A TREATISE ON CRIMINAL LAW

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ANALYSIS.

BOOK II.
CRIMES.

PART II.

OFFENCES AGAINST PROPERTY (continued).

CHAPTER XVI.
MALICIOUS MISCHIEF, § 1065.

CHAPTER XVII.
FORCIBLE ENTRY AND DETAINER, § 1083.

CHAPTER XVIII.
CHEATS.

I. At Common Law, § 1117.
II. Under False Pretence Statutes, § 1130.

CHAPTER XIX.
FRAUDULENT INSOLVENCY, § 1239.

PART III.

OFFENCES AGAINST SOCIETY.

CHAPTER XX.
PERJURY, § 1245.
ANALYSIS.

CHAPTER XXI.
CONSPIRACY, § 1337.

CHAPTER XXII.
NUISANCE, § 1410.

CHAPTER XXIII.
LOTTERIES, § 1430.

CHAPTER XXIV.
ILlicit SALE OF INTOXICATING LIQuORS, § 1436.

CHAPTER XXV.
RIOT, rout, AND UNLAWFUL ASSEMBLY, § 1535.

I. Unlawful ASSEMBLY, § 1535.
II. Rout, § 1588.
III. Riot, § 1537.
IV. Appreh, § 1551.
V. Power of Magistrate AS TO Dispersion, § 1555.
VI. Disturbance of Meetings, § 1556.

CHAPTER XXVI.
WEARING CONCEALED WEAPONS, § 1557.

CHAPTER XXVII.
COMPOUNDING CRIMES, § 1558.

CHAPTER XXVIII.
MISCONDUCT IN OFFICE.

I. Natural Officers, § 1563.
II. Statutory Officers, § 1568.
III. Voluntary Officers, § 1585.
IV. Evidence, § 1589.
V. Resistance to Officers, § 1591.

CHAPTER XXIX.
LIBEL, § 1594.

CHAPTER XXX.
ESCAPE, BREACH OF PRISON, AND RESCUE, § 1597.

CHAPTER XXXI.
BIGAMY AND POLYGAMY, § 1882.

CHAPTER XXXII.
ADULTERY, § 1717.

CHAPTER XXXIII.
FORNICATION, § 1741.

CHAPTER XXXIV.
ILlicit COHABITATION; INCEST; "MISCEGENATION," § 1747.

CHAPTER XXXV.
SEDUCTION, § 1766.

CHAPTER XXXVI.
DUELING, § 1797.

PART IV.
OFFENCES AGAINST GOVERNMENT.

CHAPTER XXXVII.
TREASON, § 1762.

CHAPTER XXXVIII.
OFFENCES AGAINST THE POST-OFFICE, § 1822.
ANALYSIS.

CHAPTER XXXIX.
ABUSE OF ELECTIVE FRANCHISE, § 1632.

CHAPTER XL.
FORESTALLING, REGRATING, AND ENGRossING, § 1849.

CHAPTER XLI.
CHAMPERTY AND MAINTENANCE, § 1853.

CHAPTER XLII.
BRIEGERY, § 1857.

PART V.
OFFENCES ON THE HIGH SEAS.

CHAPTER XLIII.
PIRACY, § 1860.

CHAPTER XLIV.
MALTREATMENT OF CREW, § 1871.

CHAPTER XLV.
REVOLT, § 1876.

CHAPTER XLVI.
FORCING SKAMAN ON SHORE, § 1882.

CHAPTER XLVII.
SLAVE TRADE, § 1889.

CHAPTER XLVIII.
DESTROYING VESSEL WITH INTENT TO DEFRAUD UNDERWRITERS, § 1894.

PART VI.

OFFENCES AGAINST FOREIGN NATIONS.

CHAPTER XLIX.
VIOLENCE TO FOREIGN MINISTERS, § 1898.

CHAPTER L.
LIBELS ON FOREIGN STATES, § 1900.

CHAPTER LI.
BREACH OF NEUTRALITY, § 1901.
BOOK II.
CRIMES.

PART II.—OFFENCES AGAINST PROPERTY.
(CONTINUED.)

CHAPTER XVI.
MALICIOUS MISCHIEF.

Statutes in this relation are based on common law, § 1065.
Offence at common law is of wider scope in this country than in England, § 1066.
Offence includes malicious physical injury to another person or to the public, § 1067.
But offence must be with malice to owner or involve a breach of the peace, § 1068.
Offence is distinguishable from larceny by absence of intent to steal, § 1069.
Malice is essential, § 1070.
Malice is to be inferred from facts, § 1071.
May be negatived by proof of other motives, § 1072.
Honest belief in title a defence, § 1072 a.
Consent of owner is a defence, § 1073.
Injury must be such as to impair utility, § 1074.
Owner is competent witness, § 1075.
All kinds of property are subjects of offence, § 1076.
Owner's title is immaterial, § 1077.
Indictment must contain proper technical averments, § 1078.
Malice must usually be averred, § 1079.
Mode of injury must be averred, § 1080.
Statutory offence of endangering lives of railroad travelers, § 1081.
Statutory offence of obstructing railroad carriages, § 1082.
Statutory offence of malicious injury to manufactures and machinery, § 1083 a.
Statutory offence of injuring mines, § 1083 b.
Statutory offence of injuring trees and shrubs, § 1082 c.
Statutory offence of cruelty to animals, § 1082 d.

I. BY STATUTE.

§ 1065. In prior editions, the statutes in force in a series of States were given on this topic. They are now omitted for purposes of condensation; but the adjudications upon them are hereafter noticed, as throwing light upon the exposition of the offence as it exists at common law. It is proper to add, also, that for two reasons the points about to be...
§ 1066. Malicious mischief in this country, as a common law offence, has received a far more extended interpretation than has been attached to it in England. In the latter country, each object of investment, as it arose into notice, became the subject of legislative protection; and as far back as the reports go, there has scarcely been a single article of property, which was likely to prove the subject of malicious injury, which was not sheltered from such assaults by severe penalties. Thus, for instance, a series of statutes, upwards of twelve in number, beginning with 37 Hen. VIII. c. 6, and ending with the Black Act, were provided for the single purpose of preventing wanton mischief to cattle and other tame beasts; and so minute was the particularity of the law-makers that distinct and several penalties were assigned to the cutting out of the tongue of a cow, to the breaking of the fore-legs of a sheep, when attempting to escape inclosures, and to the wounding of cattle, when the injury was only temporary. Upwards of one hundred and twenty, it is estimated, of acts, running from Henry VIII. to George III., repealed or otherwise, were enacted for the special purpose of providing against malicious mischief; and as the statutory penalty was both more specific and more certain than that of the common law, the books, in this class of offences, give but few examples of common law indictments. But as the later English statutes are not in force in this country, malicious mischief, as a common law offence, has here been the subject of frequent adjudications.\footnote{1 For special statutes, see supra, § 1081. In New York, by § 654 of Penal Code of 1889, "A person who unlawfully and wilfully destroys or injures any real or personal property of another, in a case where the punishment thereof is not prescribed by statutes," is to be punished, etc.}

§ 1067. In its general application malicious mischief may be defined to be any malicious or mischievous physical injury, either to the rights of another or to those of the public in general. Thus, it has been considered an offence at common law to maliciously destroy a horse belonging to another; or a cow; or a steer; or any beast whatever which may be the property of another, to wantonly kill an animal where the effect is to disturb and molest a family; to be guilty of wanton cruelty to animals, either publicly (when the animal belongs to the defendant himself), or secretly, through specific malice against another person who is the owner, in such case mere wantonness not being sufficient; to maliciously cast the carcass of an animal into a well in daily use; to maliciously poison chickens, fraudulently tear up a promissory note, or break windows; to mischievously set fire to a number of barrels of tar belonging to another; to maliciously destroy any barricade, corn crib, or shade, or maliciously girdle or injure trees or plants kept either for use or ornament; to put cow itch on a towel;
with intent to injure a person about to use it; to maliciously break up a boat; to maliciously cut off the hair of the tail or mane of a horse, with intent to annoy or distress the owner; to discharge a gun with the intention of annoying and injuring a sick person in the immediate vicinity; to maliciously and indirectly break into a room with violence for the same purpose; though it is held not an indictable offence to remove a stone from the boundary line between the premises of A. and B. with intent to injure B.

§ 1068. The recent inclination, however, so far as the common law is concerned, is to restrict the party injured to his civil remedies, except (1) where the offence is committed secretly, in the night-time, or in such other way as to inflict peculiarly wanton injury, so as to imply malice to the owner; or (2) where it is accompanied with a breach of the peace. Thus, in New York, an indictment charging that the defendant, "with force and arms, unlawfully, wilfully, and maliciously did break in pieces and destroy two windows in the dwelling-house of M. C. to the great damage of the said M. C., and against the peace," etc., was held not to set forth an offence indictable by the laws of the State; it being held that an act which would otherwise be only a trespass does not become indictable by being charged to have been done with force and arms, or by being alleged to have been committed maliciously, or without claim of right, or without any motive of gain. Whether if the breaking of the windows in this case had been charged to have been done secretly, or in the night-time, the act would have been indictable was doubted by Beardley, C. J., it being said generally that the cases in which indictments have been sustained for maliciously kill-

§ 1069. It has been shown that whenever goods are fraudulently taken against the owner's will animo furandi, the offence is larceny; while when they are simply maliciously injured, without being taken animo furandi, it is malicious mischief. It must also be noticed that there are articles of property not objects of larceny (e.g., real estate, dogs, etc.) for maliciously injuring which a person may be indicted.

§ 1070. Neither negligent injury, nor an injury inflicted angrily in hot blood, is sufficient to constitute the offence. There must be

3 Kilpatrick v. People, 5 Dougl. 277. See this case commented on in 5 Parker C. R. 568.
5 State v. Philpote, 10 Ind. 17; State v. Manual, 53 N. C. 201; Dawson v. State, 55 Ind. 478; see Illies v. Knight, 3 Tex. 312. Under the latter head fatal games, such as cock-fighting, Infras, § 1466 a.
6 supra, §§ 584 et seq. But see, as to some extent conflicting with views of the text, State v. Leavitt, 23 Me. 163.
7 See infra, §§ 1076, 1083 d.
8 Com. v. Whitten, 3 Com. 588; State v. Robinson, 3 Dev. & Bat. 130; Dawson v. State, 53 Ind. 478; U. S. v. Gildea, 1 Minn. 293; State v. Glassow, 10 Iowa, 115; Wagstaff v. Schipper, 97 Kans. 450; Thompson v. State, 51 Miss. 363.
malice to the owner or possessor, though such owner or possessor is personally unknown to the wrongdoer, but there is ground to argue that malignant cruelty to an animal is indictable at common law, irrespective of particular malice to the owner, when there is shock or scandal to the community, and that a man may in such cases be indicted for malicious cruelty to an animal belonging to himself. The same reasoning would lead us to conclude that malignant and intentional injury to public works of art, or to public libraries, is indictable, irrespective of malice to individuals.

It was held also, that to support a conviction under sect. 51 there must be a wilful and intentional doing of an unlawful act in relation to the property damaged. See supra, § 120.

In Com. v. Williams, 110 Mass. 401, it was held that for a conviction under the St. of 1862, c. 180, which provides for the punishment of any one who "wilfully or maliciously injures" a building, it is not enough that the injury was wilful and intentional, but it must have been done out of cruelty, hostility, or revenge.


State v. Linde, 51 Iowa, 120. That is the case with injury to buildings, see Com. v. Williams, 110 Mass. 401.

See R. v. Ainslie, R. & R. 490; R. v. Tivy, 1 C. & K. 704; U. S. v. Jackson, 4 Cranch C. C. 483; Stage Horse Cases, 16 Allan Pr. (N. S.) 51; Brown v. State, 28 Ohio St. 176; State v. Jackson, 12 Iowa 329; State v. Latham, 12 ibid. 358; Moses v. State, 38 Ga. 190; State v. Fieroe, 7 Ala. 125; State v. Wilson, 3 Yorg. 278. As to cruelty in dog and cock fighting, see supra, § 1465 a.

§ 1074. To sustain a conviction, there must be proof of injury done to such an extent as to impair utility, or materially diminish value.  

§ 1075. As in larceny, the owner of the property injured may be a witness for the prosecution.  

§ 1076. Not merely personal property, as has been already shown, may be thus protected, but so may real estate, it being held that it is indictable at common law maliciously to injure or deface tombs, maliciously to strip from a building copper pipes or sheetings, and maliciously to damage either immovables or movables in any way. The authorities in reference to the malicious injury of trees and plants are elsewhere given.  

§ 1077. In prosecutions of this class the prosecutor’s title to the property injured cannot be tried. It is enough if he had any special interest, rightful or wrongful, which may have been hurt.  

§ 1078. The manner of describing the property injured has been already stated.  

Indictments must contain proper technical averments.  

The nature of the injury must be specified.  

An indictment is sufficiently descriptive of the property destroyed, if laid to be “one horse beast of the value, etc., of the proper goods and chattels.” But unless required by statutory direction, the averment of value is unnecessary.  

1. Com. v. Soule, 2 Met. 21; State v. Cole, 90 Ind. 112.  
2. State v. Pike, 33 Mo. 361.  
3. See supra, §§ 1077, 1068. That there is such a property in dogs as sustains an indictment for malicious mischief, see State v. Latham, 13 Ind. 35; State v. Summer, 2 Ind. 377; State v. McQueen, 34 N. H. 423; though see contra, under statute, State v. Searing, R. & R. 350; Com. v. McCall, 3 Leigh, 809; U. S. v. Gideon, 1 Minn. 282; and supra, §§ 872; infra, § 1082 c, for statute.  
4. 3 Inst. 292.  
6. Lemly v. Edgerton, 19 Weed. 418; Resp. v. Tolescher, 1 Dallas, 338, where “breaking windows” maliciously was held indictable.  
7. Supra, § 1067; supra, § 1068 c.  
9. Supra, § 577.  
12. See State v. Blackwell, 5 Ind. 520; and State v. Shadley, 18 Ind. 230; as cases where, under statute, value is necessary.  
14. State v. Jackson, 12 Ind. 359; see supra, §§ 884, 1073 a.  
15. State v. Burr, J. Jenk., 44 Ala. 759; see supra, §§ 884, 1073 a.  
18. State v. Langford, 3 Hawa., 381; State v. Jackson, 7 Ind. 270.  
21. For indictments where the mode of injury is adequately stated, see Com. v. Cox, 7 Allen, 577, and Moyer v. Com., 7 Barr., 429.  
there is a cutting down of trees, under a statute, it is enough to aver, following the statute, that the defendant, the trees, etc., maliciously and wilfully did cut, etc.¹

§ 1081. At common law an intentional obstruction of a railroad train, in such a way as to endanger the lives of travelers, is as much an assault on such travelers as would be shooting into a car.² The common law offence, however, has been generally superseded by statutes both in England and the United States. Under these statutes it has been ruled that it is no defence that the defendant was impelled by other motives than an intention to injure the train.³ Wilfully throwing a stone at a train so as to endanger the safety of passengers is within the statutes,⁴ as it is unquestionably indictable at common law.⁵ It has been further held that on an indictment for wilfully and maliciously casting anything upon a railway carriage or truck, either with intent to injure it or to endanger the safety of persons in the train, if an intent to endanger the safety of travellers be proved, it is no defence that the train was a goods train, and there was no person on the particular truck.⁶ But where the indictment charges maliciously throwing stones into a railway carriage, with intent to endanger the safety of a person in it, it has been ruled that there must be evidence of an intent to do some grievous bodily harm, such as would support an indictment for wounding a particular person with that intent; and, if it appear that the prisoner's intention was only to commit a common assault on some person in the carriage, the case is not sustained.⁷

The statutes, also, have been ruled not to cover neglect on part of drivers and stokers to keep a good lookout for signals, according to the rules and regulations of the railway company, the common


CHAP. XVI.] MALICIOUS MISCHIEF. [§ 1082.

sequence of which neglect is that a collision occurs, and the safety of passengers is endangered.¹

It is not necessary, it has been ruled under the statutes, to aver in the indictment that the train belonged to a corporation duly chartered.²

§ 1082. Special statutes, also, have been enacted in England, and have been adopted by several of our own legislatures, making indictable the obstruction of engines and railway carriages.³

Under these statutes it is held to be a misdemeanour to place a truck across a railway line in such a manner that if a carriage or an engine had come along the line it would have been obstructed, and the safety of passengers, who might have been in any such carriage, would have been endangered; nor is it to this charge a defence that the railway was not opened for passenger traffic, and no carriage or engine was in fact obstructed.⁴ It is enough to sustain such a case to prove that the act was done by certain persons employed by the defendant to repair a walk between the railway and his premises adjoining; and that on one occasion the defendant himself, who was standing by, nodded his head, and directed the workmen to go on, is sufficient to warrant the jury in convicting the defendant.⁵ Placing a single piece of timber on the road will constitute the offence;⁶ and so of obstructing a horse railroad by putting a wagon on its track, it being the duty of wagoners to turn out when requested by the driver of the horse-car.⁷ Changing a signal so as to cause a train to go slower than it otherwise would is an obstructing;⁸ and so, it is said, is stretching out the arms as a signal.⁹ It has been held, however, that it is not indictable for a passenger (without malice or wantonness) to pull a signal rope attached to a bell on the engine.¹⁰ The intent is to be inferred from the facts; and where the evidence was that the prisoners placed a stone upon a line of railway, so as to cause an obstruction to any carriages that

might be travelling thereon, it was ruled that if this were done maliciously, and with an intention to obstruct the carriages of the company, the jury would be justified in finding that it was done maliciously. But the presumption, in such case, is one of fact, not of law. Title to the land is no defence.

§ 1082 a. For the protection of manufactures and machinery analogous statutes have been enacted. Under these statutes the following points have been ruled:

A warp, not sized, but upon its way to the sizers, to fit it for being used in manufacturing goods, is not a "warp in any stage, process, or progress of manufacture," or prepared for carding or spinning. It is not necessary that goods should be incomplete to be in "a stage, process, or progress of manufacture," under the statute. The working tools of a loom, and the cords employed to raise the harness, are "tackle employed in weaving." And so of any material part of the machinery.

In another case in England the owner removed a wooden stage belonging to the machine on which the man who fed the machine was accustomed to stand, and took away the legs, and it appeared in evidence that though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one within the act, though the stage and legs were wanting. And where certain side boards were wanting to a machine at the time it was destroyed, but the want did not render it so defective as to prevent it altogether from working.


1 R. v. Bartlett, Deas, C. L. 1517.
3 R. v. Fisher, 10 Cox C. C. 166; L. R. 1 C. C. 7.
5 R. v. Mackrell, 4 C. & P. 448; R. v. Fiddler, Ibid. 449.
6 R. v. West, Deas, C. L. 1518. As to damaging property generally, see supra, § 1070. As to South Carolina statute in respect to packing cotton, see State v. Holman, 3 McCord, 308.

On an indictment for breaking a threshing-machine, the judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. R. v. Crutchley, 5 C. & P. 133. As to meaning of "stack," see Com. v. Macomber, 3 Mass. 354.

An indictment on 7 & 8 Geo. IV. c. 30, s. 2, for feloniously damaging warps of linen yarn, with intent to destroy or render them useless, need not allege that the warps at the time of the damage done were prepared for or employed in carding, spinning, weaving, etc., or otherwise manufacturing or preparing any goods or articles of silk, woollen, linen, etc. R. v. Ashton, 2 B. & Ad. 790.

§ 1082 b. Mines have also been protected by special enactments. In this country there can be no question that malicious injury to mining property is indictable at common law. So as to mines.

But in such matters the interests involved are so large,
§ 1082 c. We have already seen that in several jurisdictions in this country it is at common law indictable to maliciously injure fruit or ornamental trees. In England prosecutions of this kind are now exclusively statutory; the statutes have absorbed the common law. Under these statutes, apple and pear-trees grafted in a wild stock, and producing fruit, are "trees," and cutting down a tree is sufficient to bring a case within the statute, although the tree is not thereby totally destroyed. As to hop-bounds, however, it was held that when "destroying" is alleged, it must be shown that the plant died in consequence of the injury received. Proof of the infliction of injury by cutting and bruising is insufficient. It has been further ruled that where shrubs are cut upon an unproved allegation that they are likely to be injurious to an adjoining wall, it is a malicious trespass, though the title to the spot on which the shrubs grow is in dispute between the parties. "Woods," when used in this relation in a statute, includes

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CHAP. XVI. MALICIOUS MISCHIEF. § 1082 d.

A field which has been overgrown with wild brush. It is usually enough, in such cases, if the indictment follow the statute.

§ 1082 d. Similar legislation has taken place to protect animals from cruelty, irrespective of the question of ownership. As "cattle," under the statutes, have been considered, cruelty to steers, pigs, hogs, asses, geldings, horses, mares, and cattle. In Missouri, however, the term has been held not to be...
include a tame buffalo. Dogs, though not the subject of larceny, have been held in this country to be protected by the statutes. The statute of 12 & 13 Vict. c. 92, § 2, which makes cruelty to “any animal” penal, goes on, in its interpretation clause, to specify as falling under this head, “any horse . . . sheep . . . goat, dog, cat, or any other domestic animal.” Under the words italicized cocks are held to be included.

It is not necessary that the injury inflicted be permanent, if it be serious and painful. Hence driving a nail into a horse’s frog out of malice to the owner was held to be within the statute. 9 Geo. I. c. 22, though the damage was but temporary, and so of putting deleterious acid in a mare’s eye. It has also been held, that injuring a mare internally, not out of malice, but merely from wantonness, is within the statute.

The omission to kill a wounded animal which is in great suffering is not cruelty, under the statute.

It is not necessary to prove, when this is out of the power of the prosecution, the particular instrument of cruelty used.


Powell v. Knights, 38 L. T. 607. It is otherwise when the owner sends out a wounded or diseased horse to graze, thereby causing it intense pain, which is held to be “torturing” under the statute. Brintz v. Davies, 20 L. T. 360.


WHETHER A CAR OR TEAM IS OVERLOADED.

Whether a car or team is overloaded is a question of fact for the jury. People v. Timedale, 10 Abb. Pr. N. S. 374. Duncan v. State, 49 Miss. 351; Thompson v. State, 51 ibid. 353. Under these particular statutes, malice to the owner need not be shown, see R. v. Tivey, 1 C. & K. 706; 1 Den. C. C. 68; Brown v. State, 23 Ohio St. 176. Supra, § 1070.

Supra, §§ 106 et seq; State v. Avery, 44 N. H. 322 (under a statute which makes it penal to “fillfully and maliciously kill, maim, beat or wound any horse, cattle, sheep, or swine”). See Thompson’s Case, 51 Misc. 353; Rembert v. State, 56 ibid. 280.


STATUTES LIMITING COMMON CARRIERS.

Maxwell, 2 East P. C. 1076; State v. Harriman, 75 Mo. 552, a dog was held not to be a “domestic animal” under the statute. See supra, § 4076.

If A. set fire to a cow and horse and burnt to death a cow which was in A.’s yard under 7 & 8 Geo. IV. c. 50, s. 16, for killing the cow. R. v. Haughton, 5 C. & P. 559. See supra, § 152.

Budge v. Parsons, 3 B. & S. 352—Wightman and Meiller, JJ.

Aahworth v. State, 63 Ala. 120. See, however, R. v. Jones, 1 C. & K. 559.


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duty or necessity. When the injury is inflicted with malignity, so as to torture, it is no defence that the animal injured was trespassing on the defendant’s field. But all proper force may be used to eject an animal doing damage to an inclosed field; and it may even be killed if it cannot otherwise be excluded.

Under statutes making indictable cruelty to animals, irrespective of ownership, it is not necessary to aver the owner’s name. When, however, the ownership is inaccurately stated, this may be a variance. Nor is it necessary, particularly, to describe the animal injured, though if there be inserted a description of the animal likely to mislead, a variance might be fatal. “Maiming” is not held to be a sufficient designation of the injury, though it is otherwise as to “killing.” When the statute prohibits “cruelly beating,” it is enough to aver that the defendant did “cruelly beat,” etc. This, however, may be doubled, when the pleader could readily have individuated the offense. “Cruelly over-drive” has been held to be enough when the statute prohibits cruel over-driving.

1 Supra, §§ 95 et seq.; James v. Brown, 1 Camp. 41; Prothero v. Mathews, 5 C. & P. 568. See argument of Horr, J., in Con. v. Lufkin, 7 Allen, 562; and see Con. v. Wood, 111 Mass. 468; Walker v. Court of Special Sessions, 4 Hun, 441.


3 In Branch v. State, 43 Tex. 624, adopted in Benson v. State, 1 Tex. Ap. 11, the court said: “It may be done under such circumstances as negative a wanton act—as where a man has a good fence, and a horse or cow is in the habit of trespassing upon his crop, and he kills it during an act of trespass on his crop, not from wantonness, but to prevent the destruction of his crop, he would not be criminally liable.” And so where poison is laid in an inclosure to kill a trespassing dog; Daniel v. Janes, 4 R. 2 C. P. 381. As to spring guns, see supra, § 464.


7 Whart. Cr. Ev. § 146.

8 State v. Pugh, 15 Mo. 569.


10 Con. v. McColman, 101 Mass. 34.

11 See Whart. Ct. Pl. & Pr. § 221.

12 State v. Comfort, 22 Minn. 271.

Chap. XVI.] 1082.

Malicious mischief. §

under the Massachusetts statute. “Maliciously” is essential; but not alternative or cumulative predicates of the state when not part of the case. It is not duplicity to join the over-driving of two horses in a team in one indictment; nor to aver the poisoning of eight horses, when the poison was distributed in the feed placed before the whole eight.
CHAPTER XVII.

FORCIBLE ENTRY AND DETFAINER.

I. CHARACTER OF OFFENCE.

Forcible exclusion of another from his lands and tenements, is an offence at common law, § 1083. Modification of common law by statute, § 1084. Gist of offence is the violence, § 1085. Statutory offence requires less force than common law, but the other holder or leasehold title, § 1086. Any person forcibly putting another out of possession is indictable, § 1087. Wife may be so indicted against her husband, § 1088. So as to tenant in common ejecting his companion, § 1089. So as to third person despousing officer of law, § 1090. Real estate, corporeal or incorporeal, may be thus protected, § 1091. To forcible trespass on personality force is essential, § 1092. And so to forcible entry, § 1093. Force may be inferred from facts, § 1094. Rule does not apply to out-houses, § 1095. Entry by trick is not forcible, § 1096. Peaceable entry may be followed by forcible detainer, § 1097.

II. INDICTMENT.

Indictment must contain technical terms, § 1107. For common law offence, possession only need be averred, § 1108. Possession must be described as in ejectment, § 1109. Entry and detainer are divisible, § 1110. Title is necessary to restitution, § 1111. Indictment for forcible trespass must aver violence, § 1112. Practice to sustain summary convictions, § 1113.

§ 1083. When a man violently takes and keeps possession of any lands and tenements occupied by another, with menaces, force, and arms, and without the authority of law, he may be indicted at common law, for forcible entry and detainer. To enter, with intent to keep possession, constitutes the offence of forcible entry. Of this there may be a conviction without proving a forcible detainer. A forcible detainer is where a party, "having wrongfully entered upon any lands or tenements, detains such lands or tenements in a manner which would render an entry upon them for the purpose of taking possession forcible." In many of the States, through the substitution of statutory remedies giving the injure, party summary relief by recourse to a civil tribunal, criminal procedure in such cases has fallen into disuse.

§ 1084. The following English statutes have been in several States held to be part of the common law: —


2 Steph. Dig. C. L. art. 79.

3 In Massachusetts (Rev. Stat. c. 106), the person thus forcibly expelled or kept out may take, from any justice of the peace, a writ in the form of an original summons (ibid., § 4), and the suit thus commenced is subject to the same restrictions as accompany other civil actions before justices of the peace. Ibid., § 5. Under this statute it has been held that a mere refusal to deliver possession, when demanded, will not warrant the process for forcible entry and detainer; but the possession must be attended with such circumstances as might excite terror in the owner, and prevent him from claiming his rights; such as apparent violence offered in deed or word to the person, having unusual offensive weapons, or being attended by a multitude of people. Com. v. Dudley, 10 Mass. 403. Where a writ of restitution has been executed, and the proceedings are afterwards quashed upon error, a new writ of restitution may be awarded. Com. v. Bigelow, 3 Pick. 31.

In New York see People v. Anthony, 4 Johns. 128; People v. Van Nostrand, 9 Wend. 62; People v. Hickert, 8 Cow. 235.

The statutes of both Pennsylvania and Virginia are simply declaratory of the common law, as modified by 6 Ritz. H. St. 1, c. 8, and 21 Jac. L. c. 15, as will hereafter appear in the adjudication given to them by the courts. See 2 Penn. L. J. 391, for a learned article on the law as obtaining in Pennsylvania.
§ 1086. Entry with Strong Hand and Multitude of People.—

"And also the king defended, that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will."

21 Jac. I. c. 15.

Restitution to be Awarded.—"That such judges, justices, or justices of the peace, by reason of any act or acts of parliament now in force are authorized and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withheld by force, shall by reason of this present act have the like and the same authority and ability from henceforth, upon indictment of such forcible entries or forcible withholdings before them duly found, to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight's service, tenants by elizet, statute-mat and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

§ 1086. The violent and forcible taking or keeping of another's property is, apart from the operation of particular statutes, a breach of the public peace, punishable in a criminal court by indictment. The gist of the offence is the violence, or threat of violence, and from the peculiar sanctity attached by the common law to every man's dwelling-house, violence offered to it is distinguished as a substantive offence, and punished with peculiar severity. Forcible entry and detainer, as an indict-

1 By St. 8 Hen. 7; this statute is extended to cases where the entry was possible, but the tenants forcible and resisted; and resistance is given in such cases. 2 C. C. 218. Both statutes are in force in Pennsylvania. Van Pool v. Com., 13 Penn. St. 362.

By 16 Jac. II. there is a summary power given to Justices to convict on view. This as well as the preceding statutes is in force in Pennsylvania and Maryland. See Roberts's Digest; Van Pool v. Com., supra; Kilby's Reports, et al., 227-36.

§ 1087. Any one who forcibly puts out and keeps out another from possession may be indicted for forcible entry and detainer. Hence, as will hereafter be observed, a landlord who violently dispossesses a tenant whose lease has expired may be guilty of forcible entry. But where his mansion is detained by one having a bare charge, a man may break open the doors and forcibly enter without
§ 1091. CRIMES. [BOOK II.

violating the statutes. 1 And though this does not hold good when unnecessary force is used, yet, if there be no such force, a person who enters upon land or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry. 2

§ 1088. It seems that though a woman cannot be mulcted in damages for a trespass on her husband’s property, she may, “if she comes with a strong hand,” “under circumstances of violence amounting to a breach of the public peace,” be convicted of a forcible entry. 3

§ 1089. A joint tenant, or tenant in common, may offend against the statutes by forcibly ejecting or holding out his companion. 4

So as to tenant in common ejecting his companion.

Thus, where one of a board of trustees forcibly put certain persons in possession of a church, which was closed by order of a majority of the board of trustees, it was held those persons were guilty of a forcible entry and detainer. 5

§ 1090. An indictment will lie against a third person who forcibly intrudes himself on land, after judgment against a former intruder, and the sheriff, who holds title under the writ of restitution, may turn him out of possession. 6

§ 1091. As a general rule, an indictment for forcible entry lies to redress an expulsion from any real estate, whether corporeal or incorporeal; and it has been said that the process can be maintained against any one, whether a terre-tenant or a stranger, who should forcibly disturb a landlord in the enjoyment of his rent, or a commoner in the use of his common. 7 But a way, 8 ferry, 9 or similar easement, is not the subject of this process.

1 1 Russ. on Cr. 9th Am. ed. 420 at sq.
2 Mr. Groves, in a note, holds this statement of S. W. Russell to be erroneous.

3 See infra, §§. 1097-1100.

4 Steph. Dig. C. L. art. 79.


6 1 Russ. on Cr. 9th Am. ed. 307; Com. v. Oliver, 2 Par. 420; Burt v. State, 2 Tr. Com. R. 488.

7 Com. v. Oliver, 2 Par. 420.

8 State v. Gilbert, 2 Bay. 355.

9 1 Russ. on Cr. 9th Am. ed. 421 et seq. See State v. Bordeaux, 2 Jones N. C. 291; State v. Caldwell, Ibid. 488.


11 3 Russ. on Cr. 9th Am. ed. 423.

12 Com. v. Lawless, Little’s Cas. (Ky.) 184.


14 State v. Barefoot, 69 N. C. 567, per Smith, C. J.

15 R. v. Gardiner, 1 Russ. on Cr. 83; State v. Mills, 2 Dev. 490; State v. Philpotts, 10 Ired. 17; State v. McDowell, 1 Hawks, 449. See infra, § 1112. State v. Laney, 87 N. C. 636.

16 R. v. Smyth, infra; R. v. Deacon, R. & R. M. 27; Com. v. Keeper of Prison, 1 Ash. 140; Com. v. Conway, 1 Brew. 609; Roe v. Com., 2 Bib. 1100; State v. McClay, 1 Harring. 520, and cases cited at close of this note. That any force in a dwelling-house likely to produce terror may constitute the offence, see R. v. Smyth, 5 C. & P. 201; 1 M. & R. 156; R. v. Deacon, R. & R. M. (N. P.) 27; Harding’s Case, 1 Greenl. 22; Penn. v. Dixon, 1 Smith’s Laws, 3; Com. v. Taylor, 5 Blen. 577; People v. Smith, 24 B. & Ad. 24; State v. Holbrook, 4 Ired. 305; State v. Tolson, 8 Bibl. 348; State v. Ross, 4 Jones (N. C.) 215, and cases cited supra.

CHAP. XVII. FORCIBLE ENTRY AND DETAINER. [§ 1098.

A forcible entry may be made on land, whether woodland or otherwise, within the bounds of a tract possessed by another, although the whole tract be not inclosed by a fence or cultivated. 1

§ 1092. Distinct from forcible entry and detainer as a statutory offence, yet bearing close relations to forcible entry and detainer at common law, stands forcible trespass on personality,—which is “the taking by force the personal property of another in his presence.” 2 It is distinguishable, however, from forcible entry and detainer at common law by two features: (1) The latter must be directed against real interests exclusively, while the forcible trespass on personality has for its object chattels of all classes; and (2) Forcible entry and detainer at common law does not necessarily involve violence offered a person actually in possession, while such violence to such person is necessary to constitute forcible trespass to personality as a common law offence. It is virtually but an aggravated assault, though from the peculiar texture of the offence, the word assault need not appear in the indictment. 3

§ 1098. On an indictment at common law for forcible entry, it is necessary to prove that the defendant entered with such force and violence as to exceed a bare trespass, and to give reasonable grounds for terror; 4 but where a party entering on land in possession of another, either by his behavior or speech, gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is deemed forcible, whether he causes the terror by carrying with him an unusual number of attendants, or by arming himself in such a manner as plainly to intimate a design to
back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions plainly implying a purpose of using force against those who make resistance.¹

A strong man went to the house of another, in his absence, and remained there against the will of the wife, using insulting language; the husband returned and ordered the intruder out, but he refused to go for some time, and then went into the yard, with a club in his hand, threatening and cursing. It was held, that this was sufficient to support an indictment for a forcible entry, in the presence of the husband, and a forcible detainer.²

An entry "with strong hand," or "with multitude of people," is the offense described in the statute. It is not necessary, however, when the latter alternative is relied on that the entry should be committed by a very great number of people; three persons, following the analogy of riot, have been held enough to sustain the averment of "multitude."³ And even where the entry is lawful, it must not be made with a strong hand, or with a number of assailants; where it is not lawful, it must not be made at all.⁴

§ 1094. An entry by breaking the doors or windows, etc., whether any person be in the house or not, especially from force, may be inferred if it be a dwelling-house, is a forcible entry within the statute.⁵ So an entry; where personal violence is done to the prosecutor, or any of his family or servants, or to any person or persons keeping the possession for him, or even where it is accompanied with such threat of personal violence (either actual or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like) as are likely to intimidate the prosecutor or his family, and to deter them from defending their possessions, is a forcible entry within the statute. The issue is, 

↑ 1 Russ. on Cr. 9th Am. cd. 426; Penn. v. Robinson, Add. 14, 17; Resp. v. Perello, 3 Exes. 301; State v. Polk, 4 Ired. 308; Deaneet v. State, 1 Black Dig. 340; State v. Cargill, 2 Brev. 442. ⁵ See 1 Hawk. c. 64, s. 26. ⁶ Ibid.

↑ 1 Hawk. c. 64, ss. 20, 21, 27; Miller v. Maclean, 2 C. & P. 17; Com. v. Shallock, 4 Cush. 14; Com. v. Dudley, 10 Mass. 403; State v. Polk, 4 Ired. 308; State v. Arnfield, 5 Ibid. 207.

↑ 1 Hawk. c. 64, s. 26. ⁶ 1 Hawk. c. 64, s. 68; Burt v. State, & R. 155; Com. v. Shallock, 4 Cush. 141; Com. v. Res, 2 Brevet. 504; ⁶ In re, §§ 1102, 1103.

↑ State v. Polk, 4 Ired. 308; State v. Polk, 4 Ired. 308; State v. Cargill, 2 Brev. 442. ⁶ People v. Rockert, 8 Cow. 226; People v. Godfrey, 1 Hall, 240; People v. Anthony, 4 Johns. 165.

↑ Douglass v. State, 6 Yerg. 535. ⁷ 1 Hawk. c. 64, s. 26. ⁸ 1 Hawk. c. 64, s. 68; Burt v. State, & R. 155; Com. v. Shallock, 4 Cush. 141; Com. v. Res, 2 Brevet. 504; ⁷ People v. Rockert, 8 Cow. 226; People v. Godfrey, 1 Hall, 240; People v. Anthony, 4 Johns. 165.

