing there before. The distinction rests on the difference between a necessary trade and a mere innocent recreation. And it suggests another; namely, between such trade and an immoral business, — the latter clearly not being protected by any prior occupancy of the ground. But, —

§ 1141. **Business before Houses, continued.** — In some American cases, it is even denied that a man may carry on any trade, however useful, and however long established, after the coming of inhabitants to the locality, if it is such as would otherwise be an

[1] I do not see any case exactly covering the points in the last two sentences; but they are within the doctrine of the cases cited in the next two notes.

[2] Rex *v.* Neville, Peake, 91.

[3] Rex *v.* Watts, Moody & M. 281.

[4] People *v.* Cunningham, 1 Denio, 524; Wright *v.* Moore, 38 Ala. 593. See Ashbrook *v.* Commonwealth, 1 Bush, 139.

[5] Rex *v.* Watts, Moody & M. 281; Rex *v.* Neville, Peake, 91, 93.

[6] Ante, § 1078 *a*.

[7] Ante, § 1131.

indictable nuisance. Thus, in Massachusetts, one was held to be rightly convicted of the nuisance of a slaughter-house, originally erected remote from the public way and from habitations; but afterward inhabitants settled in the place, and a public highway was laid out by the slaughter-house. It is submitted, that, on principle, the coming of inhabitants would not alone have justified the declaring of the slaughter-house a nuisance. The reason is, that men must eat, as well as breathe and exercise the sense of smell; and, after one has made lawful and proper arrangements to supply his fellow-beings with food, others cannot justly say to him, "We will set ourselves down by your side, and you shall no more carry on your business of supplying our wants." Yet clearly, proceeding to another point in the case, the legislature has authority so to control public industry as to prevent any one man's interfering with the industry of others, or with their comfort.[1] And if the legislature, or a subordinate power acting under legislative authority, causes a highway to be laid out, the result implies a legislative direction for the removal of all nuisances along the way. The judge, delivering the opinion of the court in this case, held the following language: "The public health, the welfare, and safety of the community, are matters of paramount importance, to which all the pursuits, occupations, and employments of individuals, inconsistent with their preservation, must yield. It is therefore immaterial, so far as the government is concerned in the administration of the law for the general welfare, how long a noxious practice may have prevailed, or illegal acts been persisted in. [This is true; but the doctrine which permits the continuance of the business, correctly viewed, does not rest on the idea of a prescription, or on any supposed right of a man to do for the one hundredth or one millionth time an illegal act, because permitted to go unpunished before.] Easements may be created in lands, and the rights of individuals may be wholly changed by adverse use and enjoyment, if it is sufficiently protracted; but lapse of time does not equally affect the rights of the State."[2] In harmony with this doctrine, it is held in Kentucky, that the carrying on of an offensive business for more than thirty years, in a place remote from dwellings and public roads,

[1] And see post, § 1144.

[2] Commonwealth v. Upton, 6 Gray, 473, 476, opinion by Merrick, J. See also Brady v. Weeks, 8 Barb. 157; Howell v. McCoy, 3 Rawle, 256.

does not authorize the owner to continue it after houses have been built and roads laid out in the vicinity, if it is then found to be a nuisance to those dwelling in the neighborhood and to passers-by.[1] And there are some other American cases to the like effect.[2]

§ 1142. **What Trades are Nuisances.** We sometimes read in the books, that such a trade is, or is not, a nuisance *per se*.[3] Now, in reason, no useful trade can be a nuisance *per se*; because every such trade must be carried on somewhere, and it is a nuisance or not according to the manner in which it is conducted, and its proximity to habitations and public ways. And no one can foretell what means may yet be found to conduct a business now offensive in a manner not to be so. But let us look at some views supplied by the books. Thus, —

Brewer — Chandler. — Hawkins says: "It hath been holden, that it is no common nuisance to make candles in a town,[4] because the needfulness of them shall dispense with the noisomeness of the smell. But the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in a town: and surely the trade of a brewer is as necessary as that of a chandler; and yet it seems to be agreed, that a brew-house, erected in such an inconvenient place wherein the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance; and so, in the like case, may a glass-house, or swine-yard."[5]

§ 1143. **Other Specific Nuisances.** — Among other nuisances, or things which may be such, are a lime-kiln,[6] a manufactory of acid

[1] Ashbrook v. Commonwealth, 1 Bush, 139.