↑ Com. Dig. Forc. Eut. & D. 3; ⁴ 1 Hawk. c. 64, s. 26. ⁸ 1 Hawk. c. 64, s. 68; Burt v. State, & R. 155; Com. v. Shallock, 4 Cush. 141; Com. v. Res, 2 Brevet. 504; ⁸ People v. Rockert, 8 Cow. 226; People v. Godfrey, 1 Hall, 240; People v. Anthony, 4 Johns. 165.

Was there force sufficient to alarm, so as to coerce surrender of possession, or to provoke a breach of the peace?¹

§ 1095. It has been ruled that as possession of a dwelling-house implies possession of its appurtenances, it is not indictable for a person who has peaceably and legally obtained possession of a dwelling-house forcibly to break open an out-house appertaining thereto.²

But when the goods of the defendant in an execution are in the house of a third person, or in a smoke-house within the curtilage of said third person, a demand for admittance by the officer holding the execution, and a refusal upon the part of the person holding the property, are necessary to justify the officer in breaking the door, and entering either house or smoke-house.⁴

§ 1096. An entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out, and then shutting the door upon him, or the like, without further violence, or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence, is not deemed a forcible entry.⁵

§ 1097. A peaceable entry may be followed, as will be seen, by a forcible detainer.⁶ Thus, where an intruder, having entered peaceably, said to the former possessor, "It will not be well for you, if you ever come upon the premises again by day or night," it was left to the jury whether this was a threat of personal violence, and so a forcible detainer within the statute: they having found it was, a conviction was held proper.⁷ And keeping forcibly a lessee out of possession to which he is entitled may be a forcible detainer.⁸ But a tenant entitled to possession may defend it by force adequate to the purpose.⁹
§ 1088. Where a party having a right, enters or makes claim, and the other party afterwards continues to hold possession by force, this is considered a forcible entry in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry.  

§ 1089. Where the party entering has in fact no right of entry, all persons in his company, as well those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence, or who actually abet those who do, are guilty.

§ 1100. A landlord has no right to expel by violence even a tenant at will, and, as will be noticed more fully under another head, should he attempt it, he will be criminally responsible for the intrusion. 1 If the landlord, said Lord Kenyon, had entered with a strong hand to dispossess the tenant with force (after the expiration of the term), he might have been indicted for a forcible entry. 2 In a case immediately succeeding, the same judge declared it to be part of the law of the land that no man should assert his title with violence. 3 It is true, that on a subsequent day of the term he stated that the court desired that the grounds of their opinion might be understood, so that it should not be considered a precedent for other cases where it did not apply. He then proceeded: "Perhaps some doubt may hereafter arise respecting what Mr. Sergeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title; but without giving any opinion concerning that dictum, one way or the other, but leaving it to be proved or disproved whenever the question shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched." 4 But now, says Sir William Russell, "there is no doubt that in England a party is indictable for forcible entry into premises in which he has a legal title." 5 While this is the case, by a curious anomaly in the law three out of six judges in the Common Pleas, in a case already cited, held that the landlord was not responsible for a trespass, at the tenant's suit for redressing the latter, even though such force was used as to subject the landlord to a criminal prosecution. 6 If this distinction be recognized, there can be no difficulty in reconciling with the law of forcible entry, the doctrine of the Supreme Court of Pennsylvania, that when a lease expires, the landlord may forcibly dispossess by night or by day the tenant whose lease has expired, with this limitation only, that he should use no greater force than might be necessary, and do no wanton damage. The plaintiff in such a case is "entitled to damages only for an injury he had suffered from unnecessary violence to his property." 7 Still, on the distinction above stated, the defendant is liable to a criminal prosecution, if he enter with violence or with a multitude of persons, so as to

1 Hawk. c. 64, ss. 22, 54; Co. Lit. 251; Bus. v. Burch, 4 Ala. R. 409.  
2 Supra, § 1087; infra, § 1091.  
3 If, when the awning is out of his house, the defendant forcibly withhold him from returning to it, and in the mean time send persons to take possession of it peacefully, this is said to be a forcible entry. R. v. Smyth, 5 C. & P. 202.  
5 Having been in possession of a house from May to October, the defendant called there, and fasting that V. had no title, proceeded to take the keys out of the door, and upon their doing so, V. gave them into custody for stealing the keys, but the magistrate refused to detain them. They then returned to the house, and having procured a sledge-hammer, forced the inner door of the hall, and some having entered that way, and some by a staircase window, they overpower the protector's opposition, and furnished with a hatchet and other weapons, after a struggle which caused a disorderly crowd to assemble, ejected the protector and his servants. From the commencement of the proceedings till the conclusion, a female servant of the protector's was in the kitchen; it was held, assuming the title of the protector to have been bad, and that the defendants had acted as the order of those who had a good title to the premises, that the evidence was sufficient to support a conviction of the defendants for a forcible entry and riot. R. v. Studd, 14 W. R. 398; 14 L. T. N. R. 225—C. C. R. infra, § 1105. Cf. article in Am. Law Reg. for November, 1883, p. 716 et seq.

7 R. v. Wilson, 8 T. R. 357.  
8 Newton v. Harland, supra.  
§ 1103. CRIME. [BOOK II.

constitute or provoke a breach of the peace. The reason of the distinction is this: The dispossessed party cannot complain in a civil suit of his dispossession, unless a personal assault was made on him with undue force, as he had no right to remain on the premises. And though there may have been a riot, he cannot sue civilly for this, which is an offence, not against him, but against the public. The only remedy is a criminal prosecution. 3

§ 1101. Yet where the prosecutor is a mere intruder, without color of title, past or present, and has entered by fraud or violence, or on a mere scrambling title, the owner may forcibly enter. This has been seen to be the case when the possession is held by one claiming mere custody under the owner, but refusing entrance to the owner. It was, therefore, rightly ruled by Lord Campbell, C. J., that a person having no possession or title to premises, but fraudulently pretending to have such title, and so allowed by the servant of the true owner to enter, does not acquire actual possession, but may be expelled by force. 4

§ 1102. For the purpose of obtaining restitution, it is necessary to prove that the prosecutor is still kept out of possession, and it is plain that this right of possession on the part of the prosecutor must be legal, and that if he has no right to enter he cannot maintain a forcible detainer. 5

§ 1103. As has already been incidentally observed, there may be a forcible detainer, though the entry is peaceable. It is sufficient if it appear from the indictment that the party aggrieved had title, and was forcibly kept out of possession. But where the entry was peaceable and

7 Supra, § 1087. See Shotwell, ex parte, 10 Johns. 304; State v. Curtis, 4 Dev. & Bat. 222.
8 Collins v. Thomas, 1 F. & F. 416.
9 1 Hawk. c. 64, s. 41; Bard v. Com., 6 S. & R. 252.
10 See infra, § 1111.

Forcible detainer does not lie against a party holding under a writ regular

the continued possession lawful, forcible detainer cannot be maintained. 3

The same circumstances evincing violence which will make an entry forcible will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, in a way indicating violence, or threatens in such connection to do some bodily hurt to the former possessor if he dare return, may be adjudged guilty of a forcible detainer, though no attempt be made to resist. 5 But merely refusing to go out of the house, or denying possession, by a tenant at will, to a lessor, is not a forcible holding within the meaning of the statute. 4

As will presently be more fully seen, the offences are divisible. 6

§ 1104. Under 5 R. I. II. the prosecutor must aver a freehold, and under 21 Jan. 1. a leasehold; but, it seems, proof that he was in actual occupation of the premises, or in the receipt of the rents and profits, is sufficient evidence of seizin. 4 At common law, however, no allegation beyond possession was necessary, when the object was only to obtain punishment for the violent invasion of the prosecutor's rights, and of course mere possession was sufficient to support the prosecution. 2 But a mere scrambling-possession will not be enough to sustain an indictment even at common law. Nor is surveying land, building cabins, and leaving them unoccupied, such possession as is necessary. 5

on its face, issued from a court of competent jurisdiction, though the issuing

was improvident. Voss v. State, 93 Ind. 211.
2 People v. Rickert, 8 Com. 226, and cases cited supra, § 1096.
3 1 Hawk. c. 64, s. 30; See Com. v. Max, 215; People v. Leonard, 11 Johns. 504; Com. v. Kenney, 6 Penn. Law Jour. 119; State v. Anders, 8 Ired. 15; State v. Bennett, 4 Dev. & Bat. 43; State v. Sperlin, 1 Beaw. 119.
4 See cases cited supra, § 1101; Shotwell, ex parte, 10 Johns. 304.
5 Marsh. 68; 4 Bl. Com. 143; 1 Hawk. 274; People v. Van Nostrand, 9 Wend. 52.
§ 1106. As we have seen, the defendant cannot go into evidence to disprove the title of the complainant, or to establish his own, as the question is not one of civil right, but of public mischief. Even where a tenant holds over beyond the period fixed by the lease, and the landlord makes forcible entry for any purpose, though the tenant cannot maintain a trespass, quare clausum, the landlord cannot justify a personal injury committed on the tenant in such entry. If he attempt to dispossess his tenant by undue violence, he is criminally responsible for the consequences, and may be punished for the breach of the peace, though he is at the time merely asserting his civil rights.

It must be remembered, however, that the possession must be actual and not constructive. Two persons cannot be in possession of the same land at the same time (i.e., adversely); and whenever the unlawful entry of one with force necessarily dispossesses the other, an indictment for forcible entry may be maintained.

§ 1107. The prosecutor is at common law not a witness to prove anything more than the force used; and he is inadmissible, therefore, to sustain an indictment for the purpose of restitution. The wife, also, of the prosecutor is admissible to prove the force, but only the force. Of course, in States where interest does not disqualify, these rulings do not apply.

II. INDICTMENT.

§ 1108. Greater force must be averred than is expressed by vi et armis. The words, "and with strong hand," should not be omitted.


The proof as to the application of force must correspond with the indictment. Thus where an indictment laid the force against the seizin of A., it was ruled that evidence was not admissible of an entry on land leased by A. and B. to C., and of force against C. Rees v. Sloan, 3 Yeats, 229; Penn. v. Grier, 1 Smith's Law 3. And as to other cases of variance, see infra, § 1109.

An indictment stating that the prosecutor was seized, without stating when he was seized, was held to be good. Ibid.

7 Com. v. Churchey, 5 Penn. L. J. 111; 2 Pars. 114.

8 Com. v. Taylor, 5 Binn. 277; Com. v. Knowes, 5 Penn. L. J. 112; 2 Pars. 241.

For common law offence possession only need be averred.

9 supra, § 1104.

Dudley v. Tracy, 4 Comm. 79.

People v. Richert, 8 Cow. 228; People v. Godfrey, 7 Hall, 340; People v. Anthony, 4 Johns. 198; Resp. v. Schryver, 1 Dall. 68; Beckett v. State, 1 Pross. C. D. 240.

Stamper v. Henry, 13 Pick. 36; tho' see, Overseer v. Lewis, 1 W. & S. 242; Supra, § 1109.

DeForest v. Ctn, 3 T. R. 292; Taumton v. Cotter, 7 Idd. 427; Turner v. Meynott, 6 Cr. C. L. 230; 2 Mcq. 574; Newton v. Hieband, 3 Man. & Gr. 82.

§ 1109. The indictment must describe the premises entered with the same particularity as in ejectment. Thus, an indictment of forcible entry and detainer.

Baker, 11 Mo. 233; Com. v. Shattuck, 4 Cush. 141; State v. Whitfield, S Fred. 315. Yet for the mere common law offence convertible terms may be used. R. v. Bane, 3 Burr. 1761.


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A B. v. Com. 149; 1 Hawk. 274; People v. Van Nostrand, 9 Wend. 50. Supra, § 1104.

§ 1111.

Com. v. Taylor, 5 Binn. 277; Com. v. Knowes, 5 Penn. L. J. 111; 2 Pars. 114.

For forcible entry and detainer.
FORCEFUL ENTRY AND DETAINER.  

§ 1112. Indictments for forcible trespass on personalty are rare at common law, since it is much simpler to indict for an assault, which, as has been seen, is a usual ingredient in a forcible trespass. If, however, an indictment of this kind should be framed, it is necessary to aver actual possession in the prosecutor, and violence offered to him, or violent wresting of the chattel from him, so as to constitute a breach of the peace. Yet, it is enough to say that the defendant, "with strong hand," and against his will, took, etc., the chattel from the possession of the prosecutor, in whose possession it then and there was. If sufficient violence to constitute a robbery be alleged, then the prosecution must try, not for forcible trespass, but for robbery. Under these circumstances, common law indictments for a forcible trespass have been rarely attempted. It must be kept in mind, in considering this question, that a party has at common law the right to rescue even by force (if such force be not excessive) his property from the hands of another.  

1 R. v. Bowler, 8 D. P. C. 128; 1 Wil. W. & H. 345; R. v. Taylor, 7 Mod. 123; Resp. v. Campbell, 1 Dall. 354; State v. Sporlein, 1 Brev. 119.  
4 See supra, § 1092.  
5 State v. Mills, 2 Dev. 420; State v. Watkins, 4 Humph. 256.  
6 State v. Mills, et supra.  
7 For a recent instance, where a prosecution of this class was sustained, see State v. McPadden, 71 N. C. 205.  
8 Supra, § 100. 1 Runn. on Cr. at sup. 421; Bladen v. Higgin, 10 C. B. (N. S.) 713; See State v. Corlington, 70 N. C. 71.
use unnecessary force, or stimulate a riotous demonstration, he is indictable.\footnote{1}

§ 1118. Of summary convictions by justices under 15 Ric. II. c. 2; and 8 Hen. VI. c. 9, there are no reported American cases. In England it is held that to sustain the procedure there must be alleged and proved an unlawful entry as well as a forcible detainer.\footnote{2} Where a conviction stated that justices had convicted A. of forcible detainer upon their own view, and that afterwards a complaint was made to the justices that A. forcibly entered the premises, and that notice of such complaint was given to A., who received it, but said nothing, and then went on to allege that the justices received evidence on oath of the unlawful entry; it was held that the conviction was bad, for not showing that A. had been summoned to answer the charge of the unlawful entry, or that he had had an opportunity afforded him of defending himself against such charge.\footnote{3}


\footnote{2} Supra, § 1106.

\footnote{3} In re Armfield, 6 Ired. 375; State v. Johnson, 3 N. & M. 765; 1 Ad. & B. 627.
CRIMES.

A false pretense is to be distinguished from a puff, § 1154. More exaggerated praises is not a false pretence, § 1155. But otherwise it is false, § 1156. Opinions are not always pretences, § 1157. But use of false brand is within statute, § 1158. And so of statement as to specific weight, § 1159. And so of statement as to property offered for loan or sale, § 1160. And so of false warranty, § 1161. And so of negotiating worthless or spurious paper, § 1162. And so of uttering post-dated cheques, § 1163. Obtaining money by forged paper not larceny but false pretences, § 1164. False returns by officers of government a statutory offence, § 1164 a.

3. Falsity of the Pretences. Only strong probability of falsity need be shown, § 1165. Burden of negative is on prosecution, § 1166. Pretences must be squarely negatived by defendant, § 1167. Sufficient to disprove one pretence, § 1168. Expecting to pay is no negation, § 1169.  

4. Pretences must not be in Words. Conduct is a sufficient pretence, § 1170.  

5. Pretence not by Defendant Personally. Pretence by one confederate is pretence by self, § 1171. Confession must be first shown, § 1172.  

6. They must relate to a Past or Present State of Things. Promises or predictions are not false pretences, § 1173. But false pretence is not negatived by concurrent promise, § 1174. They must have been the Operative Cause of the Transfer, § 1175.

Unless operative not within statute, § 1175. But need not be the sole motive, § 1176. Must have been before bargain closed, § 1177. Verification by prosecutor may be a defence, § 1178. Pretence must operate as direct cause and property must have been transferred, § 1179. No defence that goods were obtained immediately through contract, § 1180. False accounts of payments may be a pretence, § 1181. Prosecutor may be witness to prove preponderating influence, § 1182. Necessary that prosecutor should have believed the representations, § 1183.

8. Intent. Intent to be inferred from facts, § 1184. To compel payment of debt, § 1184 a. Proof of system admissible, § 1184 b. Purpose to indemnify no defence, § 1184 c.  

9. Scener. Defendant must be shown to have known falsity of pretences, § 1185.  

10. Prosecutor's Negligence or Misconduct. Prosecutor not required to show diligence beyond his opportunities, § 1186. His contributory negligence to be determined by his lights, § 1187. Carelessness amounting to consent estop prosecutor, § 1188. Trap is no defence, § 1189. That prosecutor made false representations is no bar, § 1190. Nor is prosecutor's gross culpability, § 1191. But "barg" and loan talk are not within statute, § 1192. Indebtedness of prosecutor to defendant is no defence, § 1193.

III. CHEATS AT COMMON LAW. 1

§ 1116. CHEATS, punishable at common law, are such cheats (not amounting to felony) as are effected by deceitful or illegal symbols

1 See, for forms of indictment, Whart. Prec. tit. CHEATS.
or tokens which may affect the public at large and against which common prudence could not have guarded.

§ 1117. Cheats affecting public justice, thus executed, have always been held misdemeanors. Thus where a person committed to jail under an attachment for a contempt in a civil cause counterfeited a pretended release, as from his creditor, to the sheriff and jailer, under which he obtained his discharge, he was held guilty of an offence at common law, in thus effecting an interruption of public justice; although the attachment not being for non-payment, the order was, in itself, a mere nullity, and no warrant to the sheriff for the discharge. Obtaining the queen's bounty for enlisting as a soldier, by an apprentice reclaimable by his master, is also an offence at common law. And so where a person, pretending that he had power to discharge soldiers, took money of another to discharge him as a soldier.

§ 1118. Independently, however, of cheats affecting the administration of public justice, frauds effected by any general false device or token, calculated to affect the public, are punishable at common law. Thus, selling unwholesome

1 2 East C. c. 18, s. 4, p. 821; 2 Hawk. P. C. c. 22, s. 1; 2 Russ. on Cr. 6 Am. ed. 275; C. E. v. Watkins, 3 Cush. C. C. 441; Cross v. Peters, 1 Greenl. 387; Com. v. Hearsey, 1 Mass. 137; Com. v. Morse, 2 Mass. 233; Com. v. Warren, 6 Mass. 72; People v. Beacock, 7 Johns. 203; People v. Miller, 14 Johns. 371; Lambert v. People, 8 Cow. 882; People v. Stone, 2 Wend. 187; State v. Wilson, 2 Mill's Rep. Cr. 135; State v. Vaughan, 1 Bay. 223; Hill v. State, 1 Yerg. 76; Com. v. Spear, 2 Va. Cas. 66; State v. Strodl, 1 Rich. 344; State v. Patillo, 4 Hawk. 348.


3 R. v. Fawcett, 2 East C. C. 662, and see O'Malley v. Newell, 8 East, 364; 1 Russ. on Cr. 275, 6th ed.; and see, as to falsely perempting bail, 1 Burn's, J. P. 810.


5 Serle's Case, 1 Latch. 202.

6 Sir J. F. Stephen's definition, Dig. C. L. art. 338, is as follows: "Every one commits the misdemeanor called cheating when fraudulently obtains the property of another by any deceitful practice, not amounting to felony, which practice is of such a nature that it directly affects, or may directly affect the public at large. But it is not cheating, within the meaning of this article, to deceive any person in any contract or private dealing by lies, unaccompanied by such practices as aforesaid."

The following are among the illustrations given by him:—

"Selling by a false weight or measure, even to a single person. R. v. Young, 3 T. R. 104.

"Selling clothing with the almsman's seal forged upon it. 2 Russ. Cr. 609.

"Selling a picture by means of an imitation of the name of a well-known artist inscribed upon it. R. v. Closs, D. & B. 400.

"Maining one's self in order to have a pretext for begging. 1 Hawk. P. C. 55; 2 Russ. Cr. 609.

"Selling unwholesome bread as if it were wholesome. 2 East C. C. p. 822; R. v. Dixon, 3 M. & S. 11."

On the other hand, the following cases have been held not to be cheats at common law:


"Selling as a Winchester bushel a sack of corn which is not a Winchester bushel, but greatly deficient. Pinkney's Case, 2 East P. C. 618."

In State v. Phifer, 34 N. C. 221, the distinctions in the text are supported with much clearness by Reade, J., criticizing State v. Stephon, 3 Hawks, 520. See, also, State v. Jones, 70 N. C. 78.

4 Blair Com. 162; 2 East P. C. 822. infra, § 1134.

5 R. v. Wood, 1 Ses. Cas. 217. See infra, § 1127.


7 Resp. v. Powell, 1 Dall. 47. See 3 Rep. Com. Cr. 139; 2 Russ. on Cr. 9th Am. ed. 605 et seq.
such a sale is indictable as a false pretence, it is not cognizable at common law unless a false measure is used.  
§ 1120. It is not indictable at common law for a miller, receiving good barley at his mill, to deliver a dusty and unwholesome mixture of oat and barley meal, differing from the produce of the barley; and Lord Ellenborough, C. J., in a case of this class, said: "The allegation that the quantity (of meal) delivered was dusty and unwholesome, if it had alleged that the defendant delivered it as an article for the food of man, might possibly have sustained the indictment; but I cannot say that its being dusty and unwholesome necessarily and ex vi termini imports that it was the food of man; and it is not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley meal. As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; if the case had been that this miller was owner of a scone-mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that the miller, observing the confidence of this, his situation, had made it a color for practising a fraud, this might have presented a different aspect; but as it is, it seems no more than the case of a common tradesman who is guilty of fraud in a matter of trade or dealing."  
Putting a stone, also, in a single pound of butter, has been held not indictable at common law, the offence not being of such a general character as to make it a common law cheat. 

Yet it is otherwise where an adulteration is latent, so that no suspicion is aroused by it, and is diffused, so as to address the public as such. Thus it has been held an indictable offence at common law for a baker to sell bread containing alum, which renders it noxious, although he gave no reason to his servants to mix the alum in a manner that would have rendered it harmless.  


§ 1123. Latency is not a necessary requisite when the use of the adulterated product is compulsory. Thus an indictment will lie for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man.  

§ 1124. Writers of false news are indictable for its publication, as an offence at common law, though such publication is likely to affect injuriously the public, or to provoke a breach of the peace; and it may also be held that the fabrication of false news, calculated to produce any public detriment, is an indictable offence. Yet here again must we apply the tests already given. The falsity must be latent (c. g., got up in such a way as not to manifestly excite the suspicions of the public), and it must be addressed to the public at large. In this way, the false but skilful dissemination of a report of the loss of a steamer, so as to make money out of the depression of the stock, would be a cheat at common law.  

§ 1125. As long as there is no statute giving an illicit taint to the use of dice in public places, and hence nothing to legitimately throw suspicion upon those offering to play with dice, it is indictable at common law to employ false dice, offering to play with whomsoever may come.  

§ 1126. As to false notes, also, must be invoked the tests of latency and publicity of aim, both of which must exist in an indictable common law cheat. In the case of a person offering to another a cheque on a bank where he has no funds, neither of these ingredients exists. The fraud is not so latent as not to call up inquiry, for the very fact of a man offering his own paper is notice putting the person to whom the paper is offered on his guard. The fraud is not addressed to the public at large, but only to the person invited to take the cheque. Hence, passing such a cheque on an individual is not a cheat at common law.
§ 1124. CRIMES. [BOOK II.

But it is otherwise when there are issued false bank notes so closely resembling genuine bank notes as to deceive the public at large. Here there is latency, for there is nothing on the face of the transaction to invite inquiry; and here the offence is addressed to the public at large, for no one gets up such notes to cheat solely a particular individual. We have here, therefore, the essentials of a cheat at common law. 1

§ 1124. The apparent obscurity in the cases of cheats by false personation is removed by the application of the same tests. 2 If a pretender (e. g., Perkin Warbeck, or the Tchbourne claimant) palm himself off on a community as another person, and under the guise of his assumed character obtain credit from the public at large, he is indictable as a cheat, assuming that he imposes upon persons who have no notice that his claims are disputed, and also that he addresses his imposture to the public at large. The offence is then one aimed at the public generally, and is, supposing there is no notice to put others on their guard, aimed as much at the careless as the careful. Hence it is a cheat at common law. The same rule applies when a person, apparently a major, gets money from the public at large as a major,

T. R. 505. See Ranney v. People, 22 N. Y. 413; State v. Allred, 84 N. C. 749. See, however, K. v. Thurman, C. & M. 200, where it was held that false personation, coupled with a false order, is a common law cheat.

1 Com. v. Boynton, 2 Mass. 77.

Thus, in Virginia, it has been held that the presenting goods, etc., by means of a note purporting to be a bank note of the Ohio Importing Co., issuing no such bank or company, is a cheat, punishable by indictment at common law, if the defendant knew that it was such a false note. It is necessary, in such cases, to aver the scire in the indictment. Com. v. Espie, 2 Va. Cas. 65; state v. Greene, 6 Stroth. 718; see infra, § 748; but see State v. Valino, 4 Hawl. 380. Where the defendants purchased goods from the prosecuting clerk, and gave in payment an instrument purporting to be a five dollar bill of the Bank of Tallahasse, in Florida, the blanks of which were filled up, except those opposite the words "Cashier" and "President," but in these blanks an illegible scratch was written, which, on careless inspection, might have been mistaken for the names of those officers: and the defendants knew, before they passed the instrument, that it was worthless; it was held, in South Carolina, that they were guilty, at common law, of cheating by a false token. State v. Stroll, 1 Rich. 244. And such is the law in Pennsylvania, in respect to a counterfeit bank note of another State. Lewis v. Com., 2 S. & R. 511. As to forgery in such cases, see supra, § 592.

2 As to false personation under statutes, see infra, §§ 1126, 1129, 1140. As to false pretence of insanity, see supra, § 1149.

CHAP. XVIII.] CHEATS. [§ 1126.

when really a minor, 3 and when a married woman obtains general credit by pretending to be unmarried. 2 But suppose the pretender goes simply to an individual, and with that individual uses his pretended character as a basis for getting money, while there is nothing about the pretender's appearance or general reputation to sustain such character. In such case, there being no latency, since there is a direct subject tendered to the prosecutor on which to make inquiry, and the fraud being pointed at a single individual, it is not a cheat at common law. 3

§ 1125. A false stamp or trade-mark, so made as to deceive the public generally, is clearly on this reasoning indicable. 4 More doubtful is an English ruling, that it is a cheat at common law for a painter falsely to put the name of an old master on a copy. 5 Yet this may be accepted on the supposition that the work was skillfully and subtly done, so as to give no notice of falsity, and the fraud was addressed to the public at large, by means of its adoption as a trade by the fabricator, enabling him to throw fraudulent pictures generally on the market.

§ 1126. Indictability, therefore, cannot be predicated of cheats where the falsity is not latent, and the fraud not addressed to the public at large; e. g., false warrants, reading false papers to an individual and obtaining his signature, and false pretences to an individual. In other words, if a cheat is not of such a general character as to address the public, and is not executed by means of latent false devices, it is not indictable at common law; 6 for, as has been seen, if, without false weight, a party sells to another a less quantity than he pretends to sell, it is no public offence; 7 Thus falsely warranting an unsound horse to be sound, knowing it

3 See 1 Gab. Cr. L. 204.

4 See 11 P. C. 1010.


6 R. v. Close, 6hrs. & B. C. G. 490; Hartman v. Com., 5 Barr, 60. R. v. Wheatley, 1 W. Bl. 273, Harr. 60; State v. Justice, 2 Dev. 199; Sis. 1125; U. S. v. Porter, 2 Cranch C. C. pro, § 1121.

7 See 11 P. C. 1010.


9 R. v. Close, 6hrs. & B. C. G. 490; Hartman v. Com., 5 Barr, 60. R. v. Wheatley, 1 W. Bl. 273, Harr. 60; State v. Justice, 2 Dev. 199; Sis. 1125; U. S. v. Porter, 2 Cranch C. C. pro, § 1121.

10 See 11 P. C. 1010.


12 R. v. Close, 6hrs. & B. C. G. 490; Hartman v. Com., 5 Barr, 60. R. v. Wheatley, 1 W. Bl. 273, Harr. 60; State v. Justice, 2 Dev. 199; Sis. 1125; U. S. v. Porter, 2 Cranch C. C. pro, § 1121.
to be otherwise, is no offence at common law, unless there be a conspiracy to defraud, and then an indictment might stand for a conspiracy. 1 Nor is it an offence to cause an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it is written, unless there be a conspiracy. 2

On the same reasoning, the deceitful receiving of money from one man for the use of another, upon a false pretence of having a message and order to that purpose, is not an offence at common law in a private transaction, because it is accompanied with no manner of artful contrivance, but only depends on a bare naked lie; and it was supposed to be needless to attach punishment to such mischief, against which common prudence and caution might be a sufficient security. 3 On the same principle, it is not indictable at common law to get possession of a note, under pretence of wishing to look at it, and then to carry it away, and refuse to return it; nor to pretend to have money ready to pay a debt, and thereby obtain a receipt in discharge of the debt, without paying the money; 4 nor to obtain, in violation of an agreement, and by false pretences, possession of a deed lodged in a third person's hand as an escrow; 5 nor to obtain goods on credit by falsely pretending to be in trade, keeping a grocery shop, and by giving a note for the goods in a fictitious name; 6 nor to put a stone into a pound of butter so as to increase

1 H. v. Pyrel, 1 Stark. 405; State v. Delyen, 1 Bay. 303; and see R. v. Codrington, 1 C. & P. 661.

2 See 2 East P. C. c. 36, s. 5, p. 833; 1 Hawk. c. 71, s. 1; and see R. v. Paris, 1 Sid. 431; Com. v. Banket, 22 Penn. St. 380; Wright v. People, 3 Breese, 66; State v. Justice, 2 Dev. 199; per conum, State v. M'Lean, 1 Aiken, 514; Bill v. State, 1 Yerg. 76, where the ignorance of writing of the party defrauded was held to constitute the cheat. See comments on those cases, 1 Lem. & II. Lead. Cas. 16; and see supra, §§ 674, 675, 702.

Where two persons pretended, the one to be a merchant, the other a broker, and, at such, bartered bad wine for hogs, it was considered that they were guilty of the offence of a conspiracy to cheat, but not of the offence of cheating. R. v. Mackerty, 2 Ed. Raym. 1779, 1184; 3 Ibid. 325; 2 Burr. 1129; 2 East P. C. 824. It has been held, however, indictable to get person to lay money on a race, and to prevail with the party to run bushy; yet the ground of the decision appears to have been that the offence amounted to conspiracy. 6 Mod. 42 c.

4 1 Hawk. c. 71, s. 2; 2 East P. C. 519.

5 People v. Miller, 14 Johns. 371.

6 People v. Babcock, 7 Johns. 501.

7 U. S. v. Carloo, 2 Cranch C. C. 446; Com. v. Herron, 1 Mass. 137.


§ 1127.

CHEATS.

The reasons for the distinction between public and private cheats are thus given by Lord Mansfield in a case where the defendant was convicted of selling beer short of the due and just measure, to wit, sixteen gallons as and for eighteen. This was only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor upon receiving it, to see whether it held the just measure or not. The offence that is indictable must be such as affects the public. As if a man use false weights and measures and sell by them to all or to many of his customers, or use them in the general course of his dealing; so if a man defrauds another, under false tokens, for these are deceptions that common care and prudence are not sufficient to guard against. So if there be a conspiracy to cheat; for ordinary care and caution is no guard against this. These cases are much more than private injuries; they are public offences. But here it is a mere private imposition or deception; no false weights or measures are used; no false tokens given; no conspiracy; only an imposition on the use of an apparent token; which in reality was, upon the very face of it, of no more credit than his own assertion, and was not of a public nature. 2 East P. C. c. 18, s. 2; 2 Russ. C. & M. 3d ed. 285. See State v. Summer, 10 Vid. 887; People v. Miller, 14 Johns. 371.

In a case where this was decided the court said: "We are not to indict one man for making a fool of another; let him bring his acciones." R. v. Jones, 2 Ed. Raym. 1013; 1 Ark. 375; 6 Mod. 105; 8 C. C.; and see R. v. Bryan, 2 Strange, 865; R. v. Gibb, 1 East, 173.

That this may be done, see supra, § 816. "It seems the same doctrine will hold good, though the defendant made use of an apparent token, which in reality was, upon the very face of it, of no more credit than his own assertion, and was not of a public nature."
§ 1129.]

CRIMES.

When only possession is obtained, the person dealt with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. It is only a non-performance of his contract; for which non-performance the other may bring his action. The selling an unsound horse for a sound one is not indictable; the buyer should be more upon his guard. The distinction which is laid down as proper to be attended to in all cases of this kind is this: that in impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable; but where false weights and measures are used, or false marks, tokens, or other marks are taken to cheat and deceive, as people cannot by ordinary care or prudence be guarded against, then it is an offence indictable. The same position has since been repeatedly reaffirmed. 2

§ 1127. a. Where, by means of the cheat, possession only of goods is obtained, the owner retaining the property, and afterwards the property is feloniously appropriated by the taker, this is larceny; and if the indictment be for the cheat, there is, at common law, a merger in those jurisdictions where cheats are only misdemeanors. 3

§ 1128. It has been said in Tennesse, under a statute, that an indictment for selling by false weights must specify the person to whom the sale was made. 4 But this, as a common law rule, is not only inconsistent with authority, but with sound reason, if it means anything more than that when an overt act of cheating has been executed the person cheated is to be named, or averred to be unknown. For it is the essence of the common law of cheat that it should be addressed to the public generally. The true course is to aver that the cheat was devised to defraud the public generally, and then to aver that it was operative in the particular case, supposing that the cheat was consummated.

§ 1129. Where the fraud has been effected by false tokens, and the offence so charged, the false tokens must be specified and set forth, and it must appear that by them the goods were obtained. 5

CHAP. XVIII.]

FALSE PRETENCES.

§ 1130.

It is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences. 1 But it is unnecessary to describe them more particularly than as they were shown or described to the party at the time, in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth show a false token. 2 To charge the defendant simply as a "common cheat" is clearly insufficient. 3

II. STATUTORY CHEATS BY FALSE PRETENCES.


§ 1130. By statutes existing in the several States of the American Union the obtaining goods by false pretences is made indictable. 4 The object of these statutes was not to expand the common

1 R. v. Wheatley, 2 Burr. 1122; 1 W. Bl. 273.
2 Supra, §§ 1117-9.
3 Supra, § 984; infra, § 1344.
4 State v. Woodson, 5 Humph. 55.
5 R. v. Gibbes, 8 Mod. 58.
7 See State v. Corbett, 1 Jones (N. C.), 264, which case simply holds that when a cheat is executed the execution must be set forth.
8 R. v. Close, Dears. & B. 460.

obtain from any other person any chattels, money, or valuable security, with intent to cheat or defraud any person of the same, 5 such person shall be guilty of a misdemeanor, and punished as therein required: 6 "Provided always, That if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny on the same facts." 7

The distinction between the two statutes, it will be observed, consists in two features, and, with these exceptions, the interpretation given by the courts to the one may be considered as equally applying to the other. In the first place, by the 30 Geo. II. c. 24, the subject matter, the obtaining of which by false pretences is made indictable, is limited to "goods, wares, or mer-

1 2 Bent P. C. c. 18, s. 13, p. 837.
2 Ibid. p. 838. 3 infra, §§ 1213 et seq.
3 State v. Johnson, 1 Chinn. 125.
4 The statute of 30 Geo. II. c. 24, the original from which most of our statutes are drawn, after reciting that divers evil-disposed persons had, by various artful stratagems, etc., fraudulently obtained divers sums of money, etc., to the great injury of industrious families, and to the manifest prejudice of trade and credit, enacts:

Obtaining Goods, etc., by False Pretences.—"That all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same, shall be deemed offenders against law and the public peace," and shall be punished as therein required.

The statute of 7 & 8 Geo. IV. c. 30, s. 53, provides:

Same, proved if Offence amount to Larceny there be no Exception.—"That if any person shall by any false pretence

VOL. II.—4

49
law definition of cheats, but to create a new offence which that
definition, when properly stated, did not cover. The distinction is
this: No cheat is indictable at common law unless effected by con-
sspiracy, or unless it be marked by latency, subtlety, and generality
of operation, as to affect all likely to come within its range; whereas,
under the statutes now before us it is made indictable to obtain
money or goods from individuals by any designedly false
chandlery;" by the 7 & 8 Geo. IV. c. 29,
s. 53, it comprises "any chattels,
money, or valuable security." In the
second place, what constitutes the main
point of difference, and what the
principle of the latter statute indicates
when it states that a failure of justice
frequently arises from the subtle distinc-
tion between larceny and fraud, is,
that under the 30 Geo. III. c. 24, how-
soever an offence on trial proved to
amount to constructive larceny, the
common law, by merging the misde-
meanor in the felony, worked the acqui-
ittal of the defendant; whereas, by
the 7 & 8 Geo. IV. c. 29, s. 53, it is pro-
vided that by reason of such merger,
he shall not be entitled to acquittal.
By 24 & 25 Vict. c. 95, those statutes
are modified in modes hereafter
noted.
Sir J. R. Stephen thus summarizes the
English law on this topic:—


Obtaining Goods, etc., by False Pre-
tences.—"Every one commits a misde-
meanor, and is liable, upon conviction
thereof, to five years' penal servitude
as a maximum punishment, who,

(a) By any false pretence obtains
from any other person any chattel,
money, or valuable security, with in-
tent to defraud; or who,

(b) With intent to defraud or in-
jure any other person by any false
pretence, fraudulently causes or in-
duces any other person to execute
any valuable security, or to write, impress,
or affix his name, or the name of any
other person, upon any paper or
parchment, in order that the same may
afterwards be made or converted into,
or used or dealt with as a valuable
security or property.

It is not an offence to obtain
by false pretences any chattel which is not
the subject of larceny at common law,
but it is immaterial whether such a
chattel so obtained is or is not in
existence at the time when the false
pretence is made, if the thing, when
made, is obtained by the false
pretences.

It is not an offence to obtain credit
in a partnership account by false pre-
tences to the amount which a partner
is entitled to charge against the part-
nership funds." To this is cited R. v.
Branes, L. & C. 755, of which case Sir
J. R. Stephen says he is "unable to fol-
low the reasoning of this judgment.
As to Maine, see State v. Mills, 17

1 24 & 25 Vict. c. 95, s. 81, s. 44, as explained
by the cases.


statements of facts likely, under the particular circumstances of
the case, to deceive.1

Before proceeding to an analytical examination of the constituent
elements of the statutes, it may not be out of place to notice some
of their general features, as judicially settled.

Me. 211. In Connecticut, the statute
(title 21, § 114, ed. 1855) embraces the provisions of 33 Hen.
VIII., 53 Geo. IV. and 23 Geo. III.; and the English
decisions are there adopted. State v.
Bowley, 12 Conn. 101.

By the N. Y. Penal Code of 1822,
§ 541, larceny, embezzlement, and obtain-
ing goods by false pretences are made
a common offence, under the title of lar-
ceny. (See supra, §§ 888, 1000, 1025.)
For prior statutes, see Fay's Dig. 272;
People v. Crisis, 4 Denio, 525; People v.
Galloway, 17 Wend. 840. But while obtain-
ing goods by false pretences is thus called larceny, its former charac-
terization is retained.

Under the Virginia statute an indict-
ment for the offence may be either in
the form of indictment for larceny at
common law, or by charging the specific
facts which the act declares shall be
described larceny. Leftwich v. Com., 20
Grat. 748.

By prior statute in Virginia, the
merely giving a man's own draft on a
banker in whose hands the drawer has
no funds is no more than his bare
assertion that the money will be paid.
Com. v. Speer, 2 Va. Cas. 65; Ibid.
146, 151.

But an indictment was held good
which alleged the obtaining from the
Bank of Virginia, by false pretence, of
"fifty dollars in money, current in the
Commonwealth of Virginia, although
it was contended that, as the preamble
of the statute recited a preexisting
evil, etc., as the cause of its enactment,
the defendant did not extend to banks which did
not exist in Virginia until many years
after the date of the statute. Com. v.
Swinney, 1 Va. Cas. 150, 151. See,
also, State v. Patillo, 4 Hawks, 345.

In Vermont, under a statute limited
to false tokens, it was held that fraud-
and false representations of a man's
property and resources were not indi-
table; the language of the statute being
narrower than that of 30 Geo. II.
State v. Summer, 10 Vt. 593. Subse-
quently, however, the statute was
amended by introducing the words
"false pretences." The statute 33 Hen.
VIII. has been recognized in New York,
12 Johnson, 263; 9 Wend. 180; in Massachussets,
Com. v. Warren, 6 Mass. 72; though not in Pennsylvania,
Stev. v. Powell, 1 Daill. 47.

Under the South Carolina Act of
1791, an indictment was held bad which
merely alleged that the defendant falsely,
fraudulently, etc., pretending
that a certain mulatto was a slave, did
falsely, etc., cheat and defraud one
A., by selling said mulatto to him for
a slave, when said mulatto was free.
But it is swindling, within the pur-
view of this statute, to obtain horses
from an ignorant man, by threats of
a criminal prosecution, and also by
threats of his life. State v. Vaughn,
1 Bay. 252. The same rule, however,
does not apply when a blind horse is
sold as a sound one. State v. Delyon,
1 Bay. 353; Code, 1859, c. 193, § 30.

1 Supra, §§ 1125-1137; infra, § 1186.
For English statutes see 2 Russ. on Cr.
9th Am. ed. 619 et seq.
§ 1131. In the first case reported on the subject, Lord Kenyon said: "This indictment being founded on the statute 30 Geo. II. c. 24, is different from a common law indictment. When it passed, it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence which had not happened, to which persons of ordinary caution would give credit. The statute of the 33 Hen. VIII. c. 1, requires a false seal or token to be used to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the statute 30 Geo. II. c. 24, introduced another offence, describing it in terms exceedingly general. It seems difficult to draw the line, and to say to what cases the statute shall extend, and therefore we must see whether each particular case as it arises comes within it. In the present case, four men came to the prosecutor, representing a race as about to take place; that William Lewis should go to a certain distance within a limited time; that they betted on the event, and they should probably win; he was perhaps too credulous, and gave confidence to them, and advanced his money; and afterwards the whole story proved to be an absolute fiction. Then the defendants, morally speaking, have been guilty of an offence. I admit there are certain singularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the act, for the defendants have by false pretences fraudulently contrived to obtain money from the prosecutor, and I see no reason why it should not be held to be within the meaning of the statute." Ashurst, J., said: "The statute 30 Geo. II. c. 24, created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind." Buller, J., remarked: "The ingredients of this offence are the obtaining money by false pretences and with intent to defraud. Barely asking for a sum of money is not sufficient, but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime.

1 Young v. E., 3 T. R. 98.

CHAP. XVIII. FALSE PRETENCES.

If the intent be made out, and the false pretence used in order to effect it, it brings the case within the statute."

§ 1132. In an early case on the New York statute, 2 Walworth, Chancellor, when commenting in the Court of Errors on the law as above laid down, said: "I am aware from numerous cases which have come under my notice, judicially and otherwise, that the rule of morality established by the decisions under these statutes, and by the common law of Scotland, has been deemed too strict for those who, in 1825 and subsequently, have been engaged in defrauding widows and orphans, and the honest and unsuspecting part of the community, by inducing them to invest their little all, which, in many instances, was their only dependence for the wants and infirmities of age, in the purchase of certain stocks of incorporated companies, which the vendors fraudulently represented as sound and productive, although they at the time knew the institutions to be insolvent, and their stock perfectly worthless. But I am yet to learn that a law which punishes a man for obtaining the property of his unsuspecting neighbor by means of any wilful misrepresentation or deliberate falsehood, with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid for the respectable merchants and other fair business men of the city of New York, or any other part of the State. Neither do I believe that any honest man will be in danger of becoming a tenant of the state prison if the statute against obtaining money, or other things of value, by false and fraudulent pretences, is carried into full effect, according to the principles of the decisions to which I have referred. But it may indeed limit and restrain the fraudulent speculations and acts of some, whose principles of moral honesty are regulated solely by the denunciations of the penal code. The law on this point, as laid down by the Supreme Court in this and numerous other cases, is unquestionably the settled law of the land, in conformity with both the spirit and the intent of a positive legislative enactment."

§ 1133. "It should be remembered, however," to quote from a judge whose opinions on criminal jurisprudence are entitled to pecu-

1 See also, the interesting and well-digested opinion of Recorder Vaux, in Recorder's Decision, 47, 75. Hutchinson and Turner's Cases, which are, in fact, the first instances in Penn. 546.
§ 1184. CRIMES. 

C H A P. XVIII. FALSE PRETENCES. 

§ 1185. A false pretence, under the statute, is such a designed misrepresentation of an existing condition as induces the party to whom it is made to part with his property.

2. Character of the Pretences.

§ 1185. Hence the rule may be broadly stated, that any designed misrepresentation of an existing condition, by which a party obtains goods of another, is a false pretence under the statute.\(^1\)

Whether or not the pretence that the defendant is a man of wealth and credit is enough to support an indictment is a question which does not appear in England to have received an express decision; though a case already cited\(^2\) certainly goes a great way to establish the affirmative doctrine. In an early New York case,\(^3\) it was held that fraudulently obtaining goods on such a pretence is indictable. And the same was held in a later case,\(^4\) where the defendant represented himself to be in successful business as a merchant in Boston worth from $9000 to $10,000 over and above all his debts; and, to give weight to this assertion, represented that he had never had a note protested in his life, and had then no endorsers; the truth appearing in evidence that he was at the time wholly insolvent.\(^5\) And it may be generally said that a knowingly false specific avowment of wealth and solvency is within the statute.\(^6\)

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\(^1\) See Com. v. Drew, 19 Pick. 172; State v. Phifer, 65 N. C. 321. As to distinction between false pretences and larceny, see Zink v. People, 77 N. Y. 114.

\(^2\) Ild.; People v. Kendall, 25 Wend. 389; Abbott v. People, 75 N. Y. 692; Clifford v. State, 56 Ind. 245; State v. Timmons, 58 Ind. 98. See, however, Com. v. Stevenson, 127 Mass. 440.

\(^3\) Where the defendant, then a minor, fraudulently obtained goods by falsely representing himself to be a joint owner with his father of a number of cows and other stock on a neighboring farm, it was held this was within the statute, and his minority did not avail in a criminal action, although it would have in a civil. People v. Kendall, 25 Wend. 389. In Vermont a more restricted view is taken, based mainly on the distinctive limitations of the Vermont statute. State v. Summer, 10 Vt. 557; see Dyer v. Tilton, 23 Vt. 319. That this view is peculiar to Vermont, see Bigelow on Fraud, 25.

\(^4\) In New York, by the Penal Code of 1892, § 543, it is essential to sustain a
§ 1136. Whatever we may think on the last point, we may hold it settled that it is a false pretense under the statute to falsely claim the ownership of specified assets on which credit is given. Thus in one of the earliest cases under the Pennsylvania statute, two distinct false pretenses were averred: one, that the defendant had in the hands of his guardians in New York an estate equal to two thousand dollars a year; the other that he would procure and bring on from New York money from his mother to pay the prosecutor. The first of these was held to be a false pretense under the statute.

§ 1137. The same rule applies when the object is to obtain negotiable paper. Thus where an indictment charged that N. represented to O. that he possessed certain specified valuable property, which he would sell him for four bills of exchange on Philadelphia, and that in consequence of this representation the bills were drawn by O., and that this representation was made knowingly and designedly, and with intent to cheat O. of his drafts, and that in fact N. possessed no such property as he pretended to have, this was held to present a false pretense under the statute.

§ 1138. It has further been held that a false representation that the defendant had money in the hands of a third person, absent at prosecution based on the purchaser's statement of his means, that such statement should be in writing and signed. See cases under § 1138.

1. People v. Herrick, 13 Wend. 87. 2. § 1138.

CRIMES. [BOOK II.

CHAP. XVIII.] FALSE PRETENCES.

the time, sufficient to take up a note, to which, by means of the representation thus made, the prosecutor's signature was obtained, is within the statute.

§ 1139. It is clear that a false representation of the status of the defendant brings him within the statute although there is an original felonious intent the case may be larceny. That this is the case when an infant falsely pretends to be of full age will be hereafter seen.

§ 1140. A person who falsely claims to have supernatural powers, and thereby obtains money or goods (e.g., in case of gypsy fortune telling), is indictable for false pretences, when the party defrauded is thereby really imposed upon. And in Philadelphia, in 1884, the same position was taken in respect to frauds by an alleged "spiritual medium."

§ 1141. False representations of delivery of goods are within the statute. Where a carrier, falsely pretending that he had carried certain goods to A. B., demanded and thereupon obtained from the consignor sixteen shillings for carriage of them, it was held within the statute. In another case, where the carrier falsely pretended that goods given to him for carriage had been delivered, but that he had left at home the receipt, the same rule was applied.

False representations of payment for the prosecutor fall under this head. It has been held, on this principle, that a false state-

1. People v. Herrick, 13 Wend. 87.

Infra, § 1135.

It has been held an indictable pretense for a party falsely to represent that he had a capital of two thousand dollars, and thus obtain the property of the prosecutor. Com. v. Poulson, 6 Penn. 137; S. P., State v. Pasley, 27 Comm. 501. See also, State v. Reidel, 26 Iowa, 430; State v. Fryor, 30 Ind. 350. State v. Monday, 78 N. C. 460.

1. R. v. Ball, 13 Cox C. C. 605; R. v. Burrows, Bell C. C. 232; 8 Cox C. C. 370; Com. v. Drew, 19 Pick. 179; Com. v. Stevenson, 137 Mass. 448; State v. Tomlin, 3 Dutch. 13; Bigler v. People, 94 Mich. 299; State v. Eley, 20 Wis. 217; and this where a spurious order is used. Tyler v. State, 2 Burnt. 27.

2. Supra, § 888.

Infra, § 1149.

3. R. v. Giles, L. & C. 508; 16 Cox C. C. 44. See infra, § 1155; State v. Phelps, 6 N. C. 321; Brown v. State, 9 Baxt. 45. In R. v. Evans, 3 F. & F. 523, thus obtaining money was held larceny. See supra, § 964.


5. See People v. Genet, 19 Hun, 91.


9. Supra, § 964.
ment by the agent of an insurance company that he had paid over to the company certain premiums paid him by the defendant, thus preventing its lapping, is a false pretense. And where it was the duty of C., a servant, to ascertain daily the amount of dock dues payable by his master, and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues, but where, by representing falsely to the cashier that the amount was larger than it really was, as he well knew, he obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference, it was held that the case was one of false pretences.

§ 1142. Where a person obtains goods under the false pretence that he is employed by A. B., who sent him for them, he is within the statute, supposing the intention of the owner was to pass property to the defendant, or supposing the statute covers cases where only possession is obtained. And this may be extended to all false pretences of agency, supposing that property passed to the defendant. If, however, there was no property passed to the defendant, but the goods were given to him as the servant of A. B., then the offence is not false pretences but larceny.

§ 1143. A false pretence that the party is a practising physician is within the statute. The same view is taken of a false pretence, for the purpose of selling an alleged medicine, that the defendant had effected with it certain cures.

§ 1144. A false allegation, also, that the defendant represented a principal of means is within the statute; and so of a false pretence that the defendant could secure a place for the prosecutor.

§ 1145. The same result was reached when the evidence was that the defendant obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and a house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk; the jury finding that the prosecutor was not carrying on any such business at all. That the defendant was a storekeeper may be also a false pretence.

§ 1146. On the same principle an indictment was sustained which alleged that the defendant obtained money by pretending falsely that he was an attorney who had got a third party out of a difficulty such as that in which the prosecutor was placed.

§ 1147. Where a man assumes the name of another to whom money is required to be paid, this is a pretence within the meaning of the act.

§ 1148. Where the prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she had refused to ratify, in consequence of which he threatened her with an action, and thus obtained money from her; and where, during the whole transaction, it appeared he had a wife; the indictment presented two pretences: 1st. That he was unmarried. 2d. That he was entitled to bring an action against her for a breach of promise. It was held (Lord Denman, C. J., and Maule, J.) that the case was within the statute, and that the fact of the prisoner paying his addresses to the prosecutrix was sufficient evidence to prove the first pretence. It has been held an indictable offence for
§ 1149. Crimes.

a married man to pretend he was unmarried, and thus to obtain from a woman he courted money to furnish a house. But a mere promise to marry is insufficient.\(^1\)

§ 1149. That the defendant was, as to personal status, c. q. infancy or coverture, invested with rights which he did not in fact possess,\(^2\) is a pretence under the statute. This principle, which has been elsewhere noticed in other relations,\(^3\) leads to the conclusion that a minor, having nothing in his appearance or otherwise to put parties dealing with him on their guard, who pretends to be of full age, and hence legally responsible, is liable to be prosecuted for false pretences,\(^4\) and that the same rule applies to a married woman passing herself off as unmarried, or the converse.\(^5\)

4. See supra, § 1129; and, also, Whart. Conf. of L. §§ 113, 119.
5. People v. Kendall, 25 Wend. 399, and comments, supra, § 1135. See, however, Price v. Hewett, 8 Exch. 146; Liverpool Loan Ass. v. Fairhurst, 9 Ibid. 422; Wright v. Leonard, 11 C. B. (N. S.) 258; Goods v. Harrison, 5 R. & Ald. 147, where it is argued that no action on the case lies against a minor under similar circumstances. In Gabbett's Cr. Law, 304, it is declared to be a common law cestui que for an infant to impose generally on the community under the pretence of being of full age.
6. There are, indeed, no direct adjudications on these points, but the following is on the same principle:—

An indictment charged that the prisoner was living separately from her husband, and receiving an income from him for her separate maintenance under a deed of separation, which stipulated that she should not be liable for her debts; and that she falsely pretended to U., a servant of W., that she was living under the protection of her husband, and was authorized to apply to W. for goods on the credit of her husband, and that he was willing to pay for them; and that she wanted them to furnish a house in his occupation. It was proved that on the 4th of August she called at W.'s shop, and on being served by U., selected certain goods, and being asked for a deposit, said it was a cash transaction, that her husband would give a cheque as soon as the goods were delivered. The deed was proved, and it was also shown that the annuity covenanted to be paid by the husband was duly paid, and that the house which she gave as her address, and which was found shut up after the goods had been sent to it, had been taken by her whilst in company with a man with whom she had been living as his wife from the middle of July till the end of August. It was held that there was sufficient evidence to support a conviction. R. v. Davis, 11 Cox C. C. 182—C. C. R., supra, § 71. See, also, E. v. Jennison, supra, § 1145.

§ 1150. It has been frequently held that to present a false claim of indebtedness may be a false pretence.\(^6\) Thus, where the secretary of an Odd Fellows' Society falsely pretended to a member of the society that the sum of £13, 9s. 6d. was due by him to the society for fines incurred by him as a member, by means of which such secretary fraudulently obtained from him such sum of money, it was held to be a false pretence within the statute 7 & 8 Geo. IV. c. 29.\(^7\)

§ 1151. To extort money by a false statement of an existing prosecution is within the statute.\(^8\) Thus it was held a false pretence to extort money by pretending falsely to the prosecutor that his daughter had committed a public offence, that a warrant had been issued for her, and that the defendant had come with the warrant.\(^9\) But it has been said to be otherwise when the payment is made to illegally compound the offence.\(^10\)

§ 1152. The unauthorized assumption of the dress of an Oxford student, thereby obtaining money, is a false pretence under the statute.\(^11\) And so of the assertions that the defendant was an a clergyman of standing, or an officer of the dragon,\(^12\) or an officer of a charitable institution.\(^13\) At the same time it should be remembered that there must be in such case an intent to defraud; and that no indictment will hold for a misstatement based on an honest mistake of law.\(^14\)

§ 1153. An indictment, it has been ruled in New York, will not lie when the money is parted with as a charitable donation, although the pretences moving the gift are false and fraudulent;\(^15\) and a statute was passed

3. See Perkins v. State, 67 Ind. 270, and see infra, § 1195, note.
6. Infra, § 1192, and quere.
§ 1155. CRIMES. [BOOK II.

to cover the supposed deficiency. In Massachusetts and England a
sounder view has been taken, it having been there expressly held that a begging letter, making false representations as to the condition and character of the writer, by means of which money is obtained, is a false pretense under the statute.¹

§ 1154. Assuming a "puff" to mean a loose exaggeration of
value, to make it an indictable false pretense would bring almost every sale within the statute, for there are few sales about which there is not some affirmation, either express or implied, that is not exactly true.²

Some features must be specified, therefore, which distinguish the mere puff from the false pretense.³ And the first to be here noticed is that the puff is a general estimate, loosely given as a matter of opinion for which there may be probable grounds, whereas a false pretense is a false statement of a fact known to be false. Thus it is a mere puff, and not indictable, to say of a flock, "This is a first-rate flock;" but to say that a certain lameness, observed by a purchaser, is not disease, but the result of an accident, which statement the defendant knows to be untrue, is a false pretense.⁴

So it is a mere puff, and not indictable, to say lumpsingly of an article in gross, that it is of a certain weight; but to pretend to have weighed it, and to have found it to be of a particular weight greater than it actually is, is a false pretense.⁵

§ 1155. We may therefore hold generally, that mere exaggerated praise is not a false pretense. Thus to say of a horse that he is a "first class animal," or a "fine trotter," or "is all right," is a puff which is not indictable;⁶ but the statute applies where the defendant makes a

³ People v. Cristallo, 4 Denio, 528; State v. Lambeth, 62 N. C. 395; State v. Heffner, 84 id. 751; State v. Webb, 62.
⁴ See supra, § 1193.
⁵ People v. Cristallo, 4 Denio, 528; State v. Lambeth, 62 N. C. 395; State v. Heffner, 84 id. 751; State v. Webb, 62.

CHAP. XVIII.] FALSE PRETENSES. [§ 1157.

specific false statement as to soundness; and when he falsely pretends to the prosecutor that a certain horse is the famous horse "Charley," which it is not.⁷ And it is a mere "puff" to say of a mixture that it is "good," or "first class;" but it is an indictable false pretense to declare falsely that it is a non-explosive burning fluid.⁸

§ 1156. But while it is not indictable to say of a particular article that it is "good;" to sell it by a false sample is indictable.⁹ Thus, A. bought cheese of B. at a fair, and paid for it. Before he bought it, B., offering cheese for sale there, bored two of the cheeses with an iron scoop, and produced a piece of cheese, called a taster, at the end of the scoop, for A. to taste; he did so, believing it to have been taken from the cheese, but it had not, and was from a superior kind of cheese, and fraudulently put by B. into the scoop, the cheese bought by A. being very inferior to it. It was held that B. was indictable for obtaining the price of the cheese from A. by false pretenses.¹⁰

§ 1157. As to false quality, more difficult questions arise.¹¹ In an English case, the prisoner induced a pawnbroker to advance him money on some spoons, which he represented as silver-plated spoons, which had as much silver on them as "Elkington's A." (a known class of plated spoon), and if it be that which the party taking it practically calls for, then an indictment cannot be sustained. Cases, also, may happen when proof of a real equivalent obtained will work an equitability, though the equivalent said would be illusory. Thus Barnum, to adopt an illustration of Mark, for a series of years announced "Washington's nurse" as among his curiosities on exhibition, and the part was personated by one of the old negroes named Jossi Heith. She was not really Washington's nurse, and a person paying money to see her, if he paid money for nothing else, paid money without a true equivalent. But was the money truly paid for seeing Washington's nurse? Was it not really paid for the excitement of the show, with a consciousness that such particular item in the show—the "nurse," the mermaid, the woolly

² State v. Mills, 27 Me. 211.
³ Greenough, in re, 31 Vt. 279. See infra, § 1192.
⁴ Cowles v. State, 50 Ala. 445.
⁶ As to rains, see R. v. Williamson, 11 Couch C. C. 328; Wallace v. State, 11 Lea, 542.
and that the foundations were of the best material. The spoons were plated with silver, but were, to the prisoner's knowledge, of very inferior quality, and not worth the money advanced on them. It was held by the court (Willes, J. dissenting, and Bramwell, B., doubting) that obtaining the money by the false representation as to the quality of the spoons was not an indictable offence within the statute against false pretences, as the article the prisoner delivered to the pawnbroker was the same in specie as he had professed it to be, though of inferior quality to what he had stated. This decision may be justified on the ground that the statements as to "Elkington's A." was regarded on both sides as only a conjectural estimate, and that "best" material is a term which might be interpreted in several ways. Much less defensible is a decision by Chambers, C. S., that pretending a chain to be gold, when in fact it was only a cheap amalgam, is not within the statute. This, however, is now practically overruled. And it is now settled that selling with a false assurance of quality may be a false pretence. But a mere opinion or estimate, given as conjectural, is not a false pretence.

§ 1158. The use of a false brand or trade-mark is indictable.

Thus, a false representation that a stamp on a watch was the hallmark of the Goldsmith's Company, and that the number 18, part thereof, indicated that the watch was made of 18-carat gold, is within the statute, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition.

The same conclusion was reached in a case already noticed where the evidence was that B. was in the habit of selling baking powders,


2. See supra, §§ 1168 et seq.

In R. v. Ardley, L. R. 1 C. C. 303, 40 L. J. M. C. 85, it was noticed that if the defendant, in R. v. Bryan, had represented the spoons as being fact Elkington's manufacture when he knew they were not, he would have been rightly convicted; and in R. v. Suter, supra, where the jury had found that the prisoner represented a chain as in fact 18-carat gold, when he knew in fact that it was nothing of the sort, he was held rightly convicted. Roscoe's Cr. Ev. p. 487.

§ 1159. On the question of false weight, we again encounter the distinction already noticed. If a man, selling an article by weight, falsely represent the weight to be greater than it is, and thereby obtain payment for a quantity greater than that delivered, he is indictable for obtaining money by false pretences. It is otherwise, however, if he is selling the article for a lump sum, and merely makes the false representation as a loose conjectural estimate of the value of the aggregate. The test is, is the article sold by weight, and is a deliberate false statement made it is of a particular weight? If so, there is a false pretence. Thus, the prisoner having contracted to sell and deliver to the prosecutrix a load of coals at 7 d. per cwt., delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and produced a ticket showing such to be the weight, which he said he had made out himself when the coals were weighed. She thereupon paid him the price as for 18 cwt., which was 2s. 4d. more than was his due. It was held that the prisoner was indictable for obtaining the 2s. 4d. by false pretences. And the same result was reached in a case where the defendant declared that he sold a parcel as 14 tons of coal, when in fact it was but 8 tons, heaping it so as to swell its bulk.

In another case a baker had contracted with the guardians of a parish to deliver loaves of a certain weight. The relieving officer gave the poor applicants tickets, which they were to take to the baker. He was to give them loaves on their presenting the tickets to him, and afterwards return the tickets, as his vouchers once a


VOL. II.—5
§ 1160. When we come to false statements as to property on which money is to be raised, we apply the same test. Is the statement of value a mere conjectural opinion? If so, it is not a false pretense. Is it an exact statement as to some particular fact about such property, essential in determining its value? Then it may be a false pretense. Hence a false statement as to the soundness of a horse may be a false pretense. The principle was extended to real estate in a case where A. applied to B. for a loan upon the security of a piece of land, and falsely and fraudulently represented that a house was built upon it. B. advanced the money upon A.'s signing an agreement for a mortgage, depositing his lease and executing a bond as collateral security. It was held that A. was properly convicted of obtaining money by false pretenses. And the same distinction applies to the mortgage of personal property to which the defendant has no title, and to a false allegation that a particular mortgage was a first lien. The same limitations are applicable generally to the pretense that certain land is unencumbered, and this although the prosecutor might on further inquiry have learned the truth. To sell land already sold to another is also an indictable offence, unless the vendor is acting under mistake, and without intent to defraud.

§ 1161. But a warranty when it is a mere statement as to matters transparently open to the vendee, or when it is an engagement to assume certain risks of title, is not a false pretense. Thus where the seller sold the property in the usual covenants of title, Littledale, J., held that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as a false pretense. Such warranties, in fact, are mere matters of form, and considered as such; or, if they are inducements to purchase, are only so because they are promises by the vendor to hold the vendee harmless. But if a warranty is couched in the shape of a positive false statement of a material latent fact, which statement leads to

1 R. v. Baglione, 33 Eng. L. & Eq. R. 540; Dears. & C. C. 315; 6 Cox. C. C. Watson v. People, 87 N. Y. 581; 28 Supra, §§ 1351. Supra, § 150, 1119. Hun, 76; State v. Stanley, 64 Mo. 157; Supra, § 1192; Trunk v. Downing, 76 Com. v. Jackson, 128 Mass. 15; People v. Crisis, 4 Denio, 555. But see supra, § 591; Holbrook v. Conner, 66 Mo. 262; § 1165. In State v. Hoffman, 84 N. C. Davis v. Meeker, 5 Johns. 364; 761, it was held that while to say that the eyes of a horse were sound was a mere opinion, not within the statute, it is otherwise with the statement that there has never been anything the matter with the horse's eyes.

2 R. v. Burgon, 26 Eng. L. & Eq. 615; Dears. & B. C. C. 11; 7 Cox. C. C. 131. See State v. Hill, 72 Mo. 235. Supra, § 1186; People v. Sully, et al.; though see Com. v. Brady, 13 State v. Newall, 1 Mo. 246. This and the following cases are in some States (e. g., Massachusetts) specifically indictable by statute. See Nixon v. State, 30 Ala. 170.

3 People v. Sully, 5 Parker C. R. 142. But see under California statute, People v. Cox, 65 Cal. 345.

4 State v. Dorr, 38 Mo. 448; State v. Hill, 73 Mo. 238; Com. v. Grady, 13 Bush, 285.

5 People v. Garnett, 35 Cal. 470. Supra, § 1182; State v. Young, 76 N. C. 258; State v. Chunn, 19 Mo. 233.

6 R. v. Codrington, 1 C. & P. 661.
the purchase, it is a false pretence. Nor is it any defence to a charge of a false pretence that it was backed up by a written warranty as to the future.  

§ 1162. Obtaining goods by giving in payment a cheque upon a banker with whom the party keeps no account, and which he knows will not be paid, is clearly within the statute. So where one in a fictitious name delivered to a person, to sell on commission, spurious lottery tickets purporting to be signed by himself, and received from the agent the proceeds of the sale, he was held liable to indictment for obtaining such agent's goods by false pretences. And so generally as to the passing of spurious notes or coin if goods or money be obtained thereby. But where the prisoner passed the note of a country bank which he knew had stopped payment, it appearing that one of the partners was solvent, Gaselee, J., held that he could not be convicted for obtaining money under false pretences, there being no proof that the note had lost its value. Whether the note is valueless is to be determined on all the evidence in the case; and evidence that the bank has paid a dividend is of weight, as showing the note is of some value. Generally, however, it is enough to prove in such case that the bank was broken, and unable to pay; and that these facts the defendant knew. Nor does it make any difference that the note was on its face detective, and that the prosecutor could read. On the other hand, the mere passing of a note, or other business paper on its nominal value, is an affirmation of its value. 

For A. falsely to sign his name as agent for B. and thereby obtain goods, is a false pretence in A.; and so for A. falsely to declare that a signature of a non-existent person made by him is good. 

§ 1163. Even a post-dated cheque is within the statute, if the defendant falsely declares or implies that the cheque is genuine and good. Thus, where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for £25, and refused payment, and he would not have been permitted to overlook. He did not intend when he gave the cheque to the prosecutor to meet them, but intended to defraud. It was ruled that there was evidence of the false pretence that the cheques were good and valid orders for the payment of their amount. On this case Sir J. F. Stephen (Dig. C. L. art. 390) comments as follows: 'There was some slight degree of opinion or rather of expression amongst the judges in this case. The judges were anxious to point out that to give a cheque on a bank where the drawer has no balance is not, necessarily, an offence, as he may have a right to overlook or a reasonable expectation that, if he does, his draft will be honored. These considerations would seem to affect not the falseness of the pretence, but the defendant's knowledge of its falseness, and his intent to defraud.' 

And so of uttering post-dated cheque.


R. v. Evans, Bell C. C. 187; 8 Cox C. C. 267. 

See infra, § 1185. 


Infra, § 1189. 

See cases cited in prior notes to this section. Infra, § 1170; see Lesser v. People, 73 N. Y. 78. 

Supra, §§ 657, 669. 

Supra, §§ 659, 660. 

Lesser v. People, 73 N. Y. 78; 8 Co. L. 15, Hen. 668. 

In this case the facts were as follows: The 25th of August the prisoner, having bargained for goods of complainant, sent out from complainant's residence, where he was, a friend who was with him to get, as he said, the money to pay for the goods. The friend soon after returned with a cheque on a bank, purporting to be drawn by one Steinbach, and dated August 25th. This prisoner represented to be a valid security, and attention being called to the fact that it was dated the 29th, stated that this was done because it was too late in the day and the bank was closed. No account was kept at the bank by any Steinbach, and the cheques was worthless. The cheques was taken and prisoner and his friend took away the goods. It was held by the Court of Appeals, affirming the judgment of the court below, that the offence constituted a false pretence, and the fact that the cheque was post-dated would not be ground to set aside a conviction for obtaining goods under false pretences.

§ 1168.] 

[Book II. 

CRIMES. 

[CHAP. XVIII.] 

FALSE PRETENCES.
of the value of £25, whereby he obtained a watch and chain; and the jury found that before the completion of the sale and delivery of the watch by the prosecutor to the prisoner, he represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all of which was false; and that he represented that the cheque would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, or that he had the funds to pay it; he was held to be properly convicted.1

§ 1164. As the person who advances money or goods on a forged cheque parts absolutely with his property in the thing passed, it is not larceny but false pretences so to obtain money or goods.3

Such has been held to be the law in a case where a servant, who had authority to buy goods, and was to be repaid on producing a ticket containing a statement of the purchase, produced such a ticket, and obtained the amount stated therein, no purchase having been in fact made.5

Cases, however, can be readily conceived, where the defendant brings the order ostensibly for a third person, in which, as only possession of the money or goods is passed to the defendant by the prosecutor, the defendant is guilty of larceny, if he fraudulently appropriates the property.4

It may happen, however, that where forgery is a felony, and false pretences a misdemeanour, the latter, when the two coalesce, may merge at common law in the former.5

False claims to government

§ 1164 a. By the Revised Statutes of the United States (§ 5448), it is made an indictable offence to present a false claim to the government, knowing it to be false.6

1 R. v. Parker, 7 C. & P. 326; 2 446; Com. v. Stone, 4 Met. 43; Com. v. Nathan, 9 Gray, 125; Tyler v. State, 3 Hamp. 37; though see R. v. Evans, 6 C. & P. 553; Cheek v. State, 1 Cold. (Tenn.) 172.
3 See Whart. on Cr. Ev. § 336; Whart. on Cr. Ev. § 321.
4 P., the prosecutor, lent money to C. at interest, on the security of a bill of sale on furniture, a promissory note of C. and another person, and a declaration made by C. that the furniture was unnumbered. The declaration was untrue at the time it was handed to P., C. having, a few hours before, given a bill of sale for the furniture to another person, but not to its full value. It was held that there was evidence to support the prosecution. R. v. McKein, 11 Cox C. C. 270.
5 But where it appeared that C., on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold good business for a certain large sum, whereas the business was worthless, and having in bankruptcy, it was ruled that the indictment could not be sustained upon either of the reproachfulments. R. v. Williamson, 21 L. T. N. S. 444—Bylon.
6 See supra, § 1163.
8 Com. v. Stone, 4 Met. 43.
large house in the village, who had had a daughter lately married; that B. afterwards sold the carpet, so obtained to two different persons, and a lady was called, who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent B. to the prosecutor's shop for the carpet. It was held, that there was a sufficient false pretence proved and negatived, and the case of the prosecution was made out. And where a postman falsely pretended that the sum of 2s. was payable on a post letter intrusted to him for delivery, whereas 1s. only was payable, it was held that the offence was complete when he made the pretence, and that the absence of any evidence to show positively that he did not pay over the extra 1s. to the superior officer was immaterial to his guilt or innocence. That the defendant knew the statement to be false, is also to be inferentially shown.

§ 1165. The burden of approximating a negative is on the prosecution, though when this is done, any matter peculiarly within the defendant's knowledge is to be supplied by the defence. In other words, while the prosecution must make out all the elements of its case, this is to be done inferentially as closely as possible; and when a reasonable certainty is reached, it is for the defendant to produce the affirmative proof requisite to break down the prosecution's approximate negative. Thus, in a Mississippi case, it was held, that where a man assumes the name of another to whom money is due on a genuine instrument, this by itself is indictable. Where, as we have already seen, a person at Oxford, who was not a member of the University, went to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtained goods, this was held within the act, though not a word passed as to his status. And so where the defendant, an employee in a hospital, wrote to a manager for linen, not saying in words that it was for the hospital, but knowingly creating

4. Pretences need not be in Words.

§ 1170. The conduct and acts of the party will be sufficient, without any verbal assertion, and words, written or spoken, imperfectly setting forth a pretence may be supplemented by proof of facts completing the false pretence. Where a man assumes the name of another to whom money is due on a genuine instrument, this by itself is indictable.

2 Com. v. Davidson, 1 Cush. 33.
4 Webster v. People, 92 N. Y. 422; Robey v. State, 52 Ala. 20; State v. Verbeck, 66 Mo. 166.
5 R. v. Story, R. & R. 81; R. v. Har-
that impression in the manager's mind. The mere passing of business paper, also, at its nominal value, is an affirmation that such value is real. But to make silence a pretence, it must be part of conduct or acquiescence involving an affirmation.

Silence in acquiescing in another's statements may amount to a false pretence. But the silence must be of a character to imply an affirmation of such statements.

1 R. v. Franklin, 4 P. & F. 94.

In an English case determined in 1877, the prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service he knowingly and fraudulently delivered up, as part of his uniform, to an officer of the company, a great coat belonging to a fellow-servant, and so obtained the wages due to him. It was ruled that he was properly convicted of obtaining the money by false pretences. R. v. Bull, 36 L. T. (N. S.) 376; 12 Cox C. C. 608.

2 Supra, § 1152.


4 Young v. R., 3 T. E. 58. See Whart. Cr. Ev. § 679; People v. Cline, 44 Mich. 280. The fact that I stand by while B. is lending money to A., who I know is insolvent, will not make me liable to B. unless I do something to corroborate A.'s statements of his solvency. There is no causal relation between my silence and B.'s loan. It is otherwise with my silence when such silence is in any way an affirmation of A.'s statements. But to action, in this sense, words are not necessary. As we have seen, the man who buys goods in a military uniform, which he is not entitled to wear, and who gets these goods on the credit of the uniform, under circumstances which make credit of this kind reasonable, is as responsible as if he said, "I am a military man."

On the other hand, suppression of facts by one of the parties to a contract does not impose criminal liability, unless there be an active (as distinguished from a passive) negation of facts. The Rothschilds incurred no criminal liability when they bought large masses of cotton on the receipt of private intelligence, which they kept to themselves, of the defeat of Napoleon at Waterloo. I may believe a particular piece of cotton, which I offer to buy at a farm-house, to be of peculiar antiquarian value, but I am not indictable if I conceal this belief from the owner. If the opposing view were to obtain, no bargain could be closed without exposure to criminal prosecution. We all of us have reason, personal to ourselves, for every bargain we make. It is difficult for us always to detail these reasons; if we did, it would often expose us to the placing the goods at an exorbitant price. If everything is thus to be told, it would require the man of caution and sagacity, who, before entering

5 They need not be by the Defendant personally.

§ 1171. Where two persons are jointly indicted for obtaining goods by false pretences, made designately and with intent to defraud, evidence that one of them, with the knowledge, approbation, concurrence, and direction of the other, made the false pretences charged, warrants the conviction of both.