[2] Taylor v. People, 6 Parker C. C. 347; Commonwealth v. Van Sickle, Brightly, 69; Philadelphia's Appeal, 28 Smith, Pa. 33; Douglass v. The State, 4 Wis. 387; Pettis v. Johnson, 56 Ind. 139.

[3] As, see, Huckenstine's Appeal, 20 Smith, Pa. 102; The State v. Trenton, 7 Vroom, 283; Wier's Appeal, 24 Smith, Pa. 230; Commonwealth v. Van Sickle, Brightly, 69; Fairbanks v. Kerr, 20 Smith, Pa. 86; Waupun v. Moore, 34 Wis. 450.

[4] S. P. Allen v. The State, 34 Texas, 230.

[5] 1 Hawk. P. C. Curw. ed. p. 694, § 10. In a civil case it was held, that the erection of a tallow furnace, by a chandler, to the annoyance of an innkeeper and his guests, is a nuisance for which an action will lie. "And so," added the court, "in Taohyles's Case, who erected a tallow furnace across the street of Denmark-house in the Strand, it was found a nuisance upon the indictment, and adjudged to be removed." Morley v. Pragnell, Cro. Car. 510.

[6] Aldred's Case, 9 Co. 57 *b*.

spirit of sulphur,[1] a soap-boiling establishment,[2] one for the rendering of petroleum,[3] a livery stable,[4] a pig-sty,[5] a slaughter-house,[6] a tannery,[7] brick-burning,[8] and keeping a dairy.[9] Yet the criterion is not, what business is carried on; but what is its effect, as creating a nuisance or otherwise.

§ 1144. **Legislation.** — It is competent, as already intimated, for a legislative act to regulate, directly or indirectly, whatever pertains to indictable nuisances.[10] For example, it may prohibit the use of any building, in a town of a specified population, as a slaughter-house, without permission from the town officers.[11] And where it has authorized a citizen to establish a dam of a specified height, at a place named, he is not liable to an indictment for any nuisance thereby created.[12] So works of internal improvement, erected under legislative act by the State, do not become public nuisances in law, whatever may be their character or consequences in fact; nor is it otherwise though they are transferred to a private corporation, obligated to keep the works up for the purposes of their creation.[13] For the State cannot complain of what it authorizes by its statute.[14]

[1] Rex *v.* White, 1 Bur. 333.

[2] Rex *v.* Pierce, 2 Show. 327. As to a blacksmith's shop in a village, see Ray *v.* Lynes, 10 Ala. 63.

[3] Commonwealth *v.* Kidder, 107 Mass. 188.

[4] Ante, § 1138, note.

[5] Commonwealth *v.* Van Sickle, Brightly, 69.

[6] Ante, § 1141; post, § 1144; Phillips *v.* The State, 7 Baxter, 151.

[7] The State *v.* Trenton, 7 Vroom, 283.

[8] Huckenstine's Appeal, 20 Smith, Pa. 102.

[9] The State *v.* Boll, 59 Misso. 321.

[10] Ante, § 1141; Stat. Crimes, § 1059 et seq.; McLaughlin *v.* The State, 45 Ind. 338; Mobile, &c. Railroad *v.* The State, 51 Missis. 137; Lake View *v.* Rose Hill Cemetery, 70 Ill. 191; The State *v.* Fisher, 52 Misso. 174; Blydenburgh *v.* Miles, 39 Conn. 484; Commonwealth *v.* Kidder, 107 Mass. 388; Ex parte Ah Fook, 49 Cal. 402; The State *v.* Williams, 11 S. C. 288; Sugar Refining Co. *v.* Jersey City, 11 C. E. Green, 247; Davis *v.* The State, 2 Texas Ap. 425.