§ 1171. CRIMES.

An allegation in an indictment that the defendants obtained goods of A., B., and C., partners in trade, by false pretences made to them, is supported by proof that the defendants made the alleged false pretences to their clerk and salesman, who communicated them to B., and that the goods were delivered to the defendants in consequence of those false pretences. And it is not necessary, in

ditions are, or ought to be, within his knowledge. Thus, he who calls for the payment of a debt implies the existence of a right on his part to make the demand. He who takes a receipt implies that he made a payment to which the receipt corresponds.

II. The existence of analogous conditions in the other party. He, for instance, who buys a particular article implicitly expresses the opinion that the seller is capable of disposing of the article.

III. A bargaining party also implies the existence of the conditions on which the other party depended when entering into the transaction. Thus, the manufacturer who delivers to his customer particular articles implies the existence of qualities which go to make up the value of the goods when ordered. The grocer who delivers a package to a purchaser calling for a pound of coffee implies that the package contains the article called for, in the required quantity. Of this kind of implicit assertion Mittermayer gives us the following illustration: "A customer sees an ornament, exquisitely elaborated, set with cut stones; he supposes they are jewels, and offers $100 for the ornament; the vendor sees the error of the purchaser, but does not undeceive him, and takes the money." This is a case of obtaining money on false pretences. The offering of $100 for an ornament which would not be worth one-tenth that sum if the stones were not jewels, is equivalent to a statement by the purchaser that they were jewels, and to a silent admission by the vendor to the same effect. At the same time, it must be remembered that a bare entrance into a particular transaction is not in itself such an affirmation of the opinion of the other contracting party as to amount to a false pretence, even though the transaction be entered into fraudulently. It is possible to take an attitude of absolute "non-committal" as to such expressions, and it would be absurd to treat a refusal to affirm as an affirmation. A.—to take another instance of Mittermayer's cases—imagines that he has made a large sum in a speculation in which he was engaged; exalted with his supposed good fortune, he pays a debt of $500 stipulated; the creditor takes the money, knowing at the time that the debtor is in error as to the success of the speculation, but without undeceiving him. Putting aside the fact that obtaining payment of a debt cannot be made, by itself, indictable, there is in this case no arrest by the party receiving the money to assumptions by the other party which are essential incidents of the bargain. Whart. on Cont. § 292 et seq.

1 Comm. v. Harley, 7 Met. 462. An indictment charged K. and P. with falsely pretending to B. that they had a quantity of tobacco, which they proposed to sell, and did sell to him, and thereby obtained money from him. The evidence was that K. and P., acting together, were the chief parties by whom the false pretences had been

76.

CHAP. XVIII. FALSE PRETENCES.

§ 1172. The prosecutor, however, cannot prove false pretences made by a third person, alleged to have been made by the procurement of the defendant, without first showing that the defendant instigated such person to make them; nor can the defendant, who fraudulently negotiates spurious paper, be convicted under the statute for the subsequent act of the purchaser of such spurious paper, done innocently and without the defendant's knowledge or instigation, in obtaining money on such paper.

6. They must relate to a Past or Present State of Things.

§ 1173. A false pretence, under the statute, must relate to a past event or existing fact. Any representation with regard to a future transaction is excluded. Thus, for instance, a false statement, that a draft, which the defendant exhibits to the prosecutor, has been received

made. It was held, that the acts of P. were the acts of K., and admissible against him upon the indictment. K. v. Korrigan, 9 Cox C. C. 441. Consolidation also, which is made to the same effect, is admissible as to a fact, as to the past or present state of things. In re Kennedy, 7 Met. 462; R. v. Millard, 2 Mood. C. C. 271; Cowan v. People, 14 Ill. 385; but see infra, § 1287. An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial, it was proved that the prisoner made the false pretences set forth in the indictment to J. B. only, with intent to defraud J. B. and others, his partners, of property belonging to the firm; and it was held that there was no variance between the indictment and the proof, as the words, "and others," in the allegation that the false pretence was made "to J. B. and others," might be rejected as surplusage. R. v. Kennedy, 7 Met. 462; infra, § 1287.

1 Infant, § 1164; Comm. v. Harley, 7 Met. 462; R. v. Millard, 2 Mood. C. C. 271; Cowan v. People, 14 Ill. 385; but see infra, § 1287.

2 For Bronson, C. J., People v. Parish, 4 Denio, 153.

3 Infra, § 1292.

§ 1174. CRIMES. [BOOK II.

from a house of good credit abroad, and is for a valuable consideration, on the faith of which he obtains the prosecutor's goods, is within the law; a promise to deposit with him such a draft at some future time, though wilfully and intentionally false, and the means of the prosecutor's parting with his property, is not. So a pretence that the party would do an act that he did not mean to do (as a pretence that he would pay for goods on delivery) was ruled by all the judges not to be a false pretence, within the statute of Geo. II., and the same rule is distinctly recognized in this country, it being held that the statement of an intention is not a statement of an existing fact. Thus, to take as an illustration an English case, on an indictment for obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public house, and that the prisoner conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief. It was held, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, that a conviction could not be sustained.

§ 1174. But a concurrent promise does not neutralize an accompanying false pretence. If there be the false statement of an existing fraud.

85; State v. Ryers, 49 Mo. 542; Ryan v. State, 45 Ga. 128; Keller v. State, 51 Ind. 111; Gage v. Lewis, 68 Ill. 604; Canterbury v. State, 7 Iowa, 346; Snyder v. State, 27 Iowa, 562; McDonald v. State, 9 Eng. (Ark.) 294; Johnson v. State, 41 Tex. 65. See, as conflicting with this rule, State v. Nichols, 1 How. C. C. 114.


§ 1175. FALSE PRETENCES.

fact, the adding to this of false promises does not take the case out of the statute, when the false pretence was the decisive influence. And this holds, even though the prosecutor would not have yielded to the pretence without the promise. And it is even said by Crompton, J., that the pretence need not necessarily be of some alleged existing fact, capable of being disproved by positive testimony, but may depend on the bâton fide intention and capacity of the defendant at the time of entering into a contract to perform it, or to do some act at a future period. Hence, as we have seen, it may be a false pretence to utter a post-dated cheque.

7. They must have been the Operative Cause of the Transfer.

§ 1175. Where, in Massachusetts, one of the representations proved was that the defendant gave a false name, and where the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods, it was held to have been the duty of the court, either at the time or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant. The same view generally obtains, and it is generally held that there must be causal relation between the pretence and the transfer.

1 R. v. Jeannou, Leigh & Cave, 157; 9 Cox C. C. 156; R. v. West, 8 ibid. 12; R. v. Asterley, 7 C. C. & P. 191; Com. v. Lincoln, 11 Allen, 233; State v. Bowley, 13 Conn. 109. Of this principle a striking illustration is given, supra, § 1185; and as to promises to marry, see supra, § 1148.

2 R. v. West, 8 Cox C. C. 12; R. v. Fry, 7 ibid. 294; D. & B. 449.

3 R. v. Jones, 6 Cox C. C. 457.

4 supra, § 1183.


The cases usually given on this point are those where the prosecutor was, at the time when the false pretence was uttered, fully aware of its falsity. Suppose, however, he was firmly convinced, before the utterance, of the truth of the statements of which the false pretence consisted, and that the false pretence in no way confirmed or strengthened him in that belief; can it
§ 1176. But it is not necessary to a conviction that the false pretense alleged should have been the sole inducement by which the property in question is parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party. And this is true even though the prosecutor would not have surrendered the goods solely on the pretense alleged. To require that the belief should be the exclusive motive be said that he parted with his goods on the faith of the false pretense? Or, to put the case in the concrete: A is firmly of the belief that B is a rich man, worth $100,000. B comes to A, and says, "lend me $10,000; I am worth that sum." B's statement that he is worth $10,000 has no effect on A, who is already convinced of B's great wealth, outside of this declaration. A lends B the money. Supposing that B's statement was knowingly false, can be convicted of obtaining money on false pretenses? Certainly not, if A declares he lent the money solely from what he knew by himself.

Falsehoods, also, told by a party as to matters not part of the consideration of a bargain, and which were not operative in its connection, are not false pretenses under the statute. This applies peculiarly to false statements as to motives which induce the party to sell or to buy.


§ 1178. When the prosecutor resorts to verification, this may be a defence. The prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding it was of gold, the test, he relying on his own examination and test of the chain,

1 Supra, § 119.
§ 1179. The pretence must operate as the direct cause of the transfer; and therefore, where it does not, the statute does not apply. This was the reasoning in an English case where the prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. It was held that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretences. Hence, as we have seen, the prosecution fails when it is shown that the pretences were made after the goods were obtained.

When statements were made on different occasions, it is for the jury to say whether they were so connected as to form one transaction.

The prosecutor must have intended to part with his right of property in the goods, and not merely with his possession.

When a judgment by consent is obtained by false pretences, and the money collected under such judgment, this, it has been held by the Supreme Court of Massachusetts, is not an obtaining of money by false pretences.

§ 1180. As will be hereafter seen, the goods must have been obtained for defendant, and in accordance with his directions; if so, it is no defence that they were obtained mediatly through a contract which the defendant's false pretence induced the prosecutor to make. At this point it is to be observed that the cases are plain to the effect that it matters not whether the goods were obtained immediately by the false pretence, or mediatly by a contract to which the false pretence induced the prosecutor to consent, provided there be a causal relation between the contract and the false pretence. But it must appear that when a sale is averred, a sale on some sort of consideration must be proved.

§ 1181. Delivery by servant of false accounts of payments is a pretence. Where the foreman of a manufacturer, who was in the

2. Supra, § 1202.
3. R. v. Abbott, 1 Den. C. C. 273; 2 C. & K. 630; R. v. Dark, 1 Den. C. C. 276; R. v. Kendrick, 1 D. & M. 208; 5 Q. B. 89; R. v. Greathead, 14 Cox C. C. 108; Com. v. Davidson, 1 Cush. 35; Com. v. Hooper, 104 Mass. 549; Com. v. Hutchinson, 114 Ibid. 325; Com. v. Jeffries, 7 Allen, 549; State v. Newell, 1 Mo. 248. Supra, § 1208. Thus, to obtain a "trade" by a false pretence is indictable. State v. Stanley, 64 Mo. 157. See State v. Hill, 73 Ibid. 238. It is otherwise when only credit on account was obtained, which was afterwards made operative by a distinct transaction. R. v. Wavell, 1 Moore C. C. 294. Supra, § 1198.

Of this Sir J. P. Stephen gives the following illustrations, Dig. C. L. art. 331:—

"A draws a bill upon B. in London, and gets it discounted by C. in Russia, by falsely pretending, by means of a forged authority, that he is authorised to draw upon B. for the amount of the bill. A. does not attempt to obtain money by false pretences from B., though he meant that C. should forward the draft to B., and should obtain payment of the amount, and though his act, if done in England, would have been an obtaining by false pretences from C. R. v. Kilham, L. B. 1 C. C. 261. Supra, § 878; infra § 1308.

"A., by falsely pretending to be a naval officer, induces B. to enter into a contract to board and lodge him at a guinea a week, and under this contract is supplied with food for a week. This is not obtaining food by false pretences, as the supply of food in consequence of the contract is too remotely the result of the false pretences to become the subject of an indictment. R. v. Gardner, D. & B. 49." Supra, §§ 1175, 1179.

§ 1184. While an intention to defraud is inferable from all the facts of the case, and need not be substantively proved, it must be inferred from facts. Thus, a surveyor of highways, having authority to order gravel for the roads, in ordering gravel as usual, and applying it to his own use, is not liable to a charge of obtaining it by false pretences, nor of larceny, unless it appear that he did not mean to pay for it.¹

§ 1184 c. It does not negative the intent to defraud, that the defendant intended to pay for the articles obtained when

Intent to indemnify no defence.

1 R. v. Richardson, 1 P. & F. 485— State v. Call, 43 N. H. 126; Trog-Whisham.
2 In re, § 1157; State v. Hurst, 11 W. Va. 54.
3 See supra, § 122; Whart. Crim. C. C. 260.
4 R. v. Holt, 8 Cox C. C. 411; Bell
5 Com. v. Winslow, 39 Crim. §§ 53 & 54.

"The offence consists in obtaining

85
obtained, or that a trap was laid for him by the prosecutor, or that the article obtained was not that which it was his principal motive to secure. Nor is it essential that the pretense should have been made lucro causa.


§ 1185. Falsity, in the sense of the statute, must be subjective as well as objective; the statement must not only be false in fact, but false to the knowledge of its utterer. It should be remembered, however, that proof of knowledge of a negative is circumstantial and inferential. In what way this proof is constituted has been already partially considered. And proof that the defendant was ignorant of a fact that he stated, sustains a charge of false statement.

10. Prosecutor’s Negligence or Misconduct.

§ 1186. We have seen that to a cheat at common law it is essential that the fraud should be latent. It was in part to meet this difficulty that the statute of false pretences was passed, and under this statute it has been repeatedly held that it matters not how patent the falsity of a pretence may be if it succeed in defrauding. Thus, in a leading case, Lord Denman, C. J., said, in answer to the property from another by false pretences. The intent to defraud is the intent, by the use of such false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay, nor the intention to do so, will deprive the defrauded and fraudulent act in obtaining it of its criminality. Com. v. Tomney, 37 Mass. 50; Com. v. Mason, 105 Mass. 163. The offense is complete when the property or money has been obtained by such means, and would not be purged by subsequent restoration or repayment. Evidence of ability to make the repayment is therefore immaterial and inadmissible. The possession of the means of payment is entirely consistent with the fraud charged. The evidence offered on this point did not touch the question of falsity and fraud of the means by which the loan was obtained, and was properly rejected.” Supra, § 887.

1 R. v. Eggleton, Dears. 615; 33 Eng. L. & Eq. 540.
2 Infra, § 1190; supra, § 149.
3 Todd v. State, 31 Ind. 514.
4 See R. v. Moland, 2 Moody, 271; Com. v. Hatley, 7 Mol. 462; Cowen v. People, 14 Ill. 348; Supra, § 892.
6 See supra, §§ 1185-6.
8 See supra, § 1210.

§ 1187. False Pretences.

statement that the false pretences, to become the subject of indictment, should be such as would deceive a man of average intelligence, “I never could see why that should be. Suppose a man had just enough (fraud) to impose upon a very simple person, and defraud him; how is it to be determined whether the degree of fraud is such as will amount to a misdemeanor?” Hence, the fact that the prosecutor did not possess or apply peculiar prudence is no defence when the prosecutor was really imposed upon. Nor is it any defence that the prosecutor, by searching the records of the courts, might have discovered the falsity of the statement.

§ 1187. To this rule, however, some exception has been taken. Thus, in New York, it was once laid down that a representation, though false, is not within the statute unless it be shown that it was calculated to deceive persons of ordinary prudence and discretion. So, in Pennsylvania, it was said: “Broad, however, as is the phrase ‘for any false pretence whatever,’ it still has a legal limit beyond which it cannot be carried in this or any other case. It extends no farther than to a case where a party has obtained money or property by falsely representing himself to be in a situation in which he is not, or any occurrence which has not happened, to which persons of ordinary prudence might give credit. Where the pretence is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act.” And the same opinion has been expressed in Arkansas. In Pennsylvania, however, this exception has been qualified, it being now held that it is no less a false pretence that

1 R. v. Wickham, 10 Ad. & El. 34.
2 Mr. Groves, (2 Russ. on Cr. 2d ed. 230) objects to this ruling, on the ground the question was for the jury. See Delaney v. State, 7 Exct. 28.
3 State v. Hill, 72 Mo. 286; and cases cited supra, § 1190.
5 Burrow v. State, 7 Eng. (Ark.) 87.
§ 1188. CRIMES. [BOOK II.

the party imposed upon might, by common prudence, have avoided the imposition." And in New York the position first taken has been somewhat modified. "Though the language of the statute, 'by any other false pretence,' is exceedingly broad," says Jewett, J., in a later case, "and in its general acceptation would include every kind of false pretence, and though it may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection, still I do not think it should be so interpreted as to include cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of detection at hand. The object of the statute, it is true, was to protect the weak and credulous against the wiles and stratagems of the artful and cunning. But this may be accomplished under an interpretation which should require the representation to be an artfully contrived story, which would naturally have an effect upon the mind of the person addressed—one which would be equal to a false token or false writing—an ingenious contrivance or unusual artifice, against which common sagacity and the exercise of ordinary caution would not be a sufficient guard." "

§ 1188. It is submitted, however, that whether the prosecutor had the means of detection at hand," or whether "the pretences were of such a character as to impose upon him," are questions of fact, to be left to the jury, as they must necessarily vary with the particular case. If fraudulent lent and false pretences were used, and goods obtained by them, the prosecutor's capacity and opportunities must be considered in determining his culpability. It must also be remembered that the statute assumes some defect in caution, for if there were perfect caution no false pretences could take effect. "

1 Comm. v. Henry, 22 Penn. St. 256—Woodward, J.
2 People v. Crississ, 4 Denio, 528. See R. v. Roebuck, supra, § 1186; People v. Stetson, 4 Barb. 151; infra, § 1192; and see People v. Sully, 5 Parker C. R. 134. Supra, § 1160.
3 See supra, § 147; Savage v. Stevens, 126 Mass. 297.

view accords a well considered English case, in which it was held that the offence was made out where the defendant fraudulently offered a £1 Irish bank note as a note for £5, and obtained change as for a £5 note, even though the person from whom the change was obtained could read, and the note itself upon the face of it clearly afforded the means of detecting the fraud. And it must be remembered that the question of carelessness is to be determined from the prosecutor's standpoint. To obtain from a jeweller money, by exhibiting a spurious jewel, might not be within the statute, while it would be within the statute for the jeweller to offer the same spurious stone to an ignorant customer. The simple and credulous are as much under the shelter of the law as are the astute.

§ 1189. Yet, on the other hand, carelessness so gross as to amount to a submission to fraud, estops the prosecutor from maintaining a prosecution. Thus, in Massachusetts, in 1865, it was held that obtaining money from the prosecutor on the ground that on a former occasion he had not given due change, was not within the statute. And in North Carolina, in 1877, a pretense that "certain cotton was good middling," was held not within the statute, in a case where the prosecutor, an expert, had on hand the means of detection.

1 R. v. Jessop, D. & B. 442; 7 Cox C. C. 599.
2 See supra, § 1178.
4 Cf. Crittenden v. 28 Alb. L. J. 105.
7 State v. Young, 76 N. C. 258.
8 It was held in New York, on a demurrer, that an indictment for obtaining a watch from a person, upon the false representation that the defendant was a constable and had a warrant against such person, issued by a justice of the peace, for the crime of rape, and that he would settle the same if the person defrauded would give the defendant the watch, could not be sustained. The reasoning of the court seems to have been, that if the prosecutor was guilty of rape, he was in some degree "particeps criminis," with the prisoner, and hence could make out no case; and if he was not guilty, the pretenses were not sufficiently reasonable to impose upon a prudent man of average intelligence. People v. Stetson, 4 Barb. 151, 152; S. F., McCard v. People, 46 N. Y. 470. See contra, Perkins v. State, 67 Ind. 270; People v. Williams, 4 Bill (N. Y.) 9. But this is not law where the prosecutor is simply the victim of ignorant terror, and endeavors under its influence to buy off a supposititious prosecution.
§ 1190. If the defendant obtain the money by a false pretence, knowing it to be false, it is no answer that by third parties he had been entreepted into the commission of the offence, if the prosecutor waived none of his legal rights. It is otherwise, of course, when the prosecutor is aware of the falsity of the pretences, and does not bond fide part with the goods. And carelessness or complity amounting to consent, as we have just seen, estops the prosecutor.

§ 1191. There may be cases where both parties employed false representations; but if so, each can be convicted on an independent prosecution, neither can set up the other's guilt as a defence against himself if the transactions are disconnected. It may be otherwise when the transaction is one of fraud against fraud.

§ 1192. That gross credulity is no defence is illustrated by the prosecutions sustained against conjurers and fortune tellers. Nothing but gross credulity could be imposed on by such pretenders; yet on behalf of those thus imposed on prosecutions have been sustained.

§ 1193. While a false affirmation may be within the statute, such is not the case with loose talk, or the statement of vague conjectural opinion. Thus, where a servant went into the prosecutor's store, and said he had some money for his master to buy some wheat, and the prosecutor gave him ten pounds, this was held not within the statute.

And so where the indictment alleged that the defendant falsely pre-
§ 1197. CRIMES.

It is not necessary that any actual loss should be sustained by the maker of the signature fraudulently obtained. 1

§ 1198. Value, however, is a necessary essential of the article, in order to bring it within the statute. Thus in Pennsylvania, it was held that obtaining a receipt in discharge of a debt, by means of a worthless note of a broken bank, is not within the 21st section of the Act of 12th July, 1842, the reasoning of the court being apparently that the receipt was a thing of no account, not being an extinguishment of the debt. 2

Value, however, is to be inferred from facts. 3 But no special value need be averred, unless required by statute. 4

§ 1197. A false representation, as has been already incidentally noticed, used to induce a party to pay an honest lawful debt, is not within the statute. 5 And where an indictment charged that, R. v. 56; State v. Thatcher, 52 N. J. L. 445; State v. Blauvelt, 36 Id. 308; Ellms v. State, 25 Ohio St. 365. But see R. v. Danger, D. & A. 307; 7 Cox C. C. 363; where it was held that the English statute does not over the cases of inducing another party to indorse a note. And see R. v. Brady, 26 Up. Con. Q. B. 13. Jefry, § 1896.

1 State v. Pryor, 50 Ind. 360. Jefry, § 1290.
2 Moore v. Com., 8 Barr, 290.
3 G., secretary of a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining an order on the treasurer as follows:—

“Bolton United Burial Society, No. 23.
“Mr. A. Entwistle, Treasurer,—
Please pay the bearer $2 10c, Greenhalgh, and charge the same to the above society.

“Robert Lord.
“Benjamin Bewick, President.”

It was held that this was a valuable security under the 7 & 8 Geo. IV. c. 29, s. 53, as explained by the 6th section of the same statute. R. v. Greenhalgh, 32 Eng. L. & Eq. 576; Dears. C. C. 367; 6 Cox C. C. 257.

A railway ticket is a “chattel,” and the obtaining it by false pretense from a servant of the company, so as to enable the holder to travel on the line, is an obtaining a chattel by false pretense, within the 7 & 8 Geo. IV. c. 29, s. 53. R. v. Boulton, 2 C. & K. 917; 8 C., 1 Den. C. C. 509. But see as to the point, supra, § 878.

4 Jefry, § 1291.
5 Supra, § 1154; R. v. Williams, 7 C & P. 354; Com. v. McDuff, 126 Mass. 467; Com. v. Henry, 22 Penn. St. 263; People v. Thomas, 3 Hill, 169; State v. Hurst, 11 W. Va. 54.

In Com. v. McDuff, Lord, J., said: “We are not aware that the precise question now presented has ever been considered by this court; and we have not been able to find any decision in any court of last resort that a party may be convicted of the crime of obtaining property by false pretences when he has obtained nothing in value which he would not be entitled to as of right. Com. v. Drew, 16 Pick. 179; Com. v.

CHAP. XVIII. FALSE PRETENCES. § 1198.

who held a promissory note against J., which was due, called for payment, and with intent to defraud J. falsely represented the note to have been lost or burned up, whereby the latter was induced to pay it; it was held insufficient to sustain a conviction, as not showing any legal injury resulting to J. 1

§ 1198. It has been held that merely obtaining credit is not within the statute in its original shape. 2 Thus where, to induce his bankers to pay his cheques, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him, the statute was held not to cover the case, because he only obtained credit, and not any specific sum on the bill. 3 But when the money or goods ultimately

Jeffries, 7 Allen, 568; Rex v. Williams, 7 C & P. 354; People v. Thomas, 3 Hill, 169; Com. v. Henry, 22 Penn. St. 263; People v. Getchell, 6 Mich. 490; Com. v. Thompson, 3 Penn. Law. J. 250; People v. Gemmell, 11 Wend. 12; 2 Russ. on Cr. 312; 1 Bishop's Crim. Law, § 526; 2 Bigelow, § 446.

We are, of course, not to be understood as deciding that a mere pretense of indebtedness, by the person from whose the property is obtained, is sufficient; nor is anything which we decide to be construed as in conflict with the well established rule of law, that a party is to be presumed to intend all the natural and ordinary consequences of his acts, and fraud and falsehood are always evidence tending to show that the party had a dishonest purpose; and the question for the jury to decide is, whether, upon all the facts and circumstances, the defendant had an intent to defraud and effected that purpose, and whether, in order to accomplish it, he made use of fraudulent representations and succeeded by means of such representations. We think, therefore, that the defendant should have been allowed to offer evidence in support of the facts upon which his prayers are predicated, and the jury should have been instructed that, if proved, the defendant was entitled to an acquittal, and for this reason the exceptions must be sustained.” S. P., Com. v. Thompson, Lewis C. L. 197; Com. v. Henry, 22 Penn. St. 263; State v. Hurst, 11 W. Va. 54; State v. Gilkes, 30 N. C. 356. And see Monahan v. State, 5 Lena, 577; Jamison v. State, 37 Ark. 445.

In Rex v. Williams, 7 C & P. 354, C. owed D. a debt of which D. could not get payment. S., a servant of D., obtained from C.'s wife two sacks of malt, saying that D. had bought them of C. S. knew this to be false, but took the malt to D., his master, so that he could be paid the debt due him from C. It was ruled that if S. did not intend to defraud C., but merely to put it into his master's power to compel C. to pay him a just debt, S. ought not to be convicted of obtaining the malt by false pretences.

1 People v. Thomas, 3 Hill (N. Y.), 169.
pass on the credit so obtained, the statutory offence is consummated, and even for the credit, the defendant may be convicted of an attempt.

§ 1199. The statute includes the obtaining of a chattel not in existence when the pretence was made, if the pretence is continuous. Thus where the defendant, by false pretences, induced the prosecutor to enter into a contract to build and deliver a van for a certain sum of money, and the prosecutor, on the faith of those pretences, built and delivered the van in pursuance of the original order, although there was a question as to countermanding the order after the building, and before the delivery, the offence was held to be made out. It was ruled that, to bring the case within the statute, it is not necessary that the chattel should be in existence when the false pretence is made, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence; that the question whether the pretence is or is not such a continuing one is one of fact for the jury, and that in this case there was evidence from which the jury might infer that the pretence was continuous.

§ 1200. When the goods have been obtained, only an intent to defraud need be proved, and not an actual defrauding; and hence it is not necessary to charge loss or damage to the prosecutor, the offence being complete when the goods are obtained by false pretences, with intent to cheat and defraud.

§ 1201. We must, in this relation, recall the doctrine already laid down in respect to larceny, that the prosecution fails if it appear that the goods obtained, at the time of obtaining, belonged to the defendant, either jointly or severally. This rule applies equally to prosecutions for false pretences in all cases involving partnership accounts. The prosecution, also, does not lie when the taking was under honest claim of title.

2 See parallel rulings in forgery and larceny, supra, §§ 636, 714, 759, 887. But see, on the question of larceny cause, Com. v. Harley, 7 Meq. 482.
3 See supra, § 935.
4 See supra, § 864, and cases cited, § 1187; People v. Getchell, 6 Mich. 496.
5 Goods must have been obtained for defendants, and in accordance with his directions.
6 Goods must pass, and not mere use of chattel.
7 Property must not be larcenous not within statute.
8 Goods must have been obtained for defendants, and in accordance with his directions.
9 Goods must pass, and not mere use of chattel.
10 Property must not be larcenous not within statute.

§ 1202. It has been already seen that the pretences need not be made, or the goods obtained, by the defendant personally, but that it is sufficient if he be represented in this respect by agents directed by himself. At the same time, the defendant is not criminally responsible for acts of independent third parties in the subsequent use, without any privity with him, of instruments of fraud constructed by him. And the goods must be obtained "according to the wish or to gain some object of the party who makes the false pretence." Supra, § 1203. While it is immaterial whether the property was obtained by an absolute or a conditional sale, yet the statute does not apply where only the use of a chattel passes, as in cases of bailment or hiring, or where possession only passes, not property. And if only possession passes and not property, and the property is afterwards feloniously appropriated, then the party taking may be guilty of larceny, in which case the cheat ordinarily merges in the felony.

Delivery of property either actual or constructive, to the defendant, must be proved.

§ 1204. As we have seen, property not larcenous was not at first covered by the statutes, and hence the words "money," "goods," "property," have been held not to include "dogs" or "land." It is otherwise, however, by special statutes in most jurisdictions.

12. Where the Offence is triable.

§ 1205. Cheats by false pretences being often, from their very nature, spread over several jurisdictions, it may become important...
§ 1206. Where a false pretence is uttered in A., and the money obtained in B., the venue may be laid either in A. or B.1

1 See supra, § 288. In Stewart v. Jessup, 51 Ind. 413, it was held that the place where the goods were obtained alone had jurisdiction. In Norris v. State, 25 Ok. St. 217, it was held that the place where goods were delivered to a carrier had jurisdiction.

The question of conflict of jurisdiction in such cases is examined supra, §§ 279, 284, 288, and more in detail in an article in Crim. Law Mag. for March, 1885.

C., the defendant, in a begging letter, which contained false pretences, and was addressed to P., who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the defendant’s address in Kent. It was ruled that the venue was rightly laid in Middlesex, as C., by directing the money order to be sent by post, constituted the postmaster in Middlesex agent to receive it there for him. R. v. Jones, 1 Den. C. C. 551; 4 New Sens. Cas. 253.


In R. v. Holmes, L. R. 12 Q. B. D. 96; 49 L. T. N. S. 540 (cited supra, § 288). It was held that the English courts had jurisdiction in a case where the false pretence was mailed in England and received in France, the money being sent from France to England.


Supra, § 263. See supra, § 283. See also supra, § 283. See the forum in which the pretences were uttered in Skiff v. People, 2 Parker C. R. 129; R. v. Cooke, 1 F. & F. 64; R. v. Looch, 35 Eng. L. & Eq. 539; Dears. C. C. 642; 7 Cox C. C. 160; and as to the forum in which the money was obtained in R. v. Jones, 1 Den. C. C. 551; 4 Cox C. C. 158, where the county in which money was mailed to the defendant, lying in another county, was said to have jurisdiction.

In R. v. Garrett, 23 Eng. L. & Eq. 607; 6 Cox C. C. 260; Dears. C. C. 232; People v. Adams, 3 Denio, 190; 1 Const. 173; Com. v. Van Tuyl, 1 Met. (Ky.) 1. It was held that the place of the receipt of the property has jurisdiction, although the pretence on which the money was obtained was uttered in another State. Supra, § 288.

1 See supra, § 279.


4 R. v. Steamburg, 9 Ind. 84; L. & C. 128.


6 State v. Reggerley, 21 Tex. 777.

7 R. v. Maland, 2 Mead. C. C. 276.

8 See supra, §§ 258, 279; and also People v. Adams, and R. v. Garrett, supra, § 1203; R. v. Jones, 1 Den. C. C. 551; 4 Cox C. C. 158.


10 See supra, §§ 258, 279; and also People v. Adams, and R. v. Garrett, supra, § 1203; R. v. Jones, 1 Den. C. C. 551; 4 Cox C. C. 158.

11 For Forms see Whart. Proc., 528 et seq.

12 1 Gabbet Cr. Law, 214, 215.

13 See supra, §§ 258, 279; and also People v. Adams, and R. v. Garrett, supra, § 1203; R. v. Jones, 1 Den. C. C. 551; 4 Cox C. C. 158.

14 For Forms see Whart. Proc., 528 et seq.

15 See supra, §§ 258, 279; and also People v. Adams, and R. v. Garrett, supra, § 1203; R. v. Jones, 1 Den. C. C. 551; 4 Cox C. C. 158.


18 For Forms see Whart. Proc., 528 et seq.

19 See supra, §§ 258, 279; and also People v. Adams, and R. v. Garrett, supra, § 1203; R. v. Jones, 1 Den. C. C. 551; 4 Cox C. C. 158.

to the English practice,¹ is not essential, the truth of the pretences being subsequently negatived. It is much safer, however, to insert it, and its omission has been held in this country fatal.²

§ 1211. The party injured must be described with the same accuracy as has been shown to be requisite in larceny.³ Any variance in his name is at common law fatal. What are variances are elsewhere considered.⁴

§ 1212. Pretences alleged to have been made to a firm are proved by showing that they were made to one of the firm;⁵ and a pretence made use of to an agent, who communicates it to his principal, and who is influenced by it to act, is a pretence made to the principal.⁶ A pretence made to A. in B.'s hearing, by which money is obtained from B., may be laid as a pretence made to B.⁷ Money paid by or to an agent is rightfully laid as money paid by or to a principal.⁸ And so where money is paid to the wife for the husband.⁹

§ 1215. The pretences must be specially averred,¹⁰ though their omission is now in England cured by verdict. But at common law they must be accurately and adequately set forth, so that it may clearly appear that there was a false pretence of an existing fact.¹¹

1 R. v. Alvey, 2 East, 30.
2 Hamilton v. State, 16 Fla. 283.
3 See supra, § 977.
4 Whart. Cr. Ev. § 91.
5 Stoughton v. State, 2 Ohio St. 562.
8 R. v. Dent, 1 C. C. & K. 249.
9 The money of a benevolent society, whose rules were not enrolled, was kept in a box, of which it, one of the stewards, and two others, had keys; the defendant, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E., out of the box, five pounds; it was held that in an indictment the pretence might be laid as made to E., and the money as the property of "E. and others," obtained from R. v. Dent, § C. C. 249.
13 8 B. & C. 114.

The pretences were held inadequately stated in an indictment in which the first count charged that G. unlawfully did falsely pretend to P. that he, G., was sent by W. for an order to go to T. for a pair of shoes, by means of which false pretence he obtained from T. a pair of shoes, of the goods and chattels of T., with intent to defraud P. of the price of the said shoes, to wit, nine shillings, of the moneys of P. The second count charged that he falsely pretended to P. that W. had said that P. was to give him, the defendant, an order to go to T. for a pair of shoes, by means of which false pretence he obtained from T., in the name of E., a pair of shoes of the goods of T., with intent to defraud P. of the same. R. v. Tully, 9 C. P. 227—Gorsey; though compare R. v. Brown, 2 Cox C. C. 342—per Patterson, J.

An indictment was also held defective in a case where it was charged that C. falsely pretended to E., whose mare and gelding had strayed, that he, C., would tel] them where they were, if he would give him a sovereign down, P. gave the sovereign, but the prisoner refused to tell. It was said that the indictment should have stated that he pretended he knew where they were. R. v. Douglas, 1 M. C. C. 462.

In a case already cited on the merits, the indictment charged that C., contriving and intending to cheat P., on a day named, did falsely pretend to him that he, C., then was a captain in her Majesty's fifth regiment of dragoons; by means of which false pretence he did obtain of P. a valuable security, to wit, an order for the payment of £500, of the value of £500, the property of P., with intent to cheat P. of the same; whereas in truth he (C., the defendant) was not, at the time of making such false pretence, a captain in her Majesty's regiment; and the defendant, at the time of making such false pretence, well knew that he was not a captain. This was held sufficiently after conviction and judgment. It was held not necessary to allege more precisely that the defendant made the particular pretence with the intent of obtaining the security; nor how the particular pretence was calculated to effect, or had effected, the obtaining; and it was further held that the truth of the pretence was well negatived, it appearing sufficiently that the pretence was that the defendant was a captain at the time of his making such pretence, which was the fact denied; and that it was unnecessary to aver expressly that the security was unsatisfied, at any rate since 7 Geo. IV. c. 64, s. 21, the objection being taken after verdict, and the indictment following the words of the statute creating the offence. Hamilton v. R. (in error), 9 A. & E. (N. S.) 271; 10 Jur. 1028; 18 L. J. M. C. 3; 2 Cox C. C. 11.

D. was one of many persons employed whose wages were paid weekly at a pay-table. On one occasion, when D.'s wages were due, C. said to a little boy, "I will give you a penny if you will go and get D.'s money." The boy innocently went to the pay-table,
§ 1215. [Book II.]

CRIMES.

were expressed to the prosecutor at the time of the fraud. But verbal exactness is not required, as it is enough if the effect be substantially given; nor need all that was said be stated if the operative pretense is averred. But a variance between the indictment and the evidence as to the effect of the pretenses will be fatal. It is not necessary to set out, as in forgery, the tenor of a bad note by which property is obtained. But if set out, a variance may be fatal.

§ 1215. The relation of the fraud to the bargain, in cases of sale, must appear. Thus it was held insufficient, in an indictment for the sale of a spurious watch as genuine, to aver merely that S., the defendant, falsely pretended to the prosecutor "that a certain watch which he, the said S., then and there had, was a gold watch, by means and said to the treasurer, "I am come for D.'s money;' and D.'s wages were given to him. He took the money to C., who was walking outside, and who gave the boy the promised penny: it was ruled that C. could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, C., had authority from D. to receive his money, or of obtaining it from the treasurer and the boy, by falsely pretending to the boy that he had such authority, or of obtaining it from the boy by the like false pretenses to the boy: though he might be convicted on a count charging him with fraudulently obtaining it from the treasurer by falsely pretending to the treasurer that he had this authority. R. v. Butcher, Boll C. C. 6; Cox C. C. 77. 2 East P. C. c. 35, n. 13, pp. 837, 838. See Corby v. Halfpenny, 12 Me. 446; Gispen v. Corby, 3 Metc. (Ky.) 259; State v. Webb, 26 Iowa, 262; State v. Eason, 80 N. C. 674. Infra, § 1219. If they are not self-explaining, their meaning must be supplied. Infra, § 1220.


CHAP. XVIII.] FALSE PRETENCES. [§ 1215.

whereof said S. then and there unlawfully, etc., did obtain from said B. (the prosecutor) sundry bank bills, etc., of the value, etc., with intent the said B. then and there to cheat and defraud of the same; whereas in truth and fact said watch was not then and there a gold watch, and said S. then and there well knew that the same was not a gold watch, to the damage," etc. The indictment, as said Dewey, J., "does not allege any bargain nor any colloquies as to a bargain for a watch; nor any propositions of B. to buy, or of the defendant to sell, a watch; nor any delivery of the watch, as to which the false pretenses were made, in the possession of B., as a consideration for the money paid the defendant. It seems to us that when money or property is obtained by a sale or exchange of property, effected by means of false pretences, such sale or exchange ought to be set forth in the indictment, and that the false pretense should be alleged to have been with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be."1

In fine, when the case is one of sale or exchange, the indictment should set forth the sale or exchange, and aver that the false pretenses were made with a view to effect such sale or exchange, and that by reason thereof the party was induced to part with his property, and when a false token or writing was the pretense, the indictment must aver that the defendant delivered the token or writing, to the prosecutor, who took it in exchange for the goods.2 In New York the law is less stringent; and where an indictment for obtaining property under false pretences charged that the prisoner, with an intent to defraud one A. G., Jr., did falsely pretend and represent to the said A. G., Jr., for the purpose of inducing the said A. G., Jr., to part with a yoke of oxen, of the goods and chattels of the said A. G., Jr., that, etc., "by which said false pretenses he," the prisoner, "then did unlawfully obtain from the said A. G.,..."

1 Com. v. Straun, 10 Met. 521; S. P., Com. v. Lanier, 1 Allen, 590.
3 Wagoner v. State, 50 Ind. 504.
4 Martin, 9 Gray, 125; Com. v. Jeffries, supra; see Baker v. State, 14 Tex. 7 Allen, 549. As to bad pleading of false agency, see R. v. Henshaw, L. C. 434.
6101
§ 1215. [CRIMES. ]

Jr.," the oxen mentioned; it was held that there was a substantial averment that the prisoner had obtained the property from the prosecutor by means of the false pretences made, and the latter's belief therein, and that the indictment was not defective in that particular.¹


An indictment alleged that G. designedly and unlawfully did pretend to N. that A. wanted to buy cheese of N. and had sent G. to buy it for him, and that a certain paper described, purporting to be a ten dollar bill on the Globe Bank, in the city of New York, was a good, and of the value of ten dollars; by means of which false pretences said G. unlawfully obtained from said N. forty pounds of cheese, of the value of four dollars, and sundry bank bills and silver coins amounting to and of the value of six dollars, with intent to cheat and defraud; whereas the said A. did not want to buy cheese of said N., and had not sent G. to him for that purpose, and the paper was not a good bill of the Globe Bank, in the city of New York, and was not of the value of ten dollars, but spurious and worthless. It was held, on motion in arrest of judgment, that the false pretences set forth were such as might have been effectual in accomplishing a fraud on N., in the manner alleged; that neither the omission to allege that G. knowingly made the false pretences, nor the omission to mention any person whom he intended to defraud, rendered the indictment bad; and that there was no objection to the indictment on the ground of insufficiency. 12 Mo. 446.

In Com. v. Coe, 115 Mass. 481, an indictment was sustained which alleged that the defendant falsely pretended to a certain certificate of shares of the stock of a corporation was good and genuine, and of value as security for a loan of money which J. F. gave to the defendant, the prosecutor, was induced to make to him thereon. The pretended certificate was then set forth, and purported to be a certificate that the said J. F. was the owner of the shares of stock which it represented.

"The offer of the certificate for such a purpose," said Wells, J., "is a representation that it is what it purports to be upon its face. Coho Bank v. Morton, 4 Gray, 158. Com. v. Stone, 4 Met. 43. The indictment sufficiently sets forth in what manner Perri was defrauded by means of the certificate." It was further held that the certificate is an instrument complete in itself, and requires no further allegations to fully set forth the right or contract of which it is a symbol, as was necessary in Commonwealth v. Ray, 3 Gray, 441, and Commonwealth v. Hind, 101 Mass. 200. And besides, this offense consists in the use of false tokens, and not the forgery of a written instrument.²

It was also held "unnecessary that the indictment should set forth in its terms, or by description, the cheque received for the loan. It is presumed to have been given and received as payment of the sum of money agreed to be lent. Its designation as a cheque for the payment of money sufficiently indicates its character; and as a description of the property obtained by the false pretences, would be good. Commonwealth v. Brettan, 100 Mass. 206."³

It may also be considered as settled by the same court that a false pretence is none the less a fraud because obtained in the form of a note. Commonwealth v. Lincoln, 11 Allen, 293; Com. v. Coe, 115 Mass. 481.

An indictment alleging that the prisoners falsely pretended to A. that some sort of which they then delivered to A. weighed one ton and seventeen cwt., whereas it did not weigh one ton seventeen cwt., but only weighed one ton and thirteen cwt., they well knowing the pretence to be false, by means of which false pretence they obtained from A. 8c., with intent to defraud, is good, and sufficiently describes an indictable false pretence. R. v. Lee, L. & C. 418; 9 Cox C. C. 460. See supra, § 1139; and see Whart. on Contr. § 232 at seq.

¹ Com. v. Davidson, 1 Cush. 33. See Todd v. State, 31 Ind. 514.

² O'Connor v. State, 30 Ala. 9.


⁴ R. v. Coulson, ut supra.

By which it is charged in the indictment that the prisoner obtained the property upon the security of his promissory
nation must be accurately stated. Thus if an indictment for attempting to obtain money under false pretences charges the attempt to have been by means of a paper writing purporting to be an order for money, and the instrument as stated in the indictment cannot be considered to be such an order, it is bad.

§ 1218. It is not necessary to prove the whole of the pretences charged; proof of part, and that the property was obtained by force of such part, is enough. And the principle derives support from the practice in the analogous cases of perjury and blasphemy.

§ 1219. As has been already seen, if the effect of the pretences be rightly laid, a variance as to expression is immaterial. But the omission must be substantially averred.

§ 1220. When the false pretences consist in words used by the respondent, it has been said to be sufficient to set them out in the indictment as they were uttered, without undertaking to explain their meaning. But this must be taken with some qualification, since, as in perjury and libel, it is proper and necessary that language otherwise note, through false and fraudulent representations as to his ability to pay the same, an averment of his neglect to make payment of the note is not essential. Clark v. People, 2 Lansing, 330.


1 Lord Raym. 986; 2 Camp. 133–9; Gro. C. C. 7th ed. 663; State v. Haskell, 6 N. H. 312; Com. v. Knuckles, 20 Idaho 296. Supra, § 1316.
4 supra, § 1314; State v. Vanderhill, 3 Dutch. 328; State v. Goble, 60 Iowa, 447.
5 State v. Lambeth, 80 N. C. 393.

In a case already cited to another point, the indictment stated that, by the rules of a benevolent society, every free member was entitled to five pounds on the death of his wife, and that the defendant falsely pretended that a paper which he produced was genuine, and contained a true account of his wife’s death and burial, and that he further falsely pretended that he was entitled to five pounds from the society by virtue of their rule, in consequence of the death of his wife; by means of which “false pretences” he obtained money; this was held good. R. v. Dent, 13 C. & K. 249.

1 See People v. Oyer & Terminer Court, 83 N. Y. 465. See supra, §§ 501 et seq.


1 Com. v. Davidson, 1 Conn. 33; People v. Parish, 4 Denio, 155. See Skiff v. People, 2 Parker C. R. 139.
§ 1224. [§ 1224.]

CRIMES.

[BOOK II.

described, it was held, that in these particulars the indictment was
defective.1 Goods, as a rule, should be described with the same
particularity as in libel.2

§ 1223. It is necessary to state whose the property was at the
time.3 "Of the moneys of B." is a sufficient allegation of

Owner
must be
stated.

ownership.4 A special property is sufficient to sus-
tain an averment of ownership.5

§ 1224. It is necessary for the pleader to negative specifically
the false pretences relied on to sustain the indictment;6
but if the proof be adequate as to the offence, though
only coming up to a portion of the pretence averred in
the indictment, a conviction is good.7 In fact, as is well said by
Lord Ellenborough,8 "to state merely the whole of the false pretence
is to state a matter generally combined of some truth as well as
falsehood."9 Where, however, there are several distinct pretences,
it is better to negative each pretence specifically in the indictment;
since if only one of the pretences thus negatived, be well laid, and
be proved on trial to have been the moving cause of the transfer of
property from the prosecutor to the defendant, the rest may be dis-
regarded.10

1 Dord v. People, 9 Barb. 671.
2 State v. Reese, 63 N. C. 637.
3 R. v. Martin, 3 N. & P. 473; 8 Ad. & El. 481; R. v. Norton, 6 C. & P. 196;
4 Sill v. R., Dears, C. C. 132; 1 Ad. & El. 556; See State v. Lathrop, 15 Vt. 273;
5 Halley v. State, 43 Ind. 569; State v. Levy, 41 Tex. 268.
6 Under § 9 Vict. c. 108, § 17, an
7 indictment charging that the prisoner,
8 by fraud and playing at cards, did win
9 from A. a sum of money with intent to
10 cheat A., need not necessarily allege
11 that the money won was the property
12 of A. R. v. Moss, Dears. & R. C. C.
13 104. But an indictment for a con-
14spiracy to obtain goods by false pre-
15tences, not stating whose property the
16 goods were which it was the object of
17 the conspiracy to obtain, is bad in

arrest of judgment. R. v. Parker, 2
G. & D. 709; 9 G. B. 292.
18 R. v. Godfrey, Dears. & B. 428; 7
19 Cox C. C. 392.
20 Supra, §§ 932 et seq.; Mack v. State,
21 63 Ala. 138.
22 R. v. Perrott, 2 M. & S. 379; Red-
23 mond v. State, 35 Ohio St. 81; Tyler v.
24 State, 2 Humph. 37; Amos v. State, 10
25 Ibid. 117; State v. Webb, 28 Iowa, 293.
26 The negation must be specific. Keller
27 v. State, 51 Ind. 111; State v. Bradley,
28 60 Ind. 149.

§ Supra, § 1218; R. v. Hill, R. R.
29 190; Com. v. Morezil, 8 Com. 571;
30 People v. Stone, 9 Wend. 182; People v.
31 Haynes, 11 Ibid. 556; State v. Smith,
32 8 Black. 489.
33 R. v. Perrott, ut supra.

Supra, § 1218.

108

§ 1225. The defendant's knowledge of the falsity of the pre-
tences is material,1 and must be averred, unless

false pretences are of such a nature as to exclude
the possible hypothesis of the defendant's ignorance of
their falsity.2 A reckless statement of a fact of which the narrator
is ignorant may be equivalent to a statement he knows to be false.3

§ 1226. An intent to defraud must be averred and proved;4 but
it is not necessary, in England, to state, to use the lan-
guage of Lord Denman, C. J.,5 "that the false pretence
was made with the intention of obtaining the thing, if it
be proved that in fact the party charged did intend to

Intent to

false pretence

must be

true.

Scient.

1 Supra, §§ 1165, 1166, 1210. State
3 Thus an indictment for obtaining
4 money under false pretences must al-
5 low that the defendant knew the false-
6 hood: "falsely and fraudulently" is
7 not enough. R. v. Henderson, 2 M. C.
8 C. 102; Car. & M. 258; State v. Brad-
9 ley, 68 Mo. 140. Supra, § 1185. But
10 where the indictment alleged that the
11 defendant "did unlawfully falsely pre-
12 tend,"1 et al., it was held that the omission
13 of the word "knowingly" was no
14 ground for arresting the judgment. R.
15 v. Bowens, 4 New Sess. Cas. 62; 13 Q.
16 B. 790; 3 Cox C. C. 483.
17 R. v. Philpot, 1 C. & K. 172; R.
18 v. Killgabey, Dears. & B. 145; 7 Cox C.
19 C. 217; Com. v. Speow, 2 Virg. Cases,
20 65; State v. Bradley, 68 Mo. 140; though
21 though empty inasmuch, cited Wharton's
22 Proc. 249; and Com. v. Rubert, 12 Met.
23 446. See, as to general
24 pleading of scienter, Whart. Cr. Pl.
25 & Pr. § 164. That "designedly"1 implies
26 a scienter, see State v. Offer, 63
27 Ind. 203.

28 Supra, § 1185. See Reese Mining
29 Co. v. Smith, L. R. 4 H. L. 79. Supra,
30 § 1945.

31 Supra, § 1184; People v. Getch-
32 ell, 5 Mich. 496; Scott v. People, 62
33 Barb. 63.

The intent to defraud is not suffi-

Scient.

ciently set forth in a statement that A.
1 did unlawfully attempt and endeavor
2 fraudulently, falsely, and unlawfully
to obtain from the Agricultural Cattle
3 Insurance Company a large sum of
4 money, to wit, 232 10s., with intent to
5 cheat and defraud the company. R. v.
6 Mc. March, 1 Den. C. C. 505; T. & M. 192;
7 3 New Sess. Cas. 669.
8 R. v. Hamilton, 2 Cox C. C. 11; 9
9 Ad. & El. (N. S.) 276; cited fully
10 supra, § 1213. That the omission
11 of the allegation of intent is not fatal
12 after verdict, under statute, see State
13 v. Bacon, 7 Vt. 219; Jim v. State, 8
14 Humph. 605. That it is no variance
15 that the proof goes only to a part of
16 the money, to which the intent to defraud
17 relates, see R. v. Leonard, 3 Cox C.
18 C. C. 284; 1 Den. C. C. 304.

18 Under the English statutes the fol-
19 lowing rungs have been made, which
20 are applicable to the corresponding
21 statutes in this country.

22 Under 7 Geo. IV. c. 64, § 21, an
23 indictment for obtaining goods by
24 means of false pretences, with intent
to defraud a specified person, was held
25 unless it stated whose property the
26 goods were, and the defect was not
27 noticed after verdict. R. v. Martin, 3
28 R. & F. 472; 8 A. & E. 481; S. P., R.
30 By 14 & 15 Vict. c. 100, s. 8, it

107
obtain the thing, made the false pretence, and did thereby obtain it. I am by no means sure that it is necessary even to prove that the representation was made with the particular intent." 2

An intent to defraud a firm necessarily includes an intent to defraud each of its members, and hence it is enough, when a firm is defrauded, to aver an intent to defraud a member of the firm. 3

An intent laid to defraud any one having an interest in the property is enough. 4

An averment that A. "did receive and obtain the said goods of said B. from said B. by means of the false pretences aforesaid, and with intent to cheat and defraud the said B. of the same goods," has been held a sufficient averment that the goods were designedly obtained. 5 But there must be a specific averment of intent to defraud. 6

§ 1227. The property must be distinctly averred to have been obtained by means of the pretence. 7 But the process of reasoning shall be sufficient, in an indictment for obtaining property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person. By sec. 26, every objection to an indictment for any formal defect apparent on the face thereof shall be taken before the jury shall be sworn. It was ruled that sec. 8 did not render it unnecessary, in an indictment for obtaining money by false pretences, to state whose property the money was, and that the omission was not a formal defect within sec. 25. Sill v. R., Dearls, C. C. 138; 1 Bl. & Bl. 533; 24 & 26 Vict. c. 86, s. 88, renders an allegation of ownership unnecessary.

1 Stoughton v. State, 2 Ohio St. 532. See supra, §§ 745, 7512.
4 Com. v. Dean, 110 Mass. 64.
5 In this case it was said by Morton, J.: "The indictment does not charge any offence with the precision requisite to

108

CHAP. XVIII.] FALSE PRETENCES. [§ 1227.

by which the conclusion was reached is usually matter of argument, not of pleading. 1 At the same time, there must always be something sufficient to show that the party defrauded was induced to part with his property by relying upon the truth of the alleged false statements. 2 And it is not, as a general rule, as has been seen, 3 enough to aver false statements as to the value of property sold, and then to aver the obtaining of money. A "sale of the property should be averred, as the chain connecting the other averments. 4

A delivery of the property must be averred, as the result of the false pretences, in all cases in which the prosecution rests upon such delivery.

Obtaining from A.'s wife, on A.'s directions, supports an aver-

1 17 Fl. 215; State v. Lewis, 26 Kan. 123; Pendry v. State, 16 Fl. 181; Cook v. State, 53 Ind. 462.
3 It is said in Missouri that the phrase, "by color of said false pretence," is bad. State v. Chunn, 18 Mo. 333. See R. v. Arey, 2 East. 30.
4 State v. Philbrick, 31 Me. 461; Com. v. Strain, 10 Met. 521; Norris v. State, 28 Ohio St. 219; State v. Savannah, 63 Mo. 460. See Com. v. Parmeuter, 121 Mass. 354; Ryperson v. State, 42 Tex. 79; State v. Green, 7 Wis. 570; State v. Orvis, 13 Ind. 569.
5 Supra, §§ 1215, 1246.
6 Supra, § 1215.
7 In an averment that B. was induced, by reason of the false pretence so made as aforesaid, to purchase and receive, and did then and there purchase and receive of the said A. "and to pay and deliver, and did pay and deliver therefor, and as the price thereof," certain goods, sufficiently charges that B. was induced by the false pretences to pay and deliver, and that induced by false pretences he did pay and deliver, and is not defective for not repeating the words "and therefor," before the words "to pay and deliver," or before the words "did pay and deliver." Com. v. Hopper, 104 Mass. 549.
8 The allegation of "sale on credit," is supported by proof of a sale for a note payable in four months. Com. v. Davidson, 1 Cush. 33. Supra, § 1180.
9 The indictment need not charge that any false token or counterfeit letter was used, even where false token or writing is alternatively used in the statute. Skiff v. People, 2 Parker C. R. 139. Supra, § 1179.
10 State v. Philbrick, 31 Me. 461; Com. v. Strain, 10 Met. 521; Com. v. Lannan, 1 Allen, 560; Com. v. Goddard, 4 Id. 312. See, also, Com. v. Jeffries, 7 Id. 549; Com. v. Lincoln, 11 Id. 252. Supra, § 1180.
11 It is not a fatal error that the obtaining of the signature to a promissory note, and the obtaining the money on the same, are stated to be on two distinct days. Com. v. Frey, 50 Penn. St. 246.
§ 1228. Counts varying the pretences, and counts varying the parties defrauded, may be joined.


§ 1229. The general law as to attempts is elsewhere fully discussed. So far as concerns the particular offence now under consideration, one or two special points are to be noticed.

By statute in England and in several of the United States, there may be a conviction of an attempt under indictment for the substantive offence, though at common law this is not permissible. Hence we have a number of reported cases where there was a conviction of the attempt under the ordinary indictment for obtaining goods by false pretences.

§ 1230. In attempts, the question of prudence or imprudence of the prosecutor does not arise; and a conviction may be had where there was a fruitless attempt to obtain goods by a false pretence.

§ 1231. The same distinction applies where only credit on account is shown to have been secured. It has been already seen that an indictment for the consummated offence cannot be sustained when only a credit on account was obtained. But under these circumstances, as is elsewhere more fully noticed, the defendant may be convicted of an attempt.

§ 1232. It is for the jury to determine whether the attempt was really made. Thus, where C., being employed at a hospital, wrote to the prosecutor, as manager, for a small quantity of linen, not saying it was for the hospital, and the goods were really ordered for himself, but not sent; on an indictment for an attempt to obtain them, the question left to the jury was, whether he ordered the goods as for and on behalf of the hospital or in his own name, there being no evidence of an intention to pay cash, but evidence of the absence of such intention.

§ 1233. In an indictment for an attempt to obtain by a false written instrument, a variance as to character of the instrument is fatal. Thus, it has been ruled that where the indictment charges the instrument to be a money order, and the proof does not sustain this, a conviction is erroneous. But the instrument need not, if correctly designated, be set out.

§ 1234. Nor is it sufficient baldly to aver an “attempt,” without in some way stating the means. Thus, an indictment was held bad which stated that A. did unlawfully attempt and endeavor to obtain from B. a large sum of money (stating it), with intent to cheat and defraud B.

15. Receiving Goods obtained by False Pretences.

§ 1235. At common law, persons receiving goods knowing them to have been fraudulently obtained by false pretences will be indictable as accessories after the fact, if the obtaining be a statutory felony; or, if participants in the original design, as principals, where the obtaining is a statutory misdemeanor. By statutes in England and elsewhere, however, such receiving is made a substantive offence. To sustain a conviction, in any view, it is necessary to prove that the defendant knew that the goods were obtained by false pretences.


CHAPTER XIX.

FRAUDULENT INSOLVENCY.

II. SECRETING GOODS.

§ 1259. By statute in force in many States, the secreting of goods with intent to defraud creditors is an indictable offence. To constitute this offence it is necessary that there should be—

1st. An actual fraudulent secreting, assigning, or conveying of goods, etc., or a fraudulent reception of the same.

2d. An intent to prevent such property from being made liable for the payment of debts, or, in case of reception, a guilty knowledge of such intent. 1

§ 1240. 1st. There must be an actual secreting or assigning of the goods. It is not enough that the debtor, to his creditor's face, refuses to surrender property which the creditor claims. Thus it was held that a refusal of a defendant to deliver up a watch to the sheriff's deputy was not within the statutes. 2

The object of the law is not to make a man indictable who resists process, since for this another procedure exists, but to prevent the secret and covinous disposal of property in such a way as to elude the pursuit of the law and baffle an execution. A pointed illustration of this is the case of a trader, who, after obtaining credit by stockling his store with goods, either hides such goods until such time as he may be able, without suspicion or disturbance, to convert their proceeds to his own use, or consigns them to auction under such covers as may enable him to turn them into cash without his creditors' knowledge. It would seem, from analogy to the statutes of Elizabeth, that the offence would continue to be indictable, even if a consideration were received, if the intent to defraud were proved.

1 See State v. Marsh, 36 N. H. 196; Conn. v. Damon, 109 Mass. 580. Under a recent English statute, see ruling in R. v. Rowlands, L. R. 8 Q. B. D. 930; 44 L. T. (N. S.) 286; where it was held that in such cases the questions for the jury were: "(1) Did the defendant, either subsequent to the judgment being obtained against him, or within two months before the date of any unsatisfied judgment, remove or conceal his goods? (2) Did he do so in defraud of the particular creditor who had obtained the judgment?" (3) Does the fact of his having done so, coupled with the general evidence in the case, satisfy the jury that his intention was to defraud any and every person to whom he might be indebted?" See London Law Times, May 27, 1852, p. 50.

2 People v. Morrison, 13 Wend. 399. See People v. Underwood, infra.


R. v. Smith, 6 Cox C. C. 51. As to the English statute on fraudulent bankrupcy, may be consulted Steph. Dig. C. 1, art. 359; Brett v. Perry, L. R. 1 Ch. D. 151.

See, for form of indictment, Whart. Preco. 518.
§ 1241. 2d. An intent must be shown to prevent the property from being made liable for the payment of debts; or, in case of receivers, a guilty knowledge of such intent. It is not enough that the debtor's object was to give a preference to a particular creditor.

When "all creditors" are protected by the act, as "creditors," it seems, may be classed even those whose debts are not yet due. Under such a statute it is unnecessary that the prosecutors should be judgment creditors.

The fact of indebtedness of some kind, however, on the part of the plaintiff, must be distinctly averred.

The federal statute, making it indictable to obtain goods by false pretences three months prior to bankruptcy, has been held unconstitutional, as not limited to acts in contemplation of bankruptcy.


3 Com. v. Hickey, 2 Parsons, 317.


5 People v. Underwood, 18 Wend. 546, citing Wigging v. Armstrong, 2 John. Ch. 144.

6 Thus, in New York, Bronson, J., said: "The language of the act plainly extends to all creditors, and I can perceive no sufficient reason for restricting its construction to such creditors as have obtained judgments for their demands. The fraudulent removal, assignation, or conveyance of property by a debtor, which the legislature intended to punish criminally, usually takes place in anticipation of a judgment, and for the very purpose of defeating the creditor of the fruits of his recovery. If there must first be a judgment before the crime can be committed, the statute will be of very little public importance. This is not like the case of a creditor seeking a civil remedy against a fraudulent debtor. There the creditor must complete his title by judgment and execution, before he can control the debtor in the disposal of his property; he must have a certain claim upon the goods before he can inquire into any alleged fraud on the part of the debtor. But this is a public prosecution, in which the creditor has no special interest. The legislature has relieved the honest debtor from imprisonment, and subjected the fraudulent one to punishment, as for a criminal offence. The crime consists in assigning or otherwise disposing of his property, with intent to defraud a creditor, or to prevent it from being made liable for the payment of his debts. The public offence is complete, although no creditor may be in a condition to question the validity of the transfer in the form of a civil remedy." Ibid. See, for forms, Whart. Proc. 507 et sqq.

7 State v. Robinson, 9 Foster, 274.

8 U. S. v. Fox, 95 U. S. 670.

PART III.

OFFENCES AGAINST SOCIETY.

CHAPTER XX.

PERJURY.

I. WILFUL.

Offence must be wilful, § 1245.

II. FALSE AND CORRUPT.

' 'Falsehood' is knowingly affirming without probable cause, § 1246. Probable cause is to be estimated from defendant's standpoint, § 1247. Adequate to prove mistake induced by erroneous representations, § 1248.

And so when advised by counsel, § 1249. General evil intent may constitute corruption, § 1250.

III. OATH.

Form of oath is immaterial, if legal, § 1251. No matter if oath was on voir dire, § 1252.

IV. PARTY TO BE CHARGED.

Two defendants cannot be joined, § 1253.

Perjury though witness is incompetent, § 1254.

And though he be a volunteer, § 1255.

V. BEFORE A COMPETENT OFFICER.

The false swearing must have been in proceedings authorized by law, § 1256.

Officer or court administering the oath must have been competent, § 1257.

VI. IN PROCEEDING AUTHORIZED BY LAW.

False swearing must be in proceeding authorized by law, § 1257.

Juror indictable for false swearing on voir dire, § 1258.

Voluntary false affidavits are not perjury, § 1259.

But otherwise as to statutory affidavits, § 1270.

Party may be guilty of perjury in his own case, § 1271.

No perjury in void suit, § 1272.
CRIMES.

[BOOK II.]

4. Setting out of False Matter.
   Verbal exactness as to sworn matter is not essential, § 1397.
   "Substance" and "effect" are enough, § 1398.
   Only alleged falsities need be pleaded, § 1399.

   Neglect of false matter should be express, § 1399.
   Several assignments may be incorporated in one count, § 1399.
   "Belief" must be specifically negatived, § 1399.
   Antiquities may be cleared by blandishments, § 1399.

   Materiality must appear on record, § 1399.

IX. EVIDENCE.
   Oath must be correctly averred and proved, § 1398.
   Whole of testimony is to be considered, § 1398.
   Substance of assignment must be proved, § 1398.
   One witness enough to prove testimony, § 1398.
   Answers in interrogatories and depositions to be proved by Jural, § 1399.
   Falsification admissible notwithstanding testimony was reduced to writing, § 1399.
   Lost instrument may be proved by parol, § 1399.
   Jurat of officer administering oath may be proof of oath, § 1399.

§ 1244. PERJURY. as the offence, modified by statute, is now generally defined, is the corrupt assertion of a falsehood. Definition. Under oath, or affirmation, and by legal authority, for the purpose of influencing the course of law. Or, to give a definition drawn from the older common law authorities, it is the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. 1

1 This definition is substantially that given by the English Commissioners in their draft report made in 1879, and to sustain it may be cited: 1 Hawk. c. 65, a. 1; 3 Inst. 164; Bac. Ab. tit. "Perjury:" Burn's Justice, tit. "Perjury:" Step. Dig. C. L. art. 135; 2 Russ. on Cr. 5th Am. ed. 496; State v. Tappan, 1 Porter, 54; Pickering's Case, 8 Grat. 628; State v. Brown, 79 N. C. 642; State v. Dodd, 3 Murph. 226; State v. Ammon, 3 Murph. 123; Martin v. Miller, 4 Mo. 47; Pawkey v. People, 1 Sca. 50; De Bernie v. State, 19 Ala. 23; Jackson v. State, 1 Carter (Ind.), 184; McGregor v. State, Ibid. 232; People v. Collier, 1 Mich. 137; Noloson v. State, 2 Ark. 193.

2 Perjury is at common law a misdemeanor.
§ 1245. Crimes.

And false swearing, when not technically perjury, may nevertheless be at common law indictable as an independent misdemeanor, when the oath is taken to affect a juridical right. 1

I. WILFUL.

§ 1245. The offence consists in swearing falsely and corruptly, without probable cause of belief; not in swearing rashly or inconsiderately, according to belief. 2 The false oath, if taken from inadvertence or mistake, cannot amount to voluntary and corrupt perjury. 3 Therefore, where perjury is assigned on an answer in equity, or on an affidavit, etc., the part on which the perjury is assigned may be shown to be inadvertent by another part, or even by a subsequent answer. 4

That the oath is wilful and corrupt must not only be charged in the indictment, but be supported on trial. 5 An oath is wilful when taken with deliberation, and not through surprise or confusion, or a bond false mistake as to the facts, in which latter cases perjury does not lie. 6

Oaths in court, are not "perjury," and the court consequently struck out from the indictment the averments of perjury, and sentenced for a misdemeanor at common law. But in this country such false statutory oaths are commonly treated as perjury. 7

§ 1270.


2 See infra, § 1246; U. S. v. Passmore, 4 Dall. 372.

3 1 Hawk. c. 69, a. 2; 2 Russ. on Cr. 9th Am. ed. 3 et seq. See remarks on this point in Steinman v. M'Williams, 6 Barr. 170.

4 1 Bl. 419; Com. Dig. Jus. of Peace (B.), 103.


6 U. S. v. Shellmire, 1 Bald. 370; Com. v. Brady, 6 Gray, 78; Case v. People, 6 Abb. (N. Y.) N. C. 151; 76 N. Y. 200 (infra, § 1227); Com. v. Cornish, 6 Bin. 249; Cook v. 1 Rob. (Va.) 729. See R. v. Muscot, 10 Mod. 192; R. v. Moreau, 11 Q. B. 1028; Steinman v. M'Williams, 6 Barr. 178.

7 1 Sm. 393; Com. Dig. Jus. of Peace (B.), 103.


9 U. S. v. Shellmire, 1 Bald. 370; Com. v. Brady, 6 Gray, 78; Case v. People, 6 Abb. (N. Y.) N. C. 151; 76 N. Y. 200 (infra, § 1227); Com. v. Cornish, 6 Bin. 249; Cook v. 1 Rob. (Va.) 729. See R. v. Muscot, 10 Mod. 192; R. v. Moreau, 11 Q. B. 1028; Steinman v. M'Williams, 6 Barr. 178.

§ 1246. It is perjury where one swears wilfully and corruptly to a matter which he, according to his own lights, has no probable cause for believing, 1 since a man is guilty of perjury if he knowingly and wilfully swears to a particular fact, without knowing at the time that the assertion is true, supposing that his purpose is corrupt. 2 Hence it is held a good assignment of perjury that the defendant swore that he "thought" or "believed" a certain fact, whereas in truth and fact he "thought" or "believed" the contrary, and had no probable grounds for what he swore. 3 Nor is it a defense that the fact to be inferred is true, if the defendant swear corruptly to false circumstances as a basis for inference. 4 As for

1 Ibid.


3 See Lord Mansfield, in R. v. Pedley, 1 Leach, 327; R. v. Schleisinger, 10 Q. B. 670; State v. Knox, Phil. (N. C.) L. 312; though see 2 Russ. on Cr. 9th Am. ed. 527; 1 Sid. 419; U. S. v. Shellmire, 1 Bald. 370; U. S. v. Atkins, 1 Sprague, 558; 18 Law Rep. 85, explained by Lowell, J., in U. S. v. Moore, 2 Lew. 223. Infra, § 1250. For other cases see supra, § 86.

In Lambert v. People, 76 N. Y. 229, 8 Abb. New Ca. 181, an affidavit, appended to a statement by a life insurance company, stated that dependents were the officers of the company, and on the 31st of December last, all the above described assets were the absolute property of the company, free and clear from any liens or claims, except as above stated; that the foregoing statement, with the schedules and explanations hereto annexed and by them subscribed, are a full and correct exhibit of all liabilities, . . . on the said 31st day of December last,

with the year ending on that day, according to the best of their knowledge, information, and belief respectively. 5 It was held by a majority of the court, that all the statements contained in the affidavit were on information and belief, as well as those preceding the semicolon as those after it. Perjury, it was said, "can only be imputed upon full knowledge of the falsity, and cannot be predicated where wilfulness, corruption, and malice are not manifest. A possible conception, or a mistake in swearing to the construction of a written instrument, is not enough to warrant a conviction of perjury. R. v. Crospaey, 1 Rep. 250; U. S. v. Conner, 3 McLean, 575; U. S. v. Stanley, 6 Ibid. 409; 3 Whart. C. L. (7th ed.), §§ 2169, 2200; Shellmire v. McWilliams, 6 Fenn. St. 170, 178. There is no fair inference that the accused intended to swear unqualifiedly as to the portion preceding the semicolon, and otherwise as to the remainder." See abstract in 19 Alb. L. J. 200, and see infra, § 1247, 1238.

4 1 Hawk. c. 69, a. 6; 2 Inst. 166; Palmer, 294. Infra, § 1302. In an action on a contract before a justice of
§ 1248. CRIMES. [BOOK II.

instance, if a man swear that J. N. revoked his will in his presence, though he really had revoked it, it is perjury if it were unknown to the witness that he had done so. And it is perjury for a person knowingly and corruptly to swear that he is ignorant of a particular fact of which he is cognizant, or cognizant of a fact of which he is ignorant.

§ 1247. It has just been seen that falsity consists in knowingly affirming a condition without probable cause. But what is probable cause? Here we must again accept a position so often vindicated in these pages, that probable cause must be estimated, not from the jury's standpoint, nor from the judge's, but from the defendant's. On the one hand, the fact sworn to may have been true, but if the defendant swore to it wilfully and corruptly, not knowing it to be true, or not having probable cause, according to his own lights, for believing it to be true, he is guilty, as stated in the last section of perjury. On the other hand, if he swore honestly to a fact or belief, with probable cause, according to his own lights, to the best of his belief, he is not guilty of perjury, though his oath was really untrue.

§ 1248. Hence it is admissible to prove reception of such information by the defendant as gave him probable ground for his oath. A witness stating evidence truly to the writer of an affidavit, and swearing to it when drawn up, is not guilty of perjury if the statements are written erroneously by the amanuensis. Upon an indictment against the defendant for a misdemeanor in falsely swearing that he bond fide had such an estate in law or equity the peace, the making of the contract was in issue. A witness testified that he went to a field with the parties to the contract, no other persons than the parties and himself being present, and that he heard the contract agreed to by the parties. In point of fact he did not go to the field, but was present when the contract was made, and had no knowledge of the making. The contract was made, nevertheless; but it was held that the prisoner, having wilfully sworn to a thing he did not know to be true, although it was true, was guilty of perjury. People v. McKinney, 3 Parker C. R. 519.

§ 1249. An honest oath taken under advice of counsel, therefore, is not perjury. Thus a bankrupt who submits the facts in regard to his property fairly to the advice of his counsel, and acting under the advice thus given withholds certain items from his schedule, is not guilty of perjury; the fraudulent intent being wanting. Nor is it perjury when a party swears erroneously to a written statement which his counsel tells him is substantially correct.

§ 1250. It has been already seen that where there is a general intent to do mischief, and a specific overt act follows in causal connection with such general intent, then the general intent applies to the specific act, so as to complete the offence. Hence it is perjury if a witness, from general recklessness and a depraved determination to hurt, fall the consequences where they may, swears knowingly to a falsehood. Even a drunkard, swearing falsely, may be convicted of perjury, if his intent in rendering his testimony were evil, though his conception of what he was doing was not exact; and in fact if we require proof of the exact perception of the falsification to convict of perjury, there would be few convictions of perjury, since there are few cases of perjury in which such an exact conception

1 R. v. De Beauvoir, 7 C. & P. 17.--Lord Denman, C. J.
2 U. S. v. Conner, 3 McLean, 678.
3 E. S. v. Dickey, 1 Morris, 412.
4 U. S. v. Stanley, 6 McLean, 409; Stanly, 412 Iowa, 505.  As C. S. v. Stanley, w. s. C. C. 17;  see supra, §§ 101 et seq.  People v. Willey, 2 Park. C. R. 19, see supra, § 86 b; Jesse v. State, 20 Ga. 169; for other cases, supra, § 53.
5 R. v. Tooke, 7 C. & P. 41.
§ 1251. While the oath must be solemnly administered, and by an officer duly authorized, it is immaterial in what form it is given, if the party, at the time, professes such form to be binding on his conscience. When a witness comes to be sworn, it is to be assumed that he has settled with himself in what way he will be sworn, and he should make it known to the court; and should he be sworn with uplifted hands, or by any other unusual mode, though not conscientiously opposed to swearing on the gospel, and depose falsely, he subjects himself to a prosecution for perjury. The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience. And a mere formal variation from the form of a statutory oath does not affect its obligatory character.

1. L. S. v. Shollhib, 1 Bala, 370; U. S. v. Atkins, 1 Sprague, 558; U. S. v. Moore, 3 Low, 222; Com. v. Brady, 5 Gray, 78; Cohran v. State, 39 Miss. 541.

2. Van Dusen v. People, 78 Ill. 465; Riggerstaff v. Com., 11 Bush, 169; In re, § 1253, 1315.

3. Infra, §§ 1257, 1306. See Whart. Cr. Ev. §§ 353 et seq. By §§ 97 of New York Penal Code of 1889, it is made no defense that the oath was administered irregularly.