[11] Watertown *v.* Mayo, 109 Mass. 315. And see Taylor *v.* The State, 35 Wis. 298.

[12] Stoughton *v.* The State, 5 Wis. 291; one judge dissenting, on the ground that the statute should not be construed to authorize the nuisance, but merely the erection of the dam as far as possible without becoming such.

[13] Commonwealth *v.* Reed, 10 Casey, Pa. 275. See Delaware Division Canal *v.* Commonwealth, 10 Smith, Pa. 367.

[14] People *v.* Detroit, &c. Plank Road, 37 Mich. 195; The State *v.* Davenport, &c. Railway, 47 Iowa, 507.

CHAPTER LXXIII.

PUBLIC SHOWS.[1]

§ 1145. **What, and Indictable.** — It already sufficiently appears, that any public exhibition tending to corrupt the morals, or to disturb the peace, or to create any breach of the good order of the community, is, if adequate in magnitude, indictable at the common law.[2] Thus, —

§ 1146. **Collecting Crowd — (Effigies or Pictures at Windows).** — It has been laid down in England, that, if one having a house on a street exhibits effigies at his windows, attracting a crowd, and thereby causing the footway to be obstructed, he commits an indictable nuisance, even though the effigies should not be libellous.[3] If the exhibition is libellous as being obscene, offensive, or

[1] For the procedure relating to this title, see Crim. Proced. II. § 865.

[2] Ante, § 500, 504; Rex *v.* Bradford, Comb. 304; Hall's Case, 1 Mod. 76.

[3] Rex *v.* Carlile, 6 Car. & P. 636. The general doctrine is well discussed in a civil case, which, according to the reporter's head-note, is as follows: "The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver is liable to an injunction; even though he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police." Walker *v.* Brewster, Law Rep. 5 Eq. 25. As I understand it, the doctrine is, also, that an indictment would lie in a case like this. And see ante, § 1074–1076. Said Sir W. Page Wood, V. C.: "Common sense must be used with reference to transactions of this kind. If persons use their houses for the enjoyment of life, and one of the ordinary enjoyments of life is supposed to be the occasional entertainment of one's friends at a rout, it would be very difficult for any one complaining of the noise and inconvenience caused by a rout to obtain an indictment at law, still more so, I apprehend, to persuade this court to interfere. At all events, that differs altogether from a case like this, where the defendant makes a business and a profit by giving entertainments, which are carried on so as to induce this crowd of idle people to collect in large numbers to the annoyance of the plaintiff. In this respect, the language of Lord Tenterden in Rex *v.* Moore, 3 B. & Ad. 184, is applicable to the present case: 'The defendant asks us to allow him to make a profit to the annoyance of all his neighbors. . . . If a person collects together a crowd of peo-

disgusting, — for example, the picture of a man naked to the waist and covered with eruptive sores, — it is punishable without regard to the collecting of any crowd.[1] Thus, —

Obscene Pictures. — The exhibition of obscene pictures is a common-law nuisance.[2]

In General. — The entire doctrine of this chapter is closely related to the subject of obscene libel. It is not very important to preserve the distinction. These illustrations cover only a fragment of what might be treated of under this title.