4. Com. v. Knight, 12 Mass. 274; Campbell v. People, 8 Wend. 636; hands, Jackson v. State, 1 Carter

§ 1252. Where a party offers himself to prove his books, and wilfully testifies untruthfully as to matters material to the issue, it is perjury, although he was sworn generally, but without objection, to tell the whole truth, instead of being sworn to make true answers. The defendant is generally liable for perjury in his own case.

IV. PARTY TO BE CHARGED.

§ 1253. The crime being distinct, several persons cannot be joined. One only can be made defendant. Even supposing two persons to swear jointly to the same false affidavit, it is impossible to suppose that they did so at the same moment of time, so as to make the offense exactly joint.

§ 1254. If an incompetent witness is permitted to testify, and testifies falsely, it is perjury. This holds even where a party himself is a witness.

§ 1255. Nor is it requisite that the defendant should have been served with a subpoena, or have been compelled to testify. The mere fact of his testifying is enough.


A prosecution for perjury cannot be based on testimony received orally, but which by law ought to have been taken in writing and which could not be evidence. State v. Trask, 42 Va. 192. See infra, § 1284, and State v. Holmes, 3 Hill (S. C.), 260. Infra, § 1270.

To an affidavit it is not necessary that there should be a signature. Com. v. Carol, 10 Mass. 582; Tarpin v. Rand Co., 48 Ind. 46. Infra, § 1310.


2. Infra, § 1273.


4. Infra, §§ 1271, 1280, and others there cited; Chamberlain v. People, 23 N. Y. 85; Montgomery v. State, 10 Ohio, 290.


§ 1257. BREACH OF VOWS, WHEN ATTENDED BY INJURY TO OTHERS OR TO SOCIETY, BY THE CANON LAW IS SUBJECT TO SPECIFIC ECCLESIASTICAL PENALTIES. “Quicunque scienti sejuscogitaverit quosdam alta, quosdam inferius, quosdam beatos habet uterum.” (L. 2. Cod. de reb. cred.) In the maintenance of this distinction the English common law has been resolute.

§ 1257. IT IS ESSENTIAL TO CONSTITUTE THE OFFENSE THAT, IF THE OATH IS NON-JUDICIAL, IT BE TAKEN BEFORE THE PROPER OFFICIAL OR IF IT BE JUDICIAL, BEFORE THE COURT HAVING JURISDICTION OF THE PROCEEDINGS. 1 If, in a case of a non-judicial oath, it must be shown that no part of the proceedings was irregular.

1 Infra, § 1276; 2 Barr. on Cr. 6th Am. ed. 599; R. v. Senior, L. & C. 409; 10 Cox C. C. 465; R. v. Hughes, D. & B. 188; 7 Cox C. C. 286; E. v. Shew, 10 Hld. 68; R. v. Bacon, 11 Hld. 549; R. v. Lewis, 12 Hld. 163; R. v. Willis, 13 Hld. 164; U. S. v. Bailey, 9 Peters, 238; H. S. v. Barton, 5 Crim. Cas. 429; State v. Furlong, 26 Me. 99; Comm. v. Knight, 13 Mass. 274; Comm. v. White, 8 Pick. 463; State v. Fasset, 16 Conn. 457; Arden v. State, 11 Hld. 408; Jackson v. Humphrey, 1 Johns. 405; Conner v. Comm., 2 Va. Cas. 30; Pankey v. People, 1 Scam. 80; Montgomery v. State, 10 Ohio, 220; Lamden v. State, 5 Humph. 83; Stelson v. State, 6 Yerger, 551; St. v. Gallimore, 2 Ind. 374; State v. Alexander, 4 Hawk, 182; State v. Hayward, 1 N. & McC. 546; State v. McCrosskey, 3 McCord, 306; State v. Wyatt, 2 Hayw. 66; State v. Crumb, 68 Mo. 206. For other cases, see infra, § 1290.

An indictment averring that "in the Whitechurch County Court of Middlesex, holden before J. M., being judge of the court, an action, then pending in the court, came on to be tried; that the defendant was sworn as a witness before J. M., being judge of the said court, and having sufficient and competent authority to administer the said oath; and then perjury was assigned: sufficient evidence is shown on the face of the indictment that the court was properly constituted, and that the judge had jurisdiction over the cause in which the perjury was alleged to have been committed.”}

1 Infra, § 1276; 2 Barr. on Cr. 6th Am. ed. 599; R. v. Senior, L. & C. 409; 10 Cox C. C. 465; R. v. Hughes, D. & B. 188; 7 Cox C. C. 286; E. v. Shew, 10 Hld. 68; R. v. Bacon, 11 Hld. 549; R. v. Lewis, 12 Hld. 163; R. v. Willis, 13 Hld. 164; U. S. v. Bailey, 9 Peters, 238; H. S. v. Barton, 5 Crim. Cas. 429; State v. Furlong, 26 Me. 99; Comm. v. Knight, 13 Mass. 274; Comm. v. White, 8 Pick. 463; State v. Fasset, 16 Conn. 457; Arden v. State, 11 Hld. 408; Jackson v. Humphrey, 1 Johns. 405; Conner v. Comm., 2 Va. Cas. 30; Pankey v. People, 1 Scam. 80; Montgomery v. State, 10 Ohio, 220; Lamden v. State, 5 Humph. 83; Stelson v. State, 6 Yerger, 551; St. v. Gallimore, 2 Ind. 374; State v. Alexander, 4 Hawk, 182; State v. Hayward, 1 N. & McC. 546; State v. McCrosskey, 3 McCord, 306; State v. Wyatt, 2 Hayw. 66; State v. Crumb, 68 Mo. 206. For other cases, see infra, § 1290.

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§ 1259. Perjury before courts-martial is by statute made indictable in most jurisdictions; but even where a statute does not apply, the weight of authority is that it is perjury at common law. ¹

§ 1260. In a much contested case in Connecticut, it was held by a majority of the judges, that as Christianity is part of the common law of the land, an ecclesiastical tribunal has the right to administer an oath, and that false swearing before such a tribunal is perjury. ² The last is certainly a bold position; and when we bear in mind the license with which ecclesiastical trials are conducted, particularly where the church discipline leaves the matter to the adjudication of the congregation as a body, it is questionable how far sound policy would justify a doctrine which would attach to ecclesiastical sentences, first the incidents and then the consequences of a civil judgment. When such a court, however, is established by law, this objection vanishes; ³ and, in any view, the present tendency of the courts to treat the adjudications of ecclesiastical tribunals as authoritative within their sphere makes it important to solemnize and check testimony in such courts by the sanction of an oath.

§ 1261. Perjury may be assigned on a false oath taken before a grand jury. ⁴ In England doubts seem to have existed as to whether against H. for perjury committed by him at the hearing of the case at petty sessions, and he was convicted by the jury, subject to the opinion of the court as to the jurisdiction of the justices in petty sessions, because there was no written information nor oath to support the warrant. It was held ⁵ (Kelly, C. B., dissentient), that the justices had jurisdiction to hear and determine the case against B., notwithstanding he was brought before them on an illegal warrant, and there was no written information. But to make false swearing before commissioners of bankrupts perjury, it is necessary that there should be a good petitioning creditor's debt to support the suit. ⁶

In R. v. C. C. 564, it was held that it should be proved distinctly, on the trial of an indictment for perjury, what the charge was, on the hearing of which the false evidence was given.

§ 1262. The officer who administers the oath must have legal power to administer the oath in the particular process. Thus a man cannot be indicted for perjury in swearing before a justice to his attendance in court as a witness, when the clerk only is authorized to administer such oath. ⁷

§ 1263. It is held to be sufficient privato facie, that the person by whom the oath is administered was an acting magistrate, and the evidence of the officer himself may be received to prove this. ⁸ When such a case is presented by the prosecution, it may be rebutted by proof on part


¹ R. v. Hughes, 1 C. & K. 591.
³ Wilful and corrupt false swearing, when before a local maritime board duly and lawfully appointed and constituted, upon a matter material to an inquiry then being lawfully investigated by them, is perjury. R. v. Tomlinson, L. R. 1 C. C. 49; 12 Jur. (N. S.) 945.
⁴ Chapman v. Gillot, 2 Conn. 490.
⁵ Infra, § 1267.
⁶ 1 Ch. C. L. 392; State v. Paulet, 16 Conn. 457; Com. v. Parker, 2 Conn. 212; Huldskeper v. Cotton, 8 Watts, 126.
⁷ See supra, § 1257.

In R. v. C. C. 564, an indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the county court of W. Proof was given that the perjury took place in the presence of J. U., at the county court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, entitled, "Minute of depositions, orders, and other proceedings, at a court holden at, etc., before J. U., deputy judge of the said court." It was ruled on a case reserved that there was sufficient proof of J. U. acting as deputy judge, and therefore privato facie evidence of his appointment as such. Lord Coleridge, C. J., said:

- I am of opinion that the conviction should be affirmed. One of the best recognized principles of law, Omnis processamentum causa et solemniter set activo procedatur in contrario, is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient privato facie

⁹ People v. Phelps, 5 Wend. 10; State v. Clark, 2 Tyler, 277.

127
of the defendant that he was not competent to act. Trials for perjury, in this respect, differ from that class of cases in which it is sufficient to prove that an officer whose action is assailed had a de facto right. No de facto title by the officer administering the oath will sustain an indictment for perjury. But perjury may be assigned on an oath erroneously taken, while the proceedings in which it was taken remain unrevoked. And an oath administered

proof of the proper appointment; but it is only a prima facie presumption, and it is capable of being rebutted, and in the case of Rex v. Verecr, that presumption was rebutted in fact, and the person who had acted as surrogate for twenty years was proved to have been improperly appointed. The case of Rex v. Verecr, 3 Camp. 433, is exceedingly like this; there the fact of Dr. Parson having acted as surrogate was held by Lord Ellenborough, C. J., to be sufficient prima facie evidence that he was duly appointed, and had competent authority to administer an oath, and for that proposition Rex v. Verecr was referred to as good law by Lord Campbell, C. J., in Weldon v. Fawr, 16 Q. B. R. 48. But it was further shown in Rex v. Verecr that Dr. Parson had never been regularly appointed as surrogate, and Lord Ellenborough then held that the evidence that Dr. Parson was not duly appointed a surrogate could not be set out, however long he might have acted in that capacity, and that the presumption arising from his acting only stood until the contrary was proved. That is an instructive case, as showing the true role as to the prima facie presumption in such cases. It is laid down in all the text-books as a recognized principle, that a person acting in the capacity of a public officer is prima facie to be taken to be so, and that principle was adopted by Pattecon, J., in Doe dem. Bowley v. Barnes, 8 Q. B. 1646. In that case there was a demise by the churchwardens and overseers of some parish property, and the fact that they acted as churchwardens and overseers at the time of the demise was held to be sufficient prima facie proof for the purpose of an action of ejectment without proving their appointment. He then referred to the decision of Thirlow, C. J., to the same effect, in R. v. Newton, Car. & Kirl. 400, and to R. v. Jones, 2 Camp. 131; and added: "This objection, if it were good, would extend very widely, for, supposing perjury committed on the first time of acting in his office before a judge or a recorder or county court judge, or any person who fills a responsible public position, would it lie on the prosecution to show the appointment of such an officer in the strictest possible way? Mr. Jeff has not satisfied me that it would, and no member of the court has any doubt that there is no ground for such a contention." See infra, § 1215.

1 Lambert v. People, 76 N. Y. 220. Supra, § 1245.

CHAP. XX.]

PERJURY. [§ 1265.

by an officer (though incompetent) in presence of the court, is regarded as administered by the court. According to English and American law, one State has no jurisdiction of perjury committed in another State, against the authority of such other State, nor does it make any difference that such perjury was committed in an affidavit taken before a judge of the prosecuting State at the time sojourning in the foreign State, such judge not being authorized so to act by the prosecuting State. There are, however, exceptions to this rule:

Perjury before consuls, etc., abroad, by statute, may be punished in the United States. Perjury before a commissioner to take testimony, though committed abroad, is punishable both in the State where the false oath is taken, and in the State from which the commission issues. But the authority of the commissioner is strictly limited by his commission; and if he transgress it, any oath administered by him is not the subject of prosecution in the State from which the commission issues.

Fraudulent use of a false foreign affidavit, though the perjury itself is not cognizable, is indictable at common law.

Whether a State court has jurisdiction of perjury in a federal procedure will be presently considered.

§ 1266. It has been held that if a state magistrate administer an oath under an act of Congress expressly giving this power to magistrates of his class, it is to be regarded as a lawful oath by one having competent authority; as much so as if he had been especially appointed a commissioner under a law of Congress for that purpose. The same

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1 Warwick v. State, 25 Ohio St. 21; Stephens v. State, 1 Swan, 127. See supra, § 1313, for other cases.
2 Meigs v. Medex, 19 Ves. 652; State v. State, 29 Ohio St. 477; Mair v. State, 8 Blackf. 154; Biggers v. Com., 11 Bush, 409. See supra, § 1315.
3 Jackson v. Humphrey, 1 Johns. 498. See Wickoff v. Humphrey, Ibid.
4 Supra, § 1276; Whart. Conf. of Laws, § 873.
7 Infra, § 1275.
9 Vol. II.—9
view has been taken where the authority of the State officer to
administer the oath is implied under the act of Congress. But the
right of Congress to impose duties of this class on State officials
may be questioned.  
§ 1266. Perjury may be assigned on an oath administered by a
justice of the peace, on the investigation of a matter submitted to arbitration by a rule of court, with the con-
sent of parties. The same rule applies to arbitrators.
But it may be otherwise if the arbitrators have no power to
make a binding award.

VI. IN PROCEEDING AUTHORIZED BY LAW.

§ 1267. To constitute the technical offence of perjury at common
law, it must appear that the false swearing was in a
judicial proceeding, or, as we will see hereafter, in pro-
ceedings which by statute have this predicate assigned to
them. It must be remembered, however, that in some
jurisdictions it is held that the making of a false affidavit
in any proceeding authorized by statute is held to be a distinctive
misdeemeanor; though in an indictment for such an offence, the
averments peculiar to perjury may be rejected as surplusage.
If the defendant took a false oath when examined as a witness at
a trial; or in an affidavit or to an answer in a bill of
complaint; or in depositions in a court of equity; or before a commissioner to take
depositions for a foreign court; or on a motion for continuance; or
in proceedings before referees; or in an affidavit in any pending

2 Supra, §§ 264–6; infra, § 1275.
5 Infra, § 1290.
6 Supra, § 1244; State v. Chamber-
lin, 30 VT. 559; State v. Simons, Ibid. 620.
7 Infra, § 1270.
8 R. v. Hodgkins, L. R. 1 C. C. 212; 130

Kemp v. Com., 30 Penn. St. 475.
Supra, § 1244. Infra, § 1270.
5 Mod. 346; 3 Inst. 66; R. v. White, M. & M. 271; Com. v. Warden, 11 Mont. 406.
5 Mod. 346.
9 Supra, § 1244.
10 State v. Hobbs, 49 N. H. 229; State v. Johnson, 7 Blackf. 40; State v. Flagg, 27 Ind. 54; State v. Shape, 18 Iowa, 36; Morrell v. People, 32 Ill. 495.
11 Supra, § 1244.
12 State v. White, 50 N. H. 245; State v. Heltz, 2 Ill., S. C. 230; and see infra, § 1275.
13 White v. State, 1 Sm. & M. 149.
14 5 Mod. 346; 1 Hild. 56; per Twis-
den, J.

issue in court, such as a motion for a new trial; or upon a wager of
law; or upon a commission for the examination of witnesses; or
in justifying bail in any of the courts; or before a federal
commissioner; or on a plea in abatement; or in naturalization
proceedings; or upon an affidavit in habeas corpus proceedings; or
in a judicial proceeding in a court baron; or before a grand
juror; or in mitigation of sentence; or before a legally authorized
ecclesiastical court, it is perjury.

§ 1268. An indictment lies against a juror which alleges that he
false and corruptly swore upon his voire dire, that he
had not formed or expressed an opinion on the merits of
the case, when in fact he had.

§ 1269. But a mere voluntary oath cannot amount to
perjury. Therefore, false swearing in a voluntary affi-
davit, made before a justice of the peace or notary, before
whom no cause is pending, and under no statutory
procedure, is not perjury.

1 U. S. v. Nickerson, 1 Sprague, 293; Com. v. Knight, 12 Mass. 274; Jackson
v. Humphrey, 1 John. 458; People v. Travis, 4 Parker C. R. 218; Shaffer v. Kenizer, 1 Bum. 452; Landam v. State, 5 Humph. 43; State v. Wyant, 2 Hayw.
58; PeGRAM v. Styrn, 1 Bailey, 555; State v. Stephenson, 4 McCord, 165; State v. Dayton, 3 Zab. 48. It is
doubted if perjury can be assigned upon the oath made for the purpose of
obtaining a marriage license; R. v. Alexander, 1 Leach, 74; but see 1
Vent. 270; and in R. v. Foster, R. & E. 459, a false oath taken before a sur-
rogate, to procure a marriage license, was held not sufficient to support a
is pending, it is not perjury to swear falsely before a justice to an affidavit to be used by them, if no suit or legal proceeding could be based on their action. And the same rule applies to all extrajudicial oaths, and to oaths not required by law. Even false swearing to an affidavit attached to a bill in equity is held not to be perjury when the bill is one not required by law to be verified.

§ 1270. As has been seen, when a statute authorizes an affidavit to be made as a foundation for any legal claim or right, the false swearing to such an affidavit is, in England, an indictable misdemeanor at common law, while in most jurisdictions in this country such false oath is held to be perjury. But in such case the affidavit must be within the purview of the statute. If it be so, or if the affidavit be made in conformity with any enabling statutes, the offense is a misdemeanor, if the oath were taken before a party authorized to administer the same.

Prosecution for perjury. The contrary, however, was ruled in R. v. Chapman, 1 Dec. C. C. 422; 2 C. & K. 548. In South Carolina, doubts have been expressed on a cognate point. Pregram v. Stringer, 1 Bailey, 595. In such a case it is usual to indict as a false misdemeanor at common law. Archbold C. P., 9th ed., 539; R. v. Hodgkins, L. R. 1 C. C. 212. Supra, § 1267.

Mahon v. Berry, 5 Mo. 21. See supra, § 1266.


Supra, § 1244.

So as to affidavits before assessors of taxes. State v. Cannon, 29 Mo. 34.


The authority for such statutory oaths must be specially averred, see infra, § 1287. That irrelevant matter in such an affidavit is not under the statute, see State v. Halle, supra.

Ralph r. U. S., 21 Biss. 85; U. S. v. Curtis, 107 U. S. 671; St. Dig. C. L. art. 136, citing the following:

"(1) A takes a false oath before a justice to discover in cases of which a royal grant was required to confirm title to lands. A commits a misdemeanor. Hambert, 125.

"(2) A. takes a false oath before commissioners appointed by the king to inquire into cases in which a royal grant was required to confirm title to lands. A commits a misdemeanor. Hobart, 65.

"(3) A. swears a false affidavit under the Bills of Sale Act (17 & 18 Vict. c. 30) to commit a misdemeanor. R. v. Hodgkins, L. R. 1 C. C. 212."

For false affidavits by solicitors, see R. v. Mooney, L. T. Dec. 6, 1873.

A party making a false affidavit before a justice of the peace of a State, in order to establish a claim against the United States, is indictable under the act of Congress passed March 1, 1823, to prevent false swearing touching public money, though such affidavit was not expressly authorized by act of Congress. U. S. v. Bailey, 9 Pet. 255.

As the averment of "perjury" in such an affidavit can be rejected as surplusage, and the defendant sentenced for the constituent misdemeanor (see R. v. Hodgkins, supra, § 1244), the difference, supposing the indictment to be for perjury, is immaterial. See Tattle v. People, 56 N. Y. 451; infra, § 1257; sustaining in such case the allegations of perjury.

Supra, § 1251. That it need not be signed, see supra, § 1252.

Supra, 266; infra, § 1275.


Silver v. State, 17 Ohio, 365; People v. Galge, 26 Mich. 30; supra, § 1270; infra, §§ 1276, 1304.


132
§ 1273. At common law perjury cannot be committed in an official oath, so far as such oath touches future conduct.

§ 1274. Perjury may be assigned upon an oath or affidavit which is insufficient to effect the purpose for which it was taken without additional proof, and it is not necessary to show or aver that such additional proof was made.

§ 1275. A State court, it has been ruled, cannot punish for perjury when made under an act of Congress, and such is the true view when the offense is exclusively against the United States. Yet it is on principle otherwise when the offense strikes at the integrity of the State. Hence false swearing in a naturalization case is perjury at common law, and though it may also be an offense against the federal government, the offender may be indicted and punished in a State court. Whether a State court can act generally under an act of Congress has been already discussed.

It is conceded that a State court has no jurisdiction of false swearing in a trial in a federal court.

VII. IN A MATTER OF MATERIAL.

§ 1276. The assignment of perjury on which a conviction is asked must be in a matter which was material to the issue, tending to prove a fact bearing on such issue. Thus, in a common case, if a witness was asked whether goods were paid for "on a particular day," and he answered in the affirmative; if the goods were really paid for, though not on that particular day, it will not be perjury, unless the day be material. It has also been ruled that it was not perjury when a witness falsely swore that a thing which occurred on a particular Sunday did not occur on a Sunday between two dates which included the Sunday in question; the court holding that the attention of the witness should have been called to the

1 State v. Whittimore, 50 N. H. 245; Rump v. Com., 30 Penn. St. 475.
2 Com. People v. Sweetman, 3 Parker C. R. 356. See supra, § 260, for discussion of this topic.
4 Compare People v. Sweetman, 3 Parker C. R. 356.
5 See prior cases cited to this section; State v. Shelley, 11 L. 594.
7 U. S. v. Shinn, 8 Sawy. 403; Com. v. Grant, 116 Mass. 17.
§ 1277. Yet when such apparently superfluous matter goes to give circumstantiality to the narrative, and to form therefore, a link in the chain of proof, it becomes material as contributing largely to the witness’s credibility. Bald statements of results (e.g., “He struck me,” as in a case just mentioned) want one of the prime essentials of reliable testimony. For a witness knowingly to fabricate details, in order to strengthen his credibility, is as much perjury as is any other false swearing. Hence it has been rightly held that a legible may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point. Thus where three or

1 R. v. Stoddy, 1 P. & F. 558. As to what constitutes fixing the witness’s attention on a point see R. v. London, 12 Cox C. C. 511.

2 Hatley, 97. See 1 Hawk. c. 99, n. S.

3 White v. State, 3 Sm. & M. 149.


6 R. v. Tyson, L. R. 1 C. C. 107; 11 Cox C. C. 1; Com. v. Pollard, 12 Met. 228; People v. Wood, 59 N. Y. 117; State v. Dayton, 3 Zab. 49; State v. Brown, 79 N. C. 642; Ford v. State, 30 Ala. 511; State v. Shupe, 16 Iowa, 36; Farris v. State, 18 Fl. 902. On an assignment of perjury by a defendant:

7 State v. Norris, 9 N. H. 96.


11 People v. Courtenay, 94 N. Y. 496.

12 R. v. Worley, 3 Cox C. C. 639; Studdard v. Linville, 3 Hawks, 474.

13 P., the defendant, in an answer in chancery to a bill in equity against him for specific performance of an agreement relating to the purchase of land, relied on the statute of frauds (the agreement not being in writing), and also denied having entered into any such agreement. Upon this denial in his answer he was indicted for perjury. It was held that the denial of an agreement, which, by the statute of frauds, was not binding on the parties, was immaterial and irrelevant, and that the defendant was entitled to an acquittal. R. v. Dunston, R. & M. 109. As we will see, perjury cannot be assigned on an answer in chancery, denying a promise absolutely void, by the statute of frauds. R. v. Beners, Peak's Adv. Cas. 93. Infra, § 1282.

14 P. being charged with perjury for having falsely sworn before magistrates at petty sessions that D. R. was the father of her illegitimate child, at the trial the imputed father, D. R., swore that he never had intercourse with her. In corroboration of D. R., a witness was called who swore that P. had told him, at a time when she generally denied being with child, that “D. R. had never touched her clothes.” It was ruled that, as the negation was made by P. at a time when she gene-
§ 1280. CRIMES.  [BOOK II.

person swearing falsely to a material fact cannot defend himself on the ground that the case did not ultimately rest on the fact to which he swore. 1 Whatever forms an apparent link in a chain of evidence affecting the issue is in this sense relevant. 2 The test is, was the evidence such as apparently conducted to support an hypothesis logically pertinent to the issue. If not, the evidence, in the sense now before us, is not material. 3

§ 1278. Perjury may be assigned upon a man's testimony as to the credit of a witness. 4 He may also perjure himself in his answer to a bill in equity, though it be in a matter not charged by the bill. 5

§ 1279. A witness's answers on his own cross-examination are material, and may be assigned as perjury, however discursive they may be, if they go to his credit. 6 Nor can he be set up in defence that he was compelled to answer in contravention of a constitutional right. 7

§ 1280. Hence may we accept as a general rule that where a court illegally admits evidence, such illegality, if the evidence go to the jury, is not per se evidence of immateriality. 8 Thus there

§ 1281. On the other hand, the fact that certain testimony was admitted in evidence is not by itself sufficient to warrant a jury, upon the trial of the indictment for perjury, to infer that such testimony was material to the issue. 9

§ 1282. Swearing to a falsehood necessarily and absolutely ineffective is not perjury; but it is otherwise when the falsehood is capable of a prima facie though only temporary effect. A man, for instance, denies on oath

defendant on the trial professed a document purporting to be a copy of J.'s will, and falsely swore that he had examined it with the original will in the registry; and also, that he had examined a memorandum at the foot of the copy of the will with the entry in a book called the Act Book in the same registry. The judge offered to admit the evidence, but it was withdrawn: it was, in point of law, inadmissible. It was held that the circumstances that the evidence was inadmissible, and withdrawn, did not affect the question of perjury, as it could not purg the false swearing; and that, as it was not material whether probate of J.'s will was granted in the lifetime of M., if the evidence of the prisoner had been received it would have been material to the issue, and, consequently, that the false oath of the prisoner amounted to perjury. R. v. Biddulph, 37 C. C. 302; 3 C. & K. 135; T. & M. 667; 5 Cox C. 363.

In R. v. Gibbon, L. & C. 109; 9 Cox C. 105, P. was indicted for having falsely sworn that in September, 1869, he had carnal knowledge of A. A. had obtained an affidavit summons against H., and in her cross-examination denied having had connection with P. in September, 1869 (a time which could not have made him the father of the child). P. was convicted as a witness on behalf of H., and swore that he had connection with A. in the mouth named. It was determined that although his evidence was legally inadmissible, yet being admitted, it became material, and perjury might be assigned upon it.

1 Howard v. Sexton, 4 N. Y. 157.
3 R. v. Christian, 3 C. & G. 328; State v. Whitmore, 50 N. H. 245; State v. Flagg, 29 Ind. 54.
4 Supra, § 1267.

188
§ 1283. Crimes.

CRIMES.

[BOOK II.

1. Wilful and Corrupt.

§ 1284. According to Lord Campbell, the materiality of the alleged false oath is for the jury. But the weight of authority is that it would be error to leave the question to the jury without definite instructions from the court. And the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury.

VIII. INDICTMENT.

§ 1285. Each point in the question of perjury must be distinctly shown on the indictment, subject to the statutory or other qualifications hereafter stated. Thus it must appear that the oath was—

1. Wilful and Corrupt.

§ 1286. The indictment must aver that the defendant "wilfully and corruptly" swore falsely. And an indictment which charges that the prisoner "feloniously, corruptly, knowingly, wilfully, and maliciously swore," omitting the word "falsely," but concluding "so the defendant in manner and form aforesaid did commit wilful and corrupt perjury," is bad. But in another case, an indictment which stated that the defendant "did voluntarily, and of his own free will and accord, propose to purge himself upon oath of the said contempt," negating by express averments the truth of the oath, and concluding that the defendant "did knowingly, falsely, wickedly, maliciously, and corruptly commit wilful and corrupt perjury," was held good.

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3. Resp. v. Newell, 3 Yeates, 407. In R. v. Cox, 1 Leach, 93, "wilfully" was held to be unnecessary when "falsely, wickedly, maliciously, and corruptly" were used. In Johnson v. People, 34 Ill. 505, it was held that "knowingly" could be dispensed with when "wilfully" and "corruptly" were used.
4. For forms of indictment, see Whart. Proc. § 777 et seq.
7. State v. Peake, 3 Mich. 562; State v. Terry, 30 Mo. 386.
CRIMES.

§ 1287. We may in general conclude that at common law the words "wilfully," "corruptly," and "falsely," are terms which cannot be omitted with safety.\(^3\)

2. Sworn before Competent Jurisdiction.

§ 1287. "Duly sworn" is sufficient to describe the swearing; nor need the particular mode be set forth.\(^2\) Hence it is sufficient to aver that the defendant "did then and there in due form of law, take his corporal oath," without stating whether he was sworn on the gospels, or with uplifted hand.\(^8\) But "sworn" (or affirmed) must be distinctly alleged;\(^4\) and where the procedure is special, prescribed by statute, the special oath so prescribed must be averred.\(^5\)

At common law the name and office of the person or court admin-

An indictment against an insolvent debtor for perjury, in swearing to a schedule which did not discover certain debts owing to him, was held bad on demurrer for not averring that he knew and remembered that the omitted debts were then justly due and owing to him. Com. v. Cook, 1 Rob. (Va.) 729.

That the words "committed perjury" are not essential when the constitutives of the offence are given, see Massie v. State, 5 Tex. Ap. 61.


\(^{\text{3 See infra, § 1306: R. v. McCurrier, Peake, 211; Tuttle v. People, 36 N. Y. 401; Dodge v. State, 4 Zabr. 455; State v. Farnow, 10 Rich. 165; See Com. v. Warden, 11 Me. 409; People v. Warner, 5 Wend. 741.}}\)


\(^{\text{5 State v. Divoll, 44 N. H. 140; State v. Hamilton, 65 Me. 567.}}\)

\(^{\text{6 It has been ruled that in cases where, to give a magistrate jurisdiction to hear a case punishable on summary conviction, it is essential that they should have an information of oath made before them, and that is not sufficient in an indictment for perjury, alleged to have been committed on the hearing of such information, to allege that before M. G., Reu., and T. H. H., clerk, two of the justices, etc., the magistrates who heard the case, J. O. came and exhibited a certain information upon oath, and that the oath was taken before M. G. and T. H. H. v. Goodfellow, Car. & M. 509.}}\)

§ 1288. It is, however, enough to allege swearing before a court, and proof of swearing before an officer of court, in presence of the court, will sustain an allegation of swearing before or by the court. An indictment charged the defendant with having sworn to tell "the truth, the whole truth, and nothing but the truth." The evidence was that he was sworn to tell "the whole truth and nothing but the truth." It was held that the variance was immaterial.\(^2\)

§ 1288. By stat. 23 Geo. II. c. 11, it is "sufficient to set forth . . . by what court, or before whom the oath was taken, averring such court or person or persons to have competent authority to administer the same." By the English practice, under the statute, the nature of the authority need not be specified.\(^4\) In the United States, there are jurisdictions in which the relaxation of the common law affected by the statute has not been accepted; and where it has been held necessary to set forth all the facts essential to constitute the authority to administer the oath.\(^7\) But as a general rule, the principle of the statute has been accepted among us as virtually a part of the common law;\(^8\) though it must appear from the indictment that the officer administering the oath was of a class authorized by law to act in such capacity.\(^9\) Beyond this specification need not be pushed. Thus, it has been held, where an oath before a person of a detailed authority of court need not be given.\(^{10}\)

\(^{\text{1 Kerr v. People 42 Ill. 307; State v. Street, 1 Murph. 156; State v. Hardwick, 2 Mo. 155.}}\)

\(^{\text{2 U. S. v. Douglass, 4 McLean, 3; State v. Hardin, 33 La. Ann. 1172; State v. Oppenheimer, 41 Tex. 83.}}\)

\(^{\text{3 Campbell v. People, 9 Wend. 636.}}\)

\(^{\text{4 Supra, § 1307; infra, § 1316.}}\)


\(^{\text{7 Kerr v. People 42 Ill. 307; State v. Street, 1 Murph. 156; State v. Hardwick, 2 Mo. 155.}}\)

\(^{\text{8 U. S. v. Douglass, 4 McLean, 3; State v. Hardin, 33 La. Ann. 1172; State v. Oppenheimer, 41 Tex. 83.}}\)

\(^{\text{9 Campbell v. People, 9 Wend. 636.}}\)

\(^{\text{10 Supra, § 1307; infra, § 1316.}}\)

\(^{\text{11 R. v. Southwood, 1 F. & C. 366.}}\)


\(^{\text{13 State v. Gallimmon, 2 Ired. 372; Lodge v. Com., 2 Grat. 373; McGregor v. State, 1 Carter (Ind.), 202. See State v. Hanson, 39 Mo. 337; State v. Nickerson, 46 Iowa, 447.}}\)

\(^{\text{14 U. S. v. Douglass, 4 McLean, 3; State v. Hardin, 33 La. Ann. 1172; State v. Oppenheimer, 41 Tex. 83.}}\)

\(^{\text{15 Campbell v. People, 9 Wend. 636.}}\)

\(^{\text{16 Supra, § 1307; infra, § 1316.}}\)

\(^{\text{17 R. v. Southwood, 1 F. & C. 366.}}\)

\(^{\text{18 State v. Street, 1 Murph. 156; State v. Hardwick, 2 Mo. 155.}}\)

\(^{\text{19 U. S. v. Douglass, 4 McLean, 3; State v. Hardin, 33 La. Ann. 1172; State v. Oppenheimer, 41 Tex. 83.}}\)

\(^{\text{20 Campbell v. People, 9 Wend. 636.}}\)

\(^{\text{21 Supra, § 1307; infra, § 1316.}}\)

\(^{\text{22 R. v. Southwood, 1 F. & C. 366.}}\)
§ 1290. GRANDE JURY IS AVERRED, THIS IS ENOUGH WITHOUT STATING THE FOREMAN'S NAME IN DETAIL.1 IT MUST, HOWEVER, BE SPECIFICALLY AVERRED THAT THE PERSON OR COURT ADMINISTERING THE OATH HAD AUTHORITY TO DO SO.2

§ 1289. UNDER ANY CIRCUMSTANCES, HOWEVER, WHERE THE OATH WAS TAKEN BEFORE A SUBORDINATE STATUTORY OFFICER, SPECIALLY EMPowered TO ADMINISTER AN OATH, IT IS NECESSARY THAT THE FACTS SETTING FORTH HIS AUTHORITY SHOULD BE AVERED. THUS, IT IS NOT ENOUGH TO AVER THAT THE PERJURY WAS COMMITTED BEFORE "A COMMISSIONER OF THE UNITED STATES DUTY APPOINTED." THE MODE AND AUTHORITY OF THE APPOINTMENT, AND THE OFFICIAL TITLE OF THE OFFICER, MUST BE SET OUT.3

§ 1290. THE JURISDICTION OF THE COURT OVER THE SUBJECT MATTER MUST BE DISTINCTLY AVERED.4 THE TITLE OF THE COURT MUST BE CORRECTLY GIVEN;5 AND IF A QUORUM IS ESSENTIAL TO JURISDICTION, IT IS PROPER TO AVER THAT A DUE QUORUM OF THE JUDGES WAS PRESENT.6 BUT IF JURISDICTION BE AVERED, THE SUBORDINATE PREQUISITES OF REGULARITY MAY BE INFERRED FROM THE OTHER ALLEGATIONS, WHEN NOT EXPLICITLY STATED.7 THUS, IN PERJURY COMMITTED BY A

1 St. Clair v. State, 11 Tex. Ap. 297. 2 State v. Owen, 72 Mo. 440, and prior cases cited in this section. 3 U. S. v. Wilcox, 6 Blatch. C. C. 391. See Flint v. People, 35 Mich. 431. 4 State v. Hanson, 29 Mo. 337; State v. Thadui, 35 Id. 206; State v. Piatt, 50 Id. 217; Steinman v. State, 6 Yerg. 552; State v. Withrow, 3 Murph. 158; R. v. Doty, 13 Up. Can. (Q. B.) 398. 5 State v. Street, 1 Murph. 156; State v. Knight, 84 N. C. 789. Infra, § 1314. 6 State v. Freeman, 15 Vt. 723. 7 R. v. Virriill, 4 P. & D. 161; 12 Ad. & Bl. 317; Walker v. R., 8 El. & Bl. 439; Conn. v. Hatfield, 10 Mass. 297. Supra, § 1297. 8 It has been held that jurisdiction is sufficiently averred in an indictment which charges that a petition for protection from process was, under 5 & 6 Vict. c. 116, & 8 Vict. c. 96, and 10 & 11 Vict. c. 102 (Insolvent Debtors' Acts), filed and presented at the county court of S., as W., by the defendent; that he afterwards obtained an order of protection; but afterwards, while the proceedings were pending in the county court, to wit, at the time of the filing the petition and caption, he came before K., a commissioner to administer oaths in chancery, duly appointed and empowered to act in the matter of the insolvent, and take the defendant's oath then and there at the county court, and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying his petition on oath, and was duly sworn before K., and swore and took his oath that the affidavit then made was true, K. having competent power and authority to administer the oath. The indictment went on to aver that certain matter was material in the matter of the insolvency, and that the affidavit was false in respect thereof. The defendant was convicted, and judgment sustained. Walker v. R. (in error), 8 Id. & Bl. 439; 27 L. J. M. C. 43. See supra, §§ 1297 et seq. 9 U. S. v. Deming, 4 McLean, 3. Supra, § 1299; infra, § 1299. 10 State v. Hardwick, 2 Mo. 135. 11 Whitel. Cr. Br. 2 103 a. Infra, § 1314; U. S. v. McNeal, 1 Gallus, 387; U. S. v. Bowman, 2 Wash. C. C. 432; Conn. v. Monahan, 9 Gray, 119; Rhodes' Case, 78 Va. 592. 12 State v. McKeown, Harp. 302. 13 R. v. Overton, 4 Q. B. 83; 2 G. & D. 333; State v. Lamont, 2 Wis. 437; Morell v. People, 32 Ill. 439. See for adequate form Conn. v. Carol, 106 Mass. 582. 14 An indictment was held defective which merely stated that the defendant, intending to subject W. M. to the penalties for felony, went before two magistrates, and "did depose and swear," etc., setting out a deposition, which stated that W. B. had put his hand into the defendant's pocket and taken out a $5 note, and assigning perjury upon it. The defects stated were that the indictment did not show that any charge of felony had been previously made, or that the defendant then made any charge of felony, or that any judicial proceeding was pending before the magistrate. R. v. Pearson, 8 C. & P. 119. Supra, § 1277.
touching which the defendant gave his evidence, was by indictment or presentment, is fatal.1

§ 1294. It has been shown that it is necessary that the proceedings should have been regular.2 Thus, where it becomes necessary, in charging the commission of the offense, to allege that a certain term of county court was duly held, it is not at common law sufficient to allege that it was held by and before the chief judge of such court, without mention of any assistant judges.3 And it must appear that the party administering the oath had authority.4

§ 1295. Curable irregularities, however, are not fatal.5 Thus it is no defence to perjury on an affidavit that the affidavit was not filed.6 Nor, under most recent statutes of jefails, is a variance in details of record fatal.7

§ 1296. But so radically have the statutes of jefails, and those for relaxing the old common law strictness in this respect, affected this portion of criminal pleading, that there is probably no State in which it would now be held necessary to set out the whole record of the suit in which the perjury is alleged to have been committed. It is generally enough to state correctly the facts showing that the court had jurisdiction, that the oath was duly administered, and that the proceedings were regular.8

1 Stevenson v. State, 6 Term. 932. 2 Supra, §§ 1267, 1273, 1287.
3 It was averred in the indictment that after K. was duly summoned to appear before certain justices, being and acting as two justices of the peace in and for a county, to answer before such justices a certain information and complaint against him, of having opened his house (a beer-house) on a Sunday, for the sale of beer, after three and before five in the afternoon; K. duly appeared before the justices at the petty sessions of a petty sessional division in the county, and that at the hearing, the defendant, being called as a witness for K., falsely swore that he had not been in the house of K. at all that day; that he had never seen a certain policeman, and had not been in B. that day, or for a fortnight before. It was ruled that it was sufficiently alleged in the indictment that the offense was one over which the justices had jurisdiction, and that it was committed in a place where they had jurisdiction. R. v. Shaw, L. & C. 579; 10 Cox C. C. 66.
4 State v. Freeman, 15 Vt. 723.
5 Supra, § 1291; see Bigbey v. People, 72 N. Y. 546.


§ 1297. The same rigor has not been required in this country in the setting forth of the alleged false oath of the defendant, as under the statute of Elizabeth was considered essential in England. Thus, it is said that at common law, it is only necessary to set forth the substance of the oath, and when that is done, an exact recital is not necessary; hence, when the article "an" was substituted for the article "the," the variance was held immaterial. In a case decided in 1876, in Massachusetts, an indictment charging that the defendant sworn

accuracy described by words which cannot apply to any other court. U. S. v. Dunning, 4 McLean, 3; State v. Galli- mon, 5 Iredell, 374.

As to particularity required in old practice, see State v. Gallimmon, 2 Ired. 374; State v. Keene, 26 Me. 33; Peo- ple v. Grinnell, 10 Ired. 505.

It has been held in Iowa not necessary, in an indictment for swearing falsely before the grand jury, to aver that the person whose case was under investigation, and as to whom the defendant swore, was or was not guilty, nor to state the facts as to such offense. State v. Schill, 27 Iowa, 292. See infra, § 1298.

In an indictment for perjury committed by the defendant upon an examination under oath as to his sufficiency as a surety for another in a bond executed under the 4th subdivision of the 10th section of the New York "act to abolish imprisonment for debt," etc., after a conviction of the debtor and an order for his commitment under that act, it is not necessary, under the special terms of that act, to set forth facts sufficient to show that the officer who entertained the proceedings had jurisdiction to administer the oath. People v. Tredway, 3 Barb. 470, decided on the strength of People v. Phelps, 5 Wend. 10, and People v. Warner, 3 Ibid. 271; which decisions, however, were disapproved. See supra, § 1299.


2 R. v. Wetherell, Bell C. C. 154; 8 Cox C. C. 157. In this case the indictment alleged that a cause was pending in a county court, and that at the hearing it became a material question whether the plaintiff in the cause had, in the presence of the prisoner, signed at the foot of a bill of account, purporting to be a bill of account between a firm called B. & Co. and W., a receipt for payment of the amount of the bill; and that the prisoner falsely swore that the plaintiff did, on a certain day, in the presence of the prisoner, sign the receipt (meaning a receipt at the foot of the first mentioned bill of account) for the payment of the amount of the bill. The plaintiff in the county court had on other occasions signed similar receipts in the presence of the prisoner. It was ruled that the bill of account was stated and set forth in the indictment with sufficient certainty.

3 People v. Warner, 5 Wend. 271; State v. Ammons, 3 Murph. 123.

that he had personal property in G., in the county of E., and Commonwealth of Massachusetts, was held to be sustained by proof that he swore to a written statement that he had personal property at G., in the county of E., there being proof that the statement was made for G. in the Commonwealth of Massachusetts. But a substantial variance is fatal.

§ 1298. At common law, where the tenor of an affidavit is underta-ken to be recited, and the recital is variant in a word or letter, thereby introducing a different word, it is fatal.

But where a statement of the substance and effect of an affidavit is sufficient, as is now generally the case in English and American practice, and only substance and effect are pretended to be given, evidence of the substance and effect is sufficient.

And where the charge is swearing to an affidavit "to the substance and effect following:" a variance, which consisted in using the word "suit" instead of "case," is immaterial.

§ 1299. It is not necessary to set out the whole of what the defendant has sworn: only those parts alleged to be false need be stated, and such parts may be lumped in one count. The questions which elicited the alleged false answers are also unnecessary. But alleged false statements that are averred consecutively must be proved to have been made consecutively, and the substance must be given.

1 Com. v. Bueland, 119 Mass. 317. As to variance under Massachusetts statute, see Com. v. Terry, 114 Mass. 263.

2 Infra, § 1313; Whart. Cr. Rev. § 129 a.


7 Ibid. Infra, §§ 1301, 1302, 1305.

8 State v. Bishop, 1 Chip. (Vt.) 120; Com. v. Knight, 13 Mass. 274.

9 R. v. Leefe, 2 Camp. 134.


In an indictment for perjury, under the bankrupt law, for not giving a full and true account of the property of the petitioner, the items on the schedule need not be stated in the indictment. The allegation that the property was omitted, with intent to defraud A. and the other creditors, is sufficient. U. S. v. Chapman, 3 McLean, 360. See supra, § 1280.
§ 1302. CRIMES.

5. How the False Matter is to be negatived.

§ 1303. The general averment that the defendant swore falsely, etc., upon the whole matter, will not be sufficient; the indictment must proceed by particular averments (or, as they are technically termed, by assignments of perjury) to negative that which is false, and it is necessary that the indictment should thus expressly contradict the matter falsely sworn to by the defendant. But while it may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, it does not follow that the whole context should be negatived. Even the use of the word "falsely" does not import that the whole is false; and it is only necessary to negative such parts as the prosecutor can falsify, admitting the truth of the rest.¹

Several assignments may be incorporated in one count.

§ 1304. In negativing the defendant's oath, where he has sworn only to his belief, it will be proper to aver either that the defendant did not believe what he swore, or that "he well knew" the contrary. Thus, when an affidavit merely states the belief of the affiant that a larceny has been committed, the assignment of the perjury must negative the affidavit, and it is not sufficient to allege generally that the persons charged did not commit the larceny.²

¹ Intra, § 1323; R. v. Whitehouse, 3 Cox C. C. 86; State v. Munnford, 1 Dev. 519; Dilchot v. State, 29 Ohio St. 130. Though see State v. Lindenburg, 13 Tex. 37. That a contradictory averment may be a sufficient negative, see Com. v. Sergent, 129 Mass. 115.


R. v. People, 76 N. Y. 220.

State v. Lea, 3 Ala. 602; S. P., Com. v. Cook, 1 Rob. Va. 729. See, as to whether sciretor is generally to be averred, Whart. Cr. Pl. & Pr. § 164. In State v. Lindenburg, 13 Tex. 27, a mere negation of the belief was held enough, which is sound law; and see supra, § 1246.

1808. The assignment of perjury may, in some instances, be more full than the statement of the defendant which it is intended to contradict. When there is any doubt as to the words of the oath which can be made more clear and precise by a reference to some other matter, it may and must be supplied by an innuendo; the use of which is, by reference to preceding matter, to explain and fix the meaning more precisely; but it is not allowed to add to, extend, or change the sense.² But in a case where an objection was made to an indictment that it added, by way of innuendo, to the defendant's oath, "his house, situate in the Haymarket, in St. Martin-in-the-Fields" without stating by an averment, recital, or introductory matter, that he had a house in the Haymarket; or, even admitting him to have such a house, that his oath was of and concerning the said house, so situated; the objection was overruled, on the ground that the innuendo was only a more particular description of the same house which had been previously mentioned.³

² R. v. Taylor, 1 Camp. 404; R. v. Yates, 12 Cox C. C. 253. In R. v. Verrier (or Virrier), A. P. D. 161; 12 A. & R. 317, a motion to arrest judgment was made on an indictment which alleged that a petition was presented to the House of Commons against the return of B., on the ground of bribery; that, shortly before his election, to wit, on the 6th July, B. and C. went to the house of the defendant to solicit his vote; that, at the time of the petition, it was a material question whether at the time when B. and C. went to the defendant's house, a certain act of bribery took place; that the defendant was a witness sworn to speak the truth of and concerning the premisses, and he deposed touching the election and the matter of the petition; that, shortly before B.'s election, B. and C. came on a canvassing visit to the defendant's house, and that the act of bribery then took place (innuendo), thereby meaning that at the time when B. and C. went to the defendant's house as aforesaid, the act of bribery was committed. It was held by the court; first, that the allegation that the defendant deposed "touching the election," etc., sufficiently pointed to the matter wherein the defendant was sworn as a witness; secondly, that the innuendo did not introduce new matter, as from the introductory averment it appeared there was a canvassing visit on the 6th July, and the deposition of the defendant was shown to refer to that particular time and no other.

³ R. v. Grapes, 1 Id. 256. See supra. §§ 1314, 1329.


In the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an innuendo that it was an outer door was held good.

In a case of perjury committed in an affidavit, it was held that a word which had been omitted by accident in the original document was improperly
§ 1304. It must be either averred on the face of the indictment, with proper inducement, that the matter alleged to be false was material; or such materiality must appear on record; and the latter is sufficient even where the averment of materiality is defective. When the first averment stated in the indictment as though it had been in the original document, and that such word ought to have been inserted and explained by an immendo.

R. v. Taylor, 1 Camp. 404. If an immendo is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it must be rejected as surplusage, and will be bad after verdict. R. v. Griepe, 1 Ed. Raym. 356.

Where it was alleged to be a material question whether or not F., the defendant, ever got one M. W. to write a letter for her; and in the averments, signifying the truth of what was sworn, the indictment alleged that, in truth and fact, the said P. did get the said M. to write, and that when, on her cross-examination at the trial, when the alleged perjury was committed, she was asked whether she had ever given a Mr. M. W. (who was then pointed out to her in court) to write a letter for her: it was held, that the averments were sufficient, without any allegation connecting the "one Milo Williams" named in the allegations of materiality, and the averments negativing the truth of what was sworn, with the "Mr. Milo Williams" named in the subsequent part of the indictment. R. v. Bennett, 3 C. & K. 124; 2 Den. C. C. 241; T. & M. 567.


R. v. Nicholl, 1 B. & Ad. 21; R. v. 152


Ch. XV.]

PERJURY. [§ 1304.

native, that of the allegation of materiality, is taken, it is sufficient in all cases in which the alleged false oath appears to be relevant to the issue, to charge generally that the false oath was material on the trial of the issue in which it was taken. And this is the case though the record does not itself show that the false oath, if relevant, was material. But the averment of materiality does not avail when the record shows immateriality. When, however, the record does not positively show immateriality, an express averment that a question is material lese in evidence to prove it to be so.


It is not sufficient to aver that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place. R. v. Stolady, 1 F. & F. 518.

An averment that at a court of admiralty session E. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that at and upon the trial it and that occurred and was made a material question, whether, etc., are sufficient averments that the perjury was committed on the trial of E. for the murder, and that the question on which the perjury was assigned was material on that trial. R. v. Dowlin, 5 T. R. 311; S. C. (at nisi prius), Peake, 170.

It is not necessary to set forth so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned; it is sufficient to allege generally that the particular question became material.

Ibid. State v. Sleeper, 37 Va. 122; People v. Burroughs, 1 Parker C. B. 211.


The averment of an indictment was that I. stood charged by P., before T., clerk, a justice of the peace, with having committed a trespass, by entering and being in the daytime on land in pursuit of game, on the 12th August, 1843; and that T. S. proceeded to the hearing of the charge; and that, upon the hearing of the charge, the defendant falsely swore that he did not see I. during the whole of the 12th August, meaning that he did not see I. at all on the 12th day of August, in the year aforesaid; and that, at the time he swore as aforesaid, it was material or necessary for T. S. to be in such justice, to inquire of, and be informed by, the defendant, whether he did see I. at all during the 12th day of August, in the year aforesaid. It was held that this averment of materiality was insufficient, because, consistently with this averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question and received this answer. R. v. Bartholomew, 1 C. & K. 366.


An indictment sufficiently charges materiality, by averring that upon a
§ 1004. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1005. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1006. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

II. Evidence.

§ 1007. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1008. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1009. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1010. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1011. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1012. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1013. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

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§ 1016. The fact that the defendant was only sworn as will be further explained in the section on evidence. 

§ 1017. The fact that the defendant was only sworn as will be further explained in the section on evidence.
ness is sworn beforehand to the testimony he subsequently gives. Where the former practice exists, the witness is allowed to review the whole of his testimony before the jurat; and as he has thus an opportunity to revise each point that he accepts and swears to, there is less objection to prosecuting him for perjury in particular statements. Yet even here the perjury, viewing the question philosophically, is to be gauged by the whole of the testimony thus given. Under the English common law practice, this precaution is peculiarly important. A witness examined _vivis voco_ may inadvertently, or through confusion, say many things to which he would not deliberately swear, had he an opportunity of final revision, and which, in subsequent portions of his testimony, he may qualify or recall. Hence, on the trial, he should have the privilege of proving the whole of his testimony, so as to show, if possible, that the alleged falsehood was in other portions of his examination recalled or toned down. But it is not necessary for the prosecution to put in the whole of the defendant's evidence.

§ 1307. It is necessary, at all events, for the prosecution to prove in substance the whole of what was set out in a particular assignment, as having been sworn by the defendant referable to such assignment; proving a part only is not sufficient.

§ 1308. The evidence of a single witness is sufficient to prove that the defendant swore to the facts charged in the indictment.

§ 1309. Where perjury is assigned upon an answer to a bill in equity, it is sufficient, after producing the bill or a copy of it, to produce the answer, and prove either:

2. See supra, § 1244, 1245; infra, § 1326.
3. Dodge v. State, 4 Zab. 455.
4. It is sufficient to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. R. v. Rowley, R. & M. 309.
5. See R. v. Laycock, 4 C. & P. 326.

§ 1310. It makes no difference, at common law, if either before or after the oath was administered, the statements of the witness made when examined _vivis voco_ before the jurat, were reduced to writing and signed by the witness. In either case parol testimony of the evidence is admissible.

§ 1311. Secondary evidence is admissible of a lost instrument.

§ 1312. In cases where the alleged false oath was taken before a magistrate or officer of the court, then, after proof of the identity of the defendant with the person swearing to it, the affidavit assigned as evidence must be proved.

2. Ibid.
3. On an affidavit setting forth, with proper imputations, a copy of a deposition before a magistrate, written in the English language, and signed by the defendant, he may be convicted on proof of a verbal deposition in the Welsh language, of which the written deposition, signed by him, is the substance. R. v. Thomas, 2 C. & K. 806.
6. This is essential. R. v. Barnes, 10 Cex. C. 539.

In this case, on an indictment against P. for perjury committed in an affidavit, alleged to have been made by him in order to obtain a marriage license, the evidence showed that some person went to the vicar-general's office and gave certain instructions, in accordance with which an affidavit was filled up by one of the clerks, which, after having been read over to the applicant, was signed by him. B.'s father proved that the signature to the affidavit was in his son's handwriting. The custom of the vicar-general's office was for the clerk who filled up the affidavit to go with the applicant, and get him to swear to it before a surrogate. Neither the clerk in the vicar-general's office, nor the surrogate, could identify B. as having sworn to the affidavit, and although the clergyman who married B. recognized him as being the person who was married under the license granted on the strength of the affidavit signed by him, yet he did not receive it from him on the day of the marriage, but he received it on the previous day from the verger of his church. It was ruled that further proof of the identity of the person who swore to the affidavit with the person who signed it was necessary before B. could be convicted of perjury assigned on a false statement contained in it. Ibid.
§ 1814.

CRIMES.

[BOOK II.

ministering

the certificate of such magistrate or officer, on proof of

the handwriting of his signature, is competent and suffi-

cient primit facie evidence of the administration of the

oath at the alleged time and place to the defendant. 1

§ 1813. The proof of the testimony alleged to have been given

must substantially support the narration of it in the in-

dictment; 2 and any substantial variance in this respect

will be fatal. 3 Thus where the indictment charged that

the defendant swore “that one G. did not interrupt a con-

stable in driving certain cattle to G.'s house,” and the evidence

was, that the defendant swore “that G. did assist in driving

the cattle from the officer,” it was held that the evidence did not

support the charge. 4 But substantial conformity is enough. 5

§ 1814. Any variance, as has been already said, in the setting

forth of a record is at common law fatal, 6 though under

recent statutes mere formal variances are cured by ver-

dict, or may be amended on trial. 7

The day on which the offence occurred, being matter


As already seen (entrap, § 1309), in an answer in chancery, the practice is to

prove the fact of swearing, the handwriting of defendant, and the jurat of

the officer administering the oath.

R. v. Morris, 1 Leach, 60; R. v. Benson, 2 Camp. 305; R. v. Morris, 2 Burn.

1197.

2 Whart. Cr. Ev. § 116; R. v. Loffe, 2 Camp. 134; Roberts v. People, 99

III. 275.

3 Supra, § 1297; and see Harris v. People, 54 N. Y. 145; Taylor v. State, 48 Ala. 157.


C. & P. 372; M. & M. 315; R. v. Dunn, 2 Mood. C. C. 297; 1 C. & K. 30;


State v. Tappan, 1 Poster (N. H.), 56; State v. Ammons, 3 Murph. 223; Jacobs

v. State, 61 Ala. 443. Thus, an alle-

gation of perjury committed upon a

trial for the larceny of property of W.

G. M. G., or his son M., is not sustai-

ned by a record of an indictment for

the larceny of property of W. G. M.

G.'s son M. Brown v. State, 47 Ala. 47.

State v. Bailey, 11 Poster (N. H.),

551.

§ 1816.

PRIJURY.

[§ 1816.

of record, must at common law be correctly laid; and if there be a

variance from the record on the point, the indictment is bad. 1

A failure to prove any substantial averment (e. g., that a summons

issued in the original case) is fatal. 2

§ 1815. It is not necessary for the prosecution to prove the appro-

priation of the officer who administered the oath, if a

primit facie case of authority is made out; 3 and (if the

court will not judicially notice it) that the person lawfully

exercising the duties of that office had authority to

administer an oath in such a case. 4 And the officer

himself may be called to prove that he was acting as such. 5

If the defence prove that the officer (or the court he

represents) had no authority to administer the oath, the prosecution

falls. 6

Swearing before a clerk in open court is equivalent to swearing

before the court. 7

§ 1816. Some one or more of the assignments of perjury must be

sustained by proper evidence, and the assignments

proved must have been material to the matter before the

court at the time the oath was taken. 8 It is not neces-

sary, therefore, as will be seen, to support all the assign-

ments in any given count. The proper course of pleading is to

negative specially each part of the defendant's testimony which is

alleged to be false; and if any material assignment be adequately

proved, it is enough to support the indictment; 9 if falsity be sati-

1 U. S. v. Bowman, 2 Wash. C. C. 535; U. S. v. McNeal, 1 Gallis, 397;

164, 386; R. v. Roberge, 14 C. C. 110; State v. Hascall, 6 N. H. 325; State v. Gregory, 2 Mort. 69.

2 Ibid.

3 Supra, § 1293.

4 Supra, § 1294; Whart. Cr. Ev. §§ 535; 1 In v. McNeal, 1 Gallis, 397.

5 Supra, § 1297; R. v. Roberge, 14 C. C. 110; State v. Hascall, 6 N. H. 325; State v. Gregory, 2 Mort. 69.

6 Ibid.

7 Ibid.

8 Supra, § 1293.

9 supra, §§ 1280; Whart. Cr. Ev. 535, R. v. Newall, 2 Camp. 21; R. v. Hascall, 2

9 F. & P. 271; See R. v. Dunn, 2

Mood. C. C. 297; 1 C. & K. 300; R. v. Smith, J. R. 1 C. C. 110; Supra, § 1293.

10 supra, §§ 1280; Whart. Cr. Ev. §§ 535, 396; Ox C. C. 438; R. v. Newton, 1 C. & E. 493; R. v.

Vereitel, 3 Camp. 433; R. v. Howard, 2 H. & R. 187; Katter v. People, 32

Minn. 493; Whart. Cr. Ev. §§ 535, 896; Supra, § 1293.

11 supra, §§ 1280; Supra, § 1293.
§ 1319. 

Evidence is admissible to show that the motives which actuated the defendant were fraudulent or corrupt, as, for instance, that his object was to coerce the settlement of a civil claim. For the same purpose it is admissible to prove other cognate perjuries.

Vol. II—11
§ 1321. CRIMES. [BOOK II.

admissions as a witness on the stand, as well as by independent admissible corroborative material facts.

§ 1320. The credibility of the witnesses is for the jury. They are not to be excluded because particeps criminis. When falsity is proved, the burden is on the defendant to show that it arose from surprise, inadvertence, or mistake, and not from a corrupt motive.

§ 1321. The cases in which a second living witness in issues of this class may be dispensed with, are thus summed up by the Supreme Court of the United States: where a person is charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; where the perjury is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath being proved to have been taken corruptly; where the party has been charged with an oath contrary to what he must necessarily have known to have been the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it.

w sup., and with the following comment by Mr. Greaves, in the 4th ed. of Russell on Crimes: "If this case is correctly reported, it deserves consideration. The memorandum was not itself admissible, and could only be used to refresh the memory of the witness, so that the whole statement rested on his single oath; and even if the memorandum had been admissible, it would only have been the written statement of the witness, and not on oath; and the time when it was made and the veracity of its statements must have rested on his single oath." See same effect, criticism in London Law Times, March 28, 1894, p. 375-6. See same paper, Jan. 15, 1891, p. 184.

§ 1322. Where an indictment contains several assignments of perjury, it is not sufficient to disprove all of them by a separate witness to each; since, in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence, negating the truth of the matter contained in such assignment. It is not necessary, however, that every fact which goes to make up any particular assignment of perjury should be so disproved. There can be no statement, however false, that does not contain some element of truth.

§ 1323. Nor is it requisite that the false testimony set forth in the indictment should be in every point and shade squarely negated and falsified by the prosecution, for if so, no conviction of perjury could be had, it being difficult to conceive, in matters of moral proof, of any two propositions as exactly and absolutely opposite. It is sufficient if the effect of the defendant’s testimony is shown to have been false. Thus, a false statement, on an affidavit justifying bail, to the effect that the witness owned certain parcels of land, is perjury, if he did not own some of the parcels, though the value of others of the parcels, which he did own, was sufficient to cover the amount of the bail for which he offered himself.

As has been already seen, there may be a negation of a false statement of opinion, of a false statement of an inference, and of a false statement of unreal incidents to a real fact.

But one material and salient point, at least, assigned as perjury, must be proved to have been false.

1 3 Russ. on Cr. 4th Am. ed. 79 et seq.; 3 Greenl. on Cr. § 198; R. v. Roberts, 2 C. & K. 607; Whart. Cr. Br. § 378.
4 Supra, §§ 1246 et seq.; R. v. Cook, supra, § 1319.
6 P. having sworn that he did not enter into a verbal agreement with R.
§ 1325. CRIMES. [BOOK II.

Where the false oath alleged was that the prisoner had sworn that he had not voted at the election, and the assignment of the perjury was that he had voted previously at said election, at the Fourth Ward, "at the house of T. L. W. in said ward," without stating that he had voted before a board of officers duly constituted and authorized according to law, or that any lawful election had been appointed; it was held that the assignment was too general and uncertain, not being of a character which permitted specific proof or disproof. It was further said, that in the absence of any averment to that effect, it would not be inferred that the election was lawfully held at the place named.1

§ 1324. It should not be forgotten, that as the policy of the law forbids a witness in a civil suit from being made infamous, so far as respects that suit, through a conviction for perjury obtained upon the testimony of a party to such suit, the English courts will not permit a witness, under such circumstances, to be excluded from the witness-box by an intermediate conviction of perjury.2 On the same principle, and to suppress the same evil, it has been held in Pennsylvania that an indictment for false swearing to an affidavit of defence does not lie until the case in which the affidavit is filed is terminated.3 In England the present practice is to postpone the trial for perjury until the case out of which it arises is determined,4 in order to keep the testimony of the witness intact.

§ 1325. All the facts necessary to the explanation of the evidence are admissible. Thus on the trial of an indictment for perjury alleged to have been committed on the trial of an assize, all the evidence that was admissible on the trial of the indictment for the assault is admissible, if relevant, on the trial for perjury.5 Where a written paper is referred to, the place and time of subscribing it by the accused being involved in the alleged perjury as set forth in the indictment, such paper is proper evidence at the trial.6

1 Barns v. People, 60 Barb. 531.
2 See 3 Russ. on Cr. 4th Ed. 678 et seq. 
3 See as to concurrence of civil and criminal process, supra, § 91 & 2 R. v. Harrison, 9 Cox C. C. 503.
4 B. v. Simmons, 8 C. & P. 60; R. v. Ashburn, Ibid. See Piddell v. 421.
5 Butter, Tbd. 387. And as to continuance see more fully Whart. Cr. Pl. & Pr. §§ 534 et seq.
6 See as to concurrence of civil and criminal process, supra, § 91 & 2 R. v. Harrison, 9 Cox C. C. 503.
9 For forms of indictment, see Whart. Proc., 597 et seq.
10 Bull. N. P. 248.
14 Supra, §§ 179 et seq., 185.

§ 1326. In a trial at nisi prius, on an indictment for perjury, the postea must be produced by the plaintiff.1 At common law, generally the entire record should be put in evidence.2 But where the proceedings were in any way collateral, and there is no proof of regularity, it is not necessary that all the original papers should be produced or exemplified.3 Nor need there be proof of final judgment when the postea is produced.4

§ 1327. As a defence, character for truthfulness may be set up; and Lord Denman once permitted the following questions: "What is the character of the defendant for veracity and honor?" and "Do you consider him a man likely to commit perjury?".5

X. ATTEMPTS TO COMMIT PERJURY.

§ 1328. An attempt to commit perjury is indictable6 on the same reasoning as are attempts to commit other offences. And when the complete offence of perjury is not proved (as where the false oath is taken before an incompetent officer, the defendant believing him to be competent), the defendant may be indicted for the attempt.7 Attempts to suborn witnesses, and to suppress testimony, will be independently considered.8

XI. SUBORNATION OF PERJURY.9

§ 1329. To constitute subornation of perjury, which is an offence at common law, the party charged must procure the commission of the perjury by inciting, instigating, or persuading the witness to commit the crime.10

1 Resp. v. Goss, 2 Dukes, 479.
2 Porter v. Cooper, 6 C. & P. 364.
3 See supra, § 1355.
5 For forms of indictment, see Whart. Proc., 597 et seq.
6 Bull. N. P. 248.
8 See D. L. art. 138; R. v. Taylor, Holt, 534. See R. v. Stone, Dears. 251;
10 Supra, §§ 179 et seq., 185.
§ 1332. CRIME.

The jury must have been actually committed, and this must appear in the indictment. The subornor must be aware of the intended corruption on part of the person suborned. Thus though a party, who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged.

§ 1330. In subornation of perjury, the same rules as to materiality of testimony prevail as in perjury. Hence, in trials of this class, a perjured witness, who claims to have been suborned, is not sufficient, without corroboration, to procure the conviction of the alleged subornor.

§ 1331. The scienter must be averred; and it must be also averred that the false oath was procured to be used as testimony in a court having jurisdiction, the defendant knowing that the witness knew he was to swear falsely. When the scienter is otherwise given, the word "knowingly" is not necessary in an indictment which avers that the defendant "unlawfully, wilfully, wickedly, feloniously, and corruptly did persuade, procure, and suborn" the witness to "commit said perjury in manner and form aforesaid."[10]

XII. ATTEMPTS TO SUBORN: DISSUADING WITNESS FROM APPEARING.

§ 1332. Although, in order to constitute the technical offence of subornation, the person cited must actually take the false oath, yet it is plain that attempts, though unsuccessful, to induce a witness to give particular testimony, irrespective of the truth, even though such witness had not been served with a subpoena, are indictable. But the attempt must be in connection with litigation, actual or prospective.[11]

5. 2 West Coast Rep. 611.
7. Stewart v. State, 22 Ohio St. 477.

§ 1333. To attempt to prevent, either by persuasion or intimidation, a witness from attending a trial is not merely a contempt of court, but may be punishable by indictment, irrespective, it is said, of materiality, or of the prior summoning of the witness by subpoena. In an indictment against S. for endeavoring to prevent a witness bound over to testify before a grand jury from appearing and testifying, the indictment in the original case, in which the witness was recognized to appear, need not be received, nor does the guilt or innocence of the respondent depend upon the sufficiency of that indictment, or of the guilt or innocence of the defendant in the first case.

XIV. FABRICATION OF EVIDENCE.

§ 1334. "Fabricating evidence," it is said by the English Commissioners on the Draft Code of 1879, is an offence which is not so common as perjury, but which does occur and is sometimes detected. An instance occurred a few years ago on a trial for shooting at a man, with intent to murder him, where the defence was that though the accused did fire off a pistol, it was not loaded with ball, and the only intent was to frighten. Evidence was given that a pistol ball was found lodged in the trunk of a tree nearly in the line

241; State v. Kayes, 9 Vt. 57. See supra, § 179; and see Whart. Cr. Pl. & Pr. § 854.

It is not necessary, in an indictment for attempting to suborn a witness, that the fact, which the defendant attempted to procure the witness to swear to, should be proved specifically; as that fact would only be evidence to show that unless the bribe was offered, it may be shown by other circumstances. State v. Holting, 1 McDord, 31. For form of indictment, see Stewart v. State, 22 Ohio St. 477.

See Whart. Cr. Pl. & Pr. § 966.

By § 50 of the New York Penal Code of 1828, the witnesses receiving the bribe is made indictable for felony.

242; See Martin v. State 38 Ala. 71.
§ 1384. CRIMES. [BOOK II.

from where the accused fired to where the prosecutor stood. It was afterwards discovered that the ball had been placed in the tree by those concerned in the prosecution, in order to supply the missing link in the evidence. Such an offence is as wicked and as dangerous as perjury, but the punishment as a common law offence (if, irrespective of conspiracy, it be an offence) is only fine and imprisonment." In those of our States, where a common law exists, the offence would probably be regarded as indictable at common law.¹

¹ supra, § 881.

CHAPTER XXI.

CONSPIRACY.

I. GENERAL CONSIDERATIONS.

Conspiracies are indictable when directed to accomplishment of illegal object or use of illegal means, § 1387.

Offences to be limited to such cases, § 1389.

Where concert is necessary to an offence conspiracy does not lie, § 1388.

Conspiracy must be directed to something which, if not interrupted by extenuating interference, will result in an unlawful act, § 1340.

Not necessary that all the parties should be capable of committing offence, § 1340 a.

Conspiracy analogous to attempt, § 1341.

Evil intent is necessary to offence, § 1341 a.

II. CONSPIRACIES TO COMMIT INDICTABLE OFFENCES.

Conspiracy to commit felony is indictable at common law and is a misdemeanor, § 1343.

Indictment need not detail means, § 1343.

Gratuitous abandonment of doctrine, of merger, § 1344.

In conspiracies to commit misdemeanors, indictment need not detail means, § 1345.

Such conspiracy does not merge, § 1346.

Conspiracies to cheat are indictable at common law, § 1347.

Enough if indictment charge "divers false pretences," § 1348.

On the merits a conspiracy to defraud is punishable, § 1349.

Mere civil trespass or fraud not enough: otherwise conspiracy to forcibly enter certain premises, § 1350.

Conspiracy in fraud of bankrupt or insolvent laws indictable, § 1351.

And so of conspiracies to violate lottery laws, § 1352.

And so of conspiracies to commit breaches of the peace, § 1353.

And so to assault, § 1354.

And so to falsely imprison, § 1355.

And so of sedition conspiracies, § 1356.

And so of conspiracies to commit offences against federal laws, or to defraud the United States, § 1359 a.

And so to interfere with civil rights, § 1356 b.

And so to utter illegal notes, § 1357.

III. CONSPIRACIES TO USE INDICTABLE MEANS TO EFFECT INDICTMENT END.

When the illegality is in the means, the means must be set forth, § 1358.

IV. CONSPIRACY TO DO AN ACT WHERE CRIMINALITY CONSISTS IN THE CONSPIRACY.

Acts which deprive their indictability from plurality of actors, § 1359.

Conspiracy to commit such acts is indictable, § 1360.

1. To commit Inferior Acts.

Conspiracy to reduce or cause to escape is indictable, § 1361.

So to procure a fraudulent marriage or divorce, § 1362.
CRIMES. [BOOK II.

Fact of their omission may be explained, § 1385.
Bill of particulars may be required, § 1386.
Counts for conspiracy can be joined with counts for substantive offences, § 1387.
Two or more persons necessary to offence, § 1388.
Prosecution may elect co-conspirators to prove against, § 1389.
All contributing with knowledge of common design may be joined, § 1390.
Acquittal of one defendant evidence on trial of other, § 1391.
Husband and wife without other defendant not sufficient, § 1392.
Unknown co-conspirators can be introduced, § 1393.
Judgment should be several, § 1394.
New trial for one is new trial for all, § 1395.
Parties injured must be named if practicable, § 1396.
Venue may be in place of overt act, § 1397.

VI. EVIDENCE.
Proof of conspiracy is inferential, § 1398.
Complexity in prior stages unnecessary, § 1399.
No overt act necessary, § 1400.
Order of evidence discretionary with court, § 1401.
More cognizance of fraudulent action no conspiracy, § 1402.
Material variance as to means fatal, § 1403.
System of conspiracy may be proved, § 1404.
Co-conspirators are liable for each other's acts, § 1405.
Declarations of co-conspirators admissible against each other, § 1406.

VII. VERDICT.
Verdict acquitting all but one defendant acquits all, § 1407.

CHAP. XXII. CONSPIRACY. §§ 1387.

1. GENERAL CONSIDERATIONS.

§ 1387. A conspiracy is a confederation to effect an unlawful object by lawful means or by unlawful means a lawful object, and is a misdemeanor at common law.

It is on all sides conceded that combinations of two or more persons may become indictable when directed to the accomplishment of one of an illegal object, or of a different object by illegal means. The conflict begins when we reach those combinations which are assumed to be indictable, not as aimed at an indictable offence, but

1 See infra, § 1359; supra, § 1118; and see Com. c. Bisce, 12 Phila. 580.
2 Sir J. F. Stephen's definition (Dig. C. L. art. 30) is given infra, § 1347.

The late Chief Justice Cockburn proposed the following to the commissioners of the Criminal Code:—

"Conspiracy may be divided into three classes. First, where the end to be accomplished would be a crime in each of the conspiring parties, a class which offers no difficulty. Secondly, where the purpose of the conspiracy is unlawful, but the means to be resorted to are criminal, as when the conspiracy is to support a cause believed to be just by perjured evidence. Here the proximate or immediate intention of the parties being to commit a crime, the conspiracy is to do something criminal; and here again the case is consequently free from difficulty. The third and last case is where with a malicious design to do an injury the purpose is to effect a wrong, though not such a wrong as, when perpetrated by a single individual, would amount to an offence under a criminal law. Thus an attempt to destroy a man's credit, and effect his ruin by spreading reports of his insolvency, would be a wrongful act, which would entitle the party whose credit was thus attacked to bring an action for a civil wrong, but it
§ 1338. We may now regard it as settled that it is an indictable offence for two persons to conspire to defraud a third by false statements for which one calls on the other in any way to vouch, this concert, as well as the falsehood, being concealed from the party defrauded; nor is it any defence in such cases that there is no statute under which, if the conspiracy charge were thrown out, the defendants could be convicted. Cheating by reciprocal preconceived false personations of this class may justly be regarded as a cheat at common law; and the rulings making it indictable are sustainable on principle. But to extend indictable conspiracies so as to include cases where acts not in themselves indictable are attempted by concert involving neither false statement nor concerted force, should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an indifferent act be held to make such act criminal. We all know what offences are indictable, and if we do not, the knowledge is readily obtained. Such offences, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious, and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. These there has never been any judicial attempt to define, or legislative attempt to codify. No man can know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. It is essential to the constitu-

able offence not punishable with penal

surviva."