§ 1147. *Statutory Provisions:* —

Puppet Shows, &c. — In aid of the common law, it is provided by statute in New York, that "no person shall exhibit or perform for gain or profit any puppet show, any wire or rope dance, or any other idle shows, acts, or feats, which common showmen, mountebanks, or jugglers usually practise or perform," &c.; and it was held by the majority of one of the courts, that this statute is violated by white persons appearing in public, dressed as negroes, singing negro songs, and doing pretended feats as physiologists and mesmerizers and the like.[3]

§ 1148. **Shows, Amusements, &c. — Dancing-school.** — A statute in Massachusetts made it indictable to set up, without license, "public shows, public amusements, and exhibitions of every description, to which admission is obtained upon payment of money, or the delivery of any valuable thing, or by any ticket, or voucher obtained for money or any valuable thing."[4] And the court deemed it not applicable to a school for teaching dancing, admission to which was obtained by a payment of money for each evening.[5]

§ 1149. **Theatrical Exhibitions.** — It being provided in Vermont, that, "if any company of players or persons whatever shall exhibit any tragedies, &c., in any public theatre or elsewhere, for money, &c., each person, so exhibiting, shall forfeit," &c.; the court has held, that the offence, whatever it may be, cannot be committed by a single individual. Therefore an indictment against one person, not alleging any connection with others, cannot be sustained.[1]

ple, to the annoyance of his neighbors, that is a nuisance for which he is answerable.' There the nuisance complained of was the trampling of grass and destruction of fences." p. 88. **Making Speech.** — The making of a speech in the street is not *per se* a nuisance. Fairbanks *v.* Kerr, 20 Smith, Pa. 86.

[1] Reg. *v.* Grey, 4 Fost. & F. 73. And see Reg. *v.* Saunders, 1 Q. B. D. 15, 19, 13 Cox C. C. 116.

[2] Willis *v.* Warren, 1 Hilton, 590.

[3] Thurber *v.* Sharp, 13 Barb. 627.

[4] Stat. 1849, c. 231.

[5] Commonwealth *v.* Gee, 6 Cush. 174. See also as to this sort of statute, Commonwealth *v.* Twitchell, 4 Cush. 74; Pike *v.* The State, 35 Ala. 419; The State *v.* Bowers, 14 Ind. 195; Cate *v.* The State, 8 Sneed, 120.

[1] The State *v.* Fox, 15 Vt. 22. In Alabama, by construction of the statutes, a license to keep a theatre will not protect one who, by contract with the licensee, exhibits therein feats of legerdemain or sleight of hand. Jacko *v.* The State, 22 Ala. 73.

CHAPTER LXXIV.

WOODEN BUILDINGS AND THE LIKE.

§ 1150. **Protection against Fire.** — There are statutes and ordinances for the protection of populous places against fire; forbidding, under various qualifications, the erection of wooden buildings. These provisions differ somewhat; therefore we need only refer to the work on Statutory Crimes, in which some points of interpretation are stated,[1] and to the cases.[2]

§ 1151. **Buildings for Particular Purposes.** — Likewise there are enactments against the erection of buildings, in particular localities, and for particular purposes.[3]

Contracted for. — Though one has dug the cellar and contracted for the erection of a wooden building, he cannot proceed if by the terms of a city ordinance afterward passed it becomes unlawful.[4]

[1] Stat. Crimes, § 208, 292.

[2] Stewart *v.* Commonwealth, 10 Watts, 306; Tuttle *v.* The State, 4 Conn. 68; Booth *v.* The State, 4 Conn. 65; Daggett *v.* The State, 4 Conn. 60; Douglass *v.* Commonwealth, 2 Rawle, 262; The State *v.* Brown, 16 Conn. 54; Rex *v.* Gregory, 2 Nev. & M. 478, 5 B. & Ad. 555; Waupun *v.* Moore, 34 Wis. 450; Updyke *v.* Skillman, 3 Dutcher, 131; The State *v.* Parker, 5 Vroom, 352.

[3] Rex *v.* Watts, 2 Car. & P. 486.

[4] Salem *v.* Maynes, 123 Mass. 372.

INDEX

TO THE CASES CITED IN BOTH VOLUMES.

NOTE. — Where the plaintiff is the king or queen (Rex or Reg.), the State, Commonwealth, People, United States, or the like, the defendant's name is put first. The plaintiff's is first in the other cases.

END OF VOL. I.

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