That certain acts are not necessary, see supra, §§ 1365, 1400.

§ Supra, § 1124; infra, § 1359.

Compare §§ 14 et seq.

See supra, § 15.

§ 1338. Conspiracies. § 1858.

tion of an indictable offence, as is elsewhere shown, that it should be prohibited either by statute or by common law; but conspiracies to commit by non-indictable means non-indictable offences, if we resolve them into their elements, are neither prohibited by common law nor by statute. By force of their definition, their object is not pro as prohibited; and the other ingredients in their constitution, that of an association of individuals to effect a common end, is essential to all action in which two persons engage. When we remember, also, that, as we have seen, it is necessary to a righteous administration of public justice that punishment should be attached only to acts which are made penal by rules which are pre-announced and constant, the objection just stated acquires additional weight. An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which in one phase of judicial sentiment would be regarded as a meritorious impetus to commercial activity, would be in another phase of judicial sentiment, as it once has been, treated as an indictable offence. Legislative and judicial compromises, which one court may view as essential to the working of the political machine, another court may hold to be indictable as a corrupt conspiracy. Nor can we continue to accept the reasons by which this indefinite extension of conspiracy has been justified. It used to be said that the combination of a plurality of persons to do an act invests it with a criminality which it does not otherwise possess. Undoubtedly this is so with riot, which depends on tumult, which again depends on plurality of agents; but riot is positively defined by the law, and all who engage in a riot have means to know what it is, and that it is punishable. But can this be predicated of combinations which the law does not in advance pronounce to be unlawful? One of two alternatives we must here accept. Either we must, with the old English judges, look upon all voluntary combinations as suspicious, and objects of judicial suppression, or we must declare that only such combinations are penal cognizable as are made so either by statute or by a settled judicial construction of the common law. We must, in other words, follow on the one hand say, that voluntary combination has in it an element of evil which infects with indictability acts not in themselves indictable, or we must hold that voluntary combination is indictable or

§ Supra, § 14.

See supra, §§ 1 et seq.

See infra, § 1359.

See infra, § 1856.

See infra, § 1375.
not, just as the conduct it involves is indictable or not. Now, whatever may have been the view in old times, when the maxim was that voluntary combinations should do nothing that government could do, the first of these hypotheses must be rejected in an age in which the maxim is that government so far as concerns affairs of trade, should do nothing that voluntary combinations can do as well, and in which great social and commercial enterprises can no longer be undertaken by individuals, but must be undertaken by combinations. So cogent have these and other reasons appeared to the jurists of countries whose notions of the freedom of the individual we are apt to regard as less comprehensive than our own, that conspiracy (Kompott), as a distinct offence, has been stricken from the revised codes of Prussia, Oldenburg, Würtzburg, Bavaria, Austria, and North Germany. Nor can it be justly said that by this change of the law the courts lose the power to punish offences in their inception. Such was no doubt the case before the law of attempts assumed its present comprehensiveness. Since, however, whatever crime is punishable in consummation is now punishable in attempt, the argument drawn from necessity fails. The conclusion is that on reason the offence of conspiracy at common law is limited to: (1) confederacies to effect illegal objects as ends or means; (2) confederacies to pervert public justice, or injuriously affect the body politic; and (3) confederacies which, from the mode of their operations, exhibit the features of false devices and tokens, or of aggregation of violence likely to overbear individual resistance and to produce public terror. And this is virtually saying that in the first case the confederacy is unlawful, because it is a cheat at common law; in the second case, because it is an attempt to obstruct government; in the third case, because it is an attempt at riot.

1 Bestor, a very high authority (Strafrecht, etc., 1871, § 113), says: "The common (German) law doctrine developed the idea of conspiracy to a perilous practical extent; and it has consequently been omitted in our later codes. As illustrating the mischief which this idea has wrought see the cases in Tenn. Arch. t. pp. 280-6; h. 72, 100, 122." 2 See U. S. v. Goldberg, 7 Blis. 376; U. S. v. Nauman, 111; U. S. v. Mitchell, 1 Hughes, 436; Musse v. Slough, 5 Fed. Rep. 606; 6 Savy. 612; McElroy v. Glasser, 66 Iowa, 249; and see infra, § 1400. That when an offence is consummated, the indictment should be for the consummated offence, see infra, § 1346.

As to a confederacy being a false token, see infra, § 1338. As to exhibitions of violence by two or more persons being indictable when it would not be indictable if exhibited by one person, the case is analogous to that of riot. In Pennsylvania the common law offence is not superseded by § 1290 of the criminal code. 1 Shannon v. Com., 14 Penn. St. 356; Miles v. State, 58 Ala. 350. 2 See Alderman v. People, 4 Mich. 414. A conspiracy cannot exist without the consent of two or more persons,
CRIMES. [BOOK II.

rupted by extraneous interference, will result in an unlawful act.

less under special statute, or unless such preparations are made in complicity with those by whom the crime is executed.\footnote{1} We must here again appeal to the distinction already fully set forth between a condition and a juridical cause.\footnote{2} The selling of a gun, for instance, is a condition of the gun's being used in a homicide; but it is not a juridical cause, unless the seller disposes of it for the purpose of killing a third person, and thus becomes necessary before the fact in such killing. The turning of a drunken man into the street is a condition of his being subsequently struck by lightning when lying in the public road; but it is not the juridical cause of such death, because the stroke of lightning was an extraordinary natural occurrence, not in any way a likely consequence of turning the man out of doors. If, on the other hand, the drunken man was in a hopeless state, and if the cold outside were such that he would freeze to death when exposed to it, then turning him out of doors was the juridical cause of his death, since the death resulted from this act, and not from either collateral human intervention, or an extraordinary natural occurrence. This check, which applies equally and invariably to all criminal prosecutions, is peculiarly important in conspiracy. The dangers arising from a vague extension of conspiracy have been already noticed; and it will be seen that the offense has been sometimes made to embrace cases which a wise and humane jurisprudence would withdraw from criminal cognizance. These dangers would be greatly multiplied if we should hold that conspiracy includes a combination to produce such conditions of crime as are distinct from juridical causes. If the law be thus stretched, indictments for conspiracy could be maintained against all who furnish firearms or other lethal weapons; against all who would type which could be used for incendiary publications; against all who contribute the material, however indifferent, which is subsequently employed for purposes of

and their agreement is an act in advance of the intention which each of them has conceived in his mind. Meloney v. R. (in error), 10 B. L. 170; S. C., 16 R. C. L. (Q. B.) 115. More sympathy is no conspiracy. \footnote{ Supra, § 1400.} \footnote{1} See supra, §§ 173 et seq.; U. S. v. Nunnemacher, 7 Misc. 111; U. S. v. Goldberg, Ibid. 175. In a North Carolina case it was proved that the defendant gave B certain powders which would enable him to debase certain girls. It was held that this, though followed by attempt by B on the girls in question, would not sustain an indictment for a conspiracy to ravish. State v. Trice, 88 N. C. 639. \footnote{2} See supra, §§ 152 et seq.

CHAP. XXI.] CONSPIRACY. [§ 1341.

guilt. Undoubtedly there are dicta by English judges which go to sustain this position;\footnote{3} though these dicta are usually qualified by the statement that the manufacturer or producer is not to be held guilty unless he anticipated the guilty use to which the instrument is to be put. But what thoughtful man who manufactures or sells any dangerous weapon or compound, does not anticipate that there may arise contingencies in which it may be put to an unlawful use? And what safety or uniformity can there be in the administration of penal justice, if it depend upon the surmise of a jury may make as to a defendant's capacity of anticipation? The only safe course is to make the test objective, even, and palpable, and to apply universally the limit here presented, holding that conspiracy does not lie unless the defendants can be proved to have done something which, if not interrupted by extraordinary natural occurrences, or by collateral human intervention, would have resulted in an unlawful act. But if so, the conspiracy is indictable, though the overt act was not consummated.\footnote{4}

§ 1340 a. Waiving the question discussed in the chapter on attempts, whether an indictment lies for a conspiracy to do an act of which the parties are all legally incapable, we may hold that it is in any view sufficient to sustain a conspiracy to commit an offence, that any party concerned was legally capable of committing the offence, though another party may not have been so capable.\footnote{5}

§ 1341. Conspiracy, when its object is to effect an indictable offence, is subject, in the main, to the limitations heretofore expressed with regard to attempts. Hence we may hold that it is no defence that the means adopted, if apparently adapted to the end, were not really so; that there need not have been physical ability in the conspirators to effect their pur-

\footnote{1} See O'Connell v. R., 11 C. & P. 155. A striking illustration may be found in an English case, where it was held that an indictment for conspiracy to violate the provisions of a statute will lie, after the repeal of such statute, for an offence committed before the repeal. R. v. Thompson, 16 Q. B. 833; Dears. C. C. 3. The offence could not have been prosecuted after the statute was repealed; why the conspiracy, unless seditions? \footnote{ Supra, § 31.}

\footnote{2} infra, §§ 1392-1400. As to the controversy between "objective" and "subjective" tests, see supra, § 182.

§ 1343. CRIMES. [BOOK II.

pose; and it is a defense that the conspiracy was abandoned voluntarily and freely before put in process of execution. There remains, however, the difference that while attempts are only indictable when the consummated offence is indictable, conspiracies may be, as we have seen, indictable when the means are indictable.

§ 1341 a. We must also hold, to advance a step further, that there cannot be a negligent conspiracy. Joint evil intent is necessary to constitute the offence. "The confederation must be corrupt. This is implied in the meaning of the term conspiracy." And mere passive cognisance of a conspiracy is not sufficient to make a co-conspirator. There must be active cooperation, and when this exists the period when each party enters into the combination is unessential.

II. CONSPIRACIES TO COMMIT AN INDICTABLE OFFENCE.

§ 1342. Conspiracies to commit felonies are unquestionably indictable at common law, and, like other conspiracies, are misdemeanors. Two questions of interest, however, have arisen concerning them: first, whether it is necessary for the indictment to set forth the means by which the conspiracy was to have been executed; and secondly, whether, if the act be consummated, the conspiracy merges.

§ 1343. As to the first question, it is not disputed that if the indictment set forth the object of the conspiracy in the language used to charge the commission of the offence itself, no exception as to form can be taken. But this is often impracticable, and if it were not, it would be absurd to charge A. and B. with conspiring "with one knife, of the value of one shilling, which he said A. in his right hand was then and there to have and hold, him the said C. feloniously, etc., to strike," or with conspiring to rob the prosecutor of half a dozen distinct articles which he happened to have in his pocket, but with the existence and character of which it would be irrational to suppose the defendants to have been beforehand acquainted. It is enough, therefore, for the pleader to set out the offence aimed at by such apt words as will describe it as a conclusion of law. Thus, it is sufficient to say that the defendants conspired "feloniously, wilfully, and of their malice aforethought, to kill and murder," etc., without describing the weapons intended to be used; or that they conspired "certain goods and chattels of great value, etc., then belonging to and on the person of the said A. B., feloniously to steal," without going on to mention what those goods and chattels were. This liberality is extended to every case where parties combine to commit an offence which is indictable whether committed by one or by a confederacy. It is advisable, however, that wherever the means by which a conspiracy was to have been executed are not sufficiently known to enable them to be specified, the reason why they are not set forth should be averred. And the substantive felony intended must be described accurately; it being insufficient to charge a conspiracy to rob without averring "by violence" or "by putting in fear," or a conspiracy to commit burglary without giving the distinctive features of burglary, including the word burglariously, and the intent to steal.

§ 1344. The technical rule of the old common law pleaders, that a misdemeanor always sinks in the felony when the two meet, has in some instances been recognized in this country, though without good reason. In England, as has been already noticed, the inconvenience of the prima

4 Supra, § 156, 644; infra, § 1404.
5 For parallel cases, see Whart. Cr. Pl. & Pr. § 156. And for Ohio statutes, see Code of that State.
ciple, as well as its absurdity, has attracted grave judicial scrutiny, and eminent judges have declared they felt no disposition to extend a rule by which a man, when indicted for a misdemeanor, may be acquitted because it is doubtful whether the offence is not a felony, and who, when indicted for the felony, may be acquitted because it is doubtful whether the offence is not a misdemeanor. This has led, if not to a repudiation of the doctrine, at least to its restriction within narrow limits. Thus, it has been said that even when the felony is executed there may be cases where the conspiracy may still be pursued as an independent offence. Thus, when in 1848 the defendants, who were the workmen of L., a dyer, were charged with conspireing to use his vats and dye in preparing for market goods not belonging to him, and without his assent, it appeared on the trial that L. permitted the defendants to use his dye, etc., for their own use, and for such materials as he intrusted them with, but that they made a profit by using them for other materials without his knowledge. After conviction and removal to the Queen's Bench, a motion in arrest of judgment was urged on the ground that as larceny in abstracting the prosecutor's material was proved, the conspiracy merged. But the Court of Queen's Bench were unanimous in entering judgment on the verdict. "A misdemeanor which is part of a felony," declared Lord Denman, C. J., in summing up the cases, "may be prosecuted as a misdemeanor though the felony has been completed; and the attempt, upon the argument, to make a distinction between misdemeanors by statutes and those by common law was not successful, as the incidents to a misdemeanor are not affected by the origin in law from whence it is derived. It was further urged by the defendants that unless the defence was sustained they might be twice punished for the same offence; but this is not so, the two offences being different in the eye of the law. If, however, a prosecution for felony should occur after a conviction for conspiracy, it would be the duty of the court to apportion the sentence for the felony with reference to such former conviction." On the same reasoning it was decided by the fifteen judges that a conviction for the misdemeanor of carnally

2 Whart. Cr. Pl. & Pr. § 463.
3 People v. Richards, 1 Mich. 216.
5 Rob. 499. See Hewitt, ex parte, 3 Am. Law Rec. 382.
6 See R. v. Martin, 41 L. T. (N. S.) 531, where it was held that there could be no conviction of felony on an indictment for misdemeanor. Law Times, Dec. 13, 1879.
7 This was the case in R. v. Evans, 3 C. & P. 563; R. v. Anderson, 2 M. & S. 666.
8 See infra, § 1393.
it; the law being that, in an indictment for this offence, the ticket should be particularly set out, and as the ticket is perhaps purposely of a very complex character, it is convenient for the pleader to back up a count for the individual offence with the count for a conspiracy "to sell and expose to sale, and cause to be sold and exposed to sale" (reciting the words of the statute); "a lottery ticket, and tickets in a lottery not authorized by the laws of this commonwealth." This was the language of a count which was sustained by the Supreme Court after a new trial, in consequence of a variance in the count purporting to set forth the ticket, and an arrest of judgment for want of particularity in the counts charging the sale of the ticket without an attempt to set it out. After showing that such a generality of statement as appeared in the latter counts could not be tolerated, Duncan, J., proceeded: "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly in the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell; not of any particular prohibited lottery, but of all. The conspiracy was the gravamen, the gist of the offence." The same liberality in the construction of counts for conspiracies to effect objects per se illegal having prevailed in England, the practice of joining conspiracy counts with counts for the constituent misdemeanor is there sanctioned.

§ 1846. The same difficulty as to merger, however, which is applied to felonies, has been started as to misdemeanors, with equal reason but with less success. A conspiracy, it has been said in an early case in Massachusetts, to commit either a misdemeanor or felony, arises in the overt act when such overt act has appeared to have been consummated. The case before the court was one of a conspiracy to commit a felony; and to extend the doctrine to cases of misdemeanors is in conflict with the English text-books, where such a doctrine is never broached, as well as with the books of precedents, where forms con-

2 See infra, § 1344.
3 1 Russ. on Cr. 691.
5 People v. Mathur, 4 Wend. 265; Marcy, J.; State v. Murray, 15 Mo. 100; State v. Maybery, 48 Ibid. 216; State v. Reyes, 25 Va. 415; People v. Richards, 1 Mich. 216; Com. v. Hartman, 5 Barr. 90; Com. v. McGowan, 2 Parsons, 341.
6 4 Wend. 265.
7 In E. v. Bonham, 12 Cox C. C. 93, Cockburn, C. J., said: "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudices of others, and deprive defendants of the advantage of calling their co-defendants as witnesses."
CRIMES. [BOOK II.

§ 1847.]

vicinity under indictments for conspiracies pointed out at either of these statutory offences. Where, therefore, the practitioner has a case in which he is able, from the maturity of the offence, to specify in the indictment what pretenses the defendants conspired to use, and what goods they conspired to obtain, he may be sure that he may bring himself within the strictest rules of criminal pleading, and that the offence as thus stated will be adjudged indictable at common law. But in conspiracy this is not often practicable. Two important questions,

1 See Whart. Free. 611; R. v. Parker, 3 Q. B. 592; R. e. Whitehouse, 6 Cox C. C. 38; Heymann v. R., L. R. 8 Q. B. 102; 12 Cox C. C. 368; R. v. Dunn, Hild. 15; Com. v. Walker, 108 Mass. 309; Cook v. Brown, 128 Ibid. 505; Clary v. Com., 4 Barr. 210; Huntzinger v. Com., 97 Penn. St. 337; Com. v. Brocken, 8 Weekly Notes, 326; State v. Norton, 3 Haz. 33. In Com. v. Walker, ut supra, decided, in 1871, the indictment was for a conspiracy to obtain goods by pretending falsely that the defendant intended to take the goods to his shop to sell in the ordinary course of trade. Compare, also, decisions on R. v. Dunn, in Portlytally Review for July 1, 1875, p. 40.

Sir J. F. Stephen (Dig. L. art. 330), gives the following—

"Every one commits the misdemeanor of conspiracy who agrees with any other person or persons to do any act with intent to defraud the public, or any particular person, or class of persons, or to extort from any person any money or goods. Such a conspiracy may be criminal, although the act agreed upon is not in itself a crime."

"An offender convicted of this offence may be sentenced to hard labor.

Illustrations.—The following are instances of conspiracies with intent to defraud—

A conspiracy to defraud the public by a mock auction. R. v. Lewis, 11 Cox C. C. 494.


"A conspiracy to defraud the public by issuing bills in the name of a fictitious bank. R. v. Haven, 2 East P. C. 358.

"A conspiracy to induce a man to buy horses by falsely alleging that they were the property of a private person, and not of a horse dealer. R. v. Kosnick, 5 Q. B. 49.

"A conspiracy to induce a man to take a lower price than that for which he had sold a horse, by representing that it had been discovered to be unsound, and resold for less than had been given for it. Carlisle's Case, Dear. 357.

"A conspiracy to defraud generally, by getting a settling day for shares of a new company. R. v. Aspinall, L. R. 1 Q. B. D. 730."

A conspiracy to defraud a partner by false accounts, has been held indictable, although the cheat without the conspiracy would not have been indictable at common law. R. v. Waibouton, L. R. 1 C. C. 274; S. F., State v. Cole, 19 Vroom, 394. A conspiracy by one confederate to get possession of goods to be attacked by another confederate on a sham claim, has also been held indictable. R. v. King, Dar. & M. 741; 7 Q. B. 782, cited infra, § 1348.

CHAP. XXI. CONSPIRACY. [§ 1848.

therefore, here arise. The first is, whether a conspiracy "to cheat" is itself indictable. That such an indictment is too general there can be little doubt. If, however, the indictment, following the definition which this chapter opens, should aver a conspiracy to cheat by "deceit and falsehood," or by "fraudulent means," specifying these, or excusing their non-specification, then other conditions are to be considered. It must be remembered that a confederacy to cheat, by force of combination, even in a way which is not indictable when designed and effectuated by an individual singly, adds to the cheating a quality (that of reciprocity of support among the conspirators) which may make it indictable at common law, just in the way that using false weights or tokens makes a cheat indictable at common law, when, without such false weights or tokens, it would not be so indictable. The playing of several persons into each other's hands may be, if not a false token, in some measure a false pretense. On this ground may be justified the definition already given in the text, as well as that of the eminent jurists who framed the English Draft Code of 1879. And accepting this definition, an indictment avowing, as far as it is in the pleader's power, such a conspiracy, is good.

Conspiracies to cheat the government of the United States are hereafter considered.

§ 1848. So far as concerns indictments to cheat by "false pretenses," it has been much discussed whether the pretenses should be specially averred. That such cannot always be done, is conceded. It is easy to conceive of a case in which, while the pretenses were not so far executed as to enable the pleader to specify them in complete detail, they were matured sufficiently to show that the statutory misdemeanor was in process of commission. Under such circumstances it has frequently been held, that the pleader is entitled to aver generally a conspiracy to cheat by "false pretenses." The utmost that could be exacted in such a case would be, that the pleader

1 Weight's Conspiracy, II.
2 Supra, § 1337.
3 Ibid.
4 See infra, §§ 1349, 1350.
5 Supra, § 1350 a.
6 See supra, §§ 1337 et seq.
should give the non-disclosure of the means as his reason for not setting them out. In England such is certainly the law; and a careful scrutiny of the cases collated below enables us to say that

1 The leading case is R. v. Gill, 2 B. & A. 394; Whart. Proc. 611, etc., in which an indictment was sustained which merely charged the defendants with conspiring, "by divers false pretences and subtle means and devices, to obtain and to acquire to themselves, of and from P. D. and G. D., divers large sums of money, of the respective moneys of the said P. D. and G. D., to cheat and defraud them respectively thereof." Notwithstanding, however, the statement of Lord Mansfield, that for an undigested conspiracy no form more stringent than this could be exacted, the practice was for some time in the habit of complaining of the precedent as too lax. R. v. Parker, 3 Q. B. 555. In 1854, a case was reported in which it appeared that R. v. Gill was seriously questioned by the King's Bench. R. v. Hens, 1 Ad. & El. 337.

In R. v. Peck, 9 A. & E. 585; 1 P. & D. 508 (1839), an indictment was held defective which charged the defendants with conspiring to defraud divers of her Majesty's subject, who should bargain with the defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration, or satisfaction for the same, with intent to obtain profit and emolument to the defendants (not stating with particularity what the defendants conspired to do). It was said, however, to be no objection that the court does not name the parties who were to have been defrauded. And it was further ruled that a count charging that the defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emolument to themselves, is bad, for omitting to show in what respect the deed was false and fraudulent. (But in R. v. Heyrnann, L. R. 8 Q. B. 102; 12 Cox C. C. 363 (1873), R. v. Peck, was declared by Mellor, J., to be "virtually overruled.")

In none of these cases, however, was the object of the conspiracy an offence per se indictable, and though on each of them the court advised verdict with great promptness upon a plea of plegue, which gave the defendant no notice of what he was tried for, yet there was an express recognition of the distinction between a conspiracy to commit an indictable offence, where the means need not be set out, and a conspiracy to commit an act not indictable, where the means must appear.

In 1844, the question was canvassed on an indictment which charged that the defendants conspired to cheat and defraud certain people in the quantity of their goods; that, in pursuance of the conspiracy, the defendants, fraudulently ordered and obtained upon credit from W. W. and C. W., upholsterers, divers goods of W. W. and C. W. (the count stated a like obtaining on credit from other tradesmen named, and from others whose names were unknown); and that, in further pursuance of their conspiracy, and in order that the goods might be taken in execution and sold, as above mentioned, the defendants ordered the same to be delivered by W. W. and C. W. at the house of B., and they were so delivered and never paid for; and in further pursuance, etc., B. allowed them to continue in his house till they were taken in execution as aforesaid. That the defendants, in further pursuance, etc., did falsely and fraudulently pretend that certain debts were due from B. to R. and P., two others of the defendants, and R. and P. did, to obtain payment of such fictitious debts, by collusion with B., cause a return against B. that R. and P. collusively signed judgment against B. in the actions, and issued execution thereon, by virtue of which the goods, before the expiration of the times of credit, were taken in execution, and sold to satisfy the fictitious debts: and so the jurors found "the defendants, in manner and means aforesaid, did cheat and defraud W. W. and C. W. of the goods." The indictment was sustained in the Queen's Bench. R. v. King, 7 Q. B. 783; 3 M. & J. 741, citing R. v. Spragg, 2 B. & C. 389; R. v. De Berenger, 3 M. & S. 67. Error being brought upon the judgment, it was ruled in the Exchequer Chamber that the indictment was defective, not in the offence charged, but in the parties to be defrauded, it being held that the words alleging conspiracy showed a design to injure, not tradesmen indefinitely, but individuals, and therefore either the persons should have been named, or an excuse stated for not naming them, and that the allegation of conspiracy was not aided by the overt acts; and that the overt acts themselves did not, either in connection with the allegation of conspiracy or independently, amount to indictable misdemeanours. King v. R. (in error), 7 Q. B. 782, 795 (1844). See infra, §§ 1360-6-6.

Where the third count of an indictment to obtain money under false pretences charged the offence in general terms as a conspiracy to cheat the prosecutor by false pretences, without setting out the false pretences, the evidence was, that the prosecutor was told by the defendant that certain horses had been the property of a lady deceased, and were the property of her sister, and never had been the property of a horse dealer, etc. All these statements were false, the defendants knowing that nothing but a belief of their truth would have induced the prosecutor to make the purchase. The conspiracy was proved. It was held that this count was sufficient, and that it charged an indictable offence. R. v. Kenrick, 5 & 6 C. 49 (1842).

Now is this the only case in which the Court of King's Bench has sustained R. v. Gill. In R. v. Comports, 9 Q. B. 584 (1846), the last of eight counts charged the defendants with conspiring "by divers false pretences and indirect means to cheat and defraud the said S. R. of his moneys, to the great damage, fraud, and deceit of the said S. R., to the evil example, etc." There was a verdict for the crown in each of the counts, before Lord Denman, C. J., at the Middlesex sessions, and on December 17, 1846, a motion for a new trial was argued before the court in banc. "First, we think," said Lord Denman, in giving the opinion of the court, "that there is no ground for reversing the judgment in this case; one count is good, on the authority of R. v. Gill, never overturned, but founded on excellent reason, and always recognized, though not without regret, because that form

187
of indictment may give too little information to the accused. A fair observation was made upon the manner in which the precedent was treated in R. v. Biers, 1 Ad. & El. 237, but even from the expressions therein used, and much more from what has been said in later cases, it appears plainly that the court has never doubted the correctness of the decision in R. v. Gill. 1

In 1848, an indictment was sustained in the Exchequer Chamber, which averred merely that the defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud the prosecutor of his goods and chattels, to the great damage," etc. Sydseff v. R., 11 Q. B. 245. 2 "R. v. Biers," 1 Ad. & El. 327, said Whitley, C. J., "was relied on in support of the objection, and as overruling R. v. Gill, from which we think the present case is not distinguishable. But, upon referring to the judgment in R. v. Biers, there appears strong reason to doubt whether it did not go wholly on the one objection to the special counts. Neither R. v. Gill, nor any other authority at all bearing on the point, was referred to in the judgment; and it appears distinctly from the recent case of Regina v. Compron that R. v. Biers has never been considered by the Court of Queen's Bench as overruling R. v. Gill. We are of opinion that this count is good." This case goes to an extreme extent, but so far as it reaffirms R. v. Gill, it has been approved by succeeding cases. R. v. Whitehouse, 6 Cox C. C. 38; E. v. Carlisle, ibid. 366; 25 Eng. L. & Eq. 577. In R. v. Yates, 6 Cox C. C. 441, a count charged the defendants with a conspiracy, by false pretences and subtle means and devices, to extort from T. R. one sovereign, his moneys, and to cheat and defraud him thereof. The evidence failed to prove that the defendants employed any false pretence in the attempt to obtain the money. It was held that so much of the count might be rejected as surmises, and the defendants convicted of the conspiracy to extort and defraud.

In Latham v. R. (in error), 9 Cox C. C. 516; 5 B. & S. 636, the defendants were tried at a quarter sessions upon an indictment, one of the counts of which charged a conspiracy, "by divers false pretences" against the statute in that case made and provided, the said R. B. of his moneys to defraud, against the form of the statute. It was held that the count sufficiently charged a conspiracy to obtain money by false pretences.

It may now be viewed as finally settled that an indictment charging that the defendants unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together by false pretences, specified as far as possible, to cheat and defraud the prosecutor of his goods and chattels, is good. Sydseff v. R. (in error) 11 Q. B. 245; 12 Edw. 414—Er. Ch.; R. v. Heymann, L. R. 8 Q. B. 102; 12 Cox C. C. 333. See, also, infra, § 1282. As suggesting due limits to R. v. Gill, see White v. R., 13 Cox C. C. 318 (Irish Q. B.).

It has been held that a party may be convicted of a conspiracy to cheat and defraud, by means of a false and fraudulent representation as to the ownership of goods or chattels, even though the representation was oral, and one for which, per se, he would not be civilly liable under 2 Geo. IV. c. 16, s. 14: and that in such case the question will not be merely whether the representation was false and fraudu-
and fraudulently conspire to cheat by false pretenses, setting out such pretenses when practicable, and when not practicable duly

the laws of Pennsylvania, would not be criminal in Pennsylvania, such an hypothesis should be distinctly excluded by the record. But it will be no difficult matter to frame a count for a conspiracy in such a way as to meet these situations without essentially varying from the rules previously announced. By charging that the defendants conspired by "divers false pretenses and indirect means, then and there to cheat and defraud the said A. B. of his goods," etc., describing the pretenses as exactly as possible, an indictable offense will be made out. This

3 In Comm. v. Eberle, 3 B. R. with fifty others, many of whom were members of the same congregation in Philadelphia, were charged, in the first count, with conspiring to "prevent, by force and arms, the use of the English language to those who have been aliens," among the said congregation, and for that purpose did then and there wickedly and unlawfully and oppressively confederate and agree among themselves, and did then and there determine and firmly bind themselves before God, and solemnly to each other, in defense, with their bodies and lives, the German divines, and to oppose by every means, lawful or unlawful, the introduction of any other language into the church; and that in pursuance of the conspiracy, etc., the defendants did afterwards, as an election, etc., create a great riot and tumult, etc., and did commit divers assaults. The second count charged simply the conspiracy, without any overt acts. Comm. v. Eberle, 3 B. R. 3. See Pumphrey Trial, 186. At the trial, before James, J., ex nexuses were taken in the indictment, and its insufficiency was urged with great learning by the eminent counsel engaged. It was said that, casting out the overt acts, which were always considered mere legal fictions, that there was nothing in the charging portion of the indictment to show that an offense was really committed. The object in the alleged conspiracy was clearly lawful; it was necessary, therefore, in order to make out the offense, that the court should show unlawful means were to have been employed. Judge Trist, however, held both counts good (Pumphrey Trial, 186); and though a motion for a new trial was argued

view is sustained by an elaborate opinion of Judge Hare in Comm. v. Burger, with great energy before the court in banc (Comm. v. Eberle, 3 B. R. & Raw. 2), it does not appear from the report that the objections to the indictment were pressed. The judgment of the court below was sustained.

In an indictment shortly afterwards, the defendants were charged with conspiring to defraud and defraud the public of the commonwealth of great sums of money, by means of false pretenses, and false, illegal, and unauthorized paper writing in the form and semblance of bank notes, which were of no value, and purporting to have been promissory notes for the payment of divers sums of money or demand, by a company which was in fact fictitious. The indictment was sustained, though at the time there was no statute in Pennsylvania making it indictable to obtain property on false pretenses. Still, however, the passing of a law of depositions which had been held a cheat at common law, and on this ground the case may be regarded with the current of authority. Collins v. Comm., 9 B. R. & R. 230.

In a case some years later, the second count, on which alone the prosecution laid stress, alleged that the defendants "conspired to cheat and defraud J. S. of the aforesaid heller." "There may be confederacies," said Trist, J., in giving the opinion of the court, "which are lawful and you must therefore set forth some object of the confederacy which it would be unlawful for them to attain either simply or jointly, if it would be dangerous to the public to be attained by the combination of individual means. For it is the object that imparts to the confederacy its character of guilt or innocence; and of the nature of such object, and the bearing which the various kinds of it may have on the question in different cases, it is at present necessary to say no more than that where it is that the doing of an act which would be indictable, it would undoubtedly render the confederacy criminal. But in this case, the object, which accrued to the defendants in pursuance of their conspiring, did "offer to sell, pass, utter, and publish" etc., it was held, that the means whereby the conspiracies was to be accomplished was not sufficient stated. Twitchell v. Comm., 9 B. R. 311.


and their non-specification, is good wherever obtaining goods by false pretenses is by statute indictable.


In Massachusetts, it is held that in an indictment for a conspiracy to do an act which is a well-known and recognized offense at common law, the object of the conspiracy may be described in the general language of which it is familiarly known; if the alleged purpose be the doing of an act which is not unlawful in itself, but which is to be effected by the use of unlawful means, these means must be particularly set forth; if it be the doing of an act which is not an offense at common law, but only by statute, the purpose of the conspiracy must be set forth in such a manner as to show that it is within the general language of the terms "cheat and defraud," it is held, do not necessarily import any offense, either by statute or at common law; and, therefore, an indictment for a conspiracy, in which the object is alleged to be to "cheat and defraud," must set forth in detail each other allegations as will show the object to be an offense, either by statute or at common law. And such in the confederating together; and this is proved by the proceeds produced on the part of the commonwealth. The count was held sufficient to support the indictment. Comm. v. McKisson, 9 B. R. & R. 430.

To the same effect isMiller v. Comm., 6 W. & N. 6. For the indictment in this case, see Wharton's Tr. 370. See, even after Comm. v. Hartmann, as an indictment for a conspiracy to cheat by offering to sell forged foreign bank notes, of a deconstruction the circulation of which was forbidden by law, which accrued to the defendants, in pursuance of their conspiring, did "offer to sell, pass, utter, and publish," etc., it was held, that the means whereby the conspiracies was to be accomplished was not sufficiently stated. Twitchell v. Comm., 9 B. R. 311.

5 Miller v. State, 52 Ind. 188.

6 State v. Rinehart, 40 Ind. 113. Nor in this regard was the act of conspiracy by the words "by device and subterfuge" ibid.

7 State v. Younger, 1 Dea. 567.

§ 1349. Where the means are developed, and show a fraudulent scheme in operation, the offence is clearly indictable. Thus it has been held that an indictment lies for a conspiracy to defraud by false pretences, though the money is obtained mediately by a contract, a conspiracy to impose pretended wine upon a man as and for true and good Portuguese wine, in exchange for goods; a conspiracy to defraud a bank by false pretences and other illegal means of large sums of money; a conspiracy to defraud the government of taxes; a conspiracy by a female servant and a man whom never be punished more severely than the perpetration of it. This was said surgently, and it was admitted that a conspiracy to cheat by false pretences was indictable in Pennsylvania. It was subsequently expressly held by the same court, that a conspiracy to cheat by false tokens cannot be more severely punished than the offence itself, that is, by imprisonment not exceeding one year. "In an indictment for a conspiracy to do an act prohibited by the common law," said Lewis, C. J., in 1854, "where the act has a specific name which indicates its criminality, it is not necessary to describe it minutely. But it has been thought that where the object of the conspiracy is merely forbidden by the statute, it can be described only by its particular features. But even in offences of this character, it has never been held necessary to set forth the unlawful object with precision required in an indictment for perpetrating it. And wherever a statute exists making cheating by false pretences indictable, an indictment charging a conspiracy to cheat by "divers false pretences" must, if further non-specification be excused, be good. As long as the law makes an unexecuted conspiracy indictable, we must permit the offence to be set forth merely as an unexecuted conspiracy, without the specification of detail which the very idea of incompleteness excludes. Any imprecision in pleading in this respect will be cured, as stated above, by requiring the prosecution to file a bill of particulars."

1 See infra, § 1370; Com. v. Fuller, 122 Mass. 562.
2 State v. Younger, 1 Dart. 367.
7 See State v. Rowley, 12 Conn. 303; People v. Clark, 10 Mich. 310; State v. Cawood, 3 Stewart, 380; State v. Younger, 1 Dart. 367; State v. Buchanan, 5 Harr. & J. 317; Blinnor v. State, 45 Md. 301; State v. Dewitt, 5 Hill (N. J.) 300; Justice v. State, 48 Miss. 354; so well as the Pennsylvania and English cases heretofore cited.

In infra, § 1350; Whart. Cr. Pl. & Pr. §§ 157, 728.

R. v. Taylor, 1 Leach, 49.
2 R. v. Robinson, 1 Leach, 44; 2 East P. C. 1010.
4 R. v. Eclan, 1 Leach, 274. Eclan's case, so far as it goes to show that a mere conspiracy to impoverish another is indictable, may be regarded as overruled by R. v. Bowland, 2 Dec. C. C. 394; 5 Cox C. C. 460, 463; 17 Q. B. 671.
5 R. v. Warburton, infra, Cockburn, C. J., argued that a conspiracy would be indictable even if no action or indictment would lie for such acts. But this is false, since the proposition on which the decision rests is that it is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. The case, therefore, was that of a conspiracy to commit an indictable offence.

2 R. v. Ferrig, 4 Clark (Phila.), 29; Brighgley R. 315.
4 State v. Schooner, 8 Rich. 72.
5 State v. Supt. of Police, County Prison, 6 Phila. 169 (Ludlow, J., 1866).
§ 1849. CRIMES. [Book II.

just claim by false representations as to its value; a conspiracy to obtain possession of goods, under the pretense of paying cash for them on delivery, the buyer knowing that he had no funds to pay with, in fraud of the seller; a conspiracy to induce persons to take shares in a new company, to which was to be transferred the business of an old company known to the conspirators to be hopelessly insolvent and worthless, with a view of defrauding and cheating the persons so taking and paying for their shares of the price which they would have to pay; and a conspiracy to sell fraudulent railroad tickets.


2 In this case the indictment alleged that B. sold B. a mare for £39, that while the price was unpaid, B. & C. conspired by false and fraudulent representations made to B. that the mare was unsold, and that B. had sold her for £27, to induce B. to accept £27, instead of the agreed price of £39, and thereby to defraud B. of £27. It was held that the indictment was good, and that, being supported by proof of the facts alleged, it warranted a conviction.

3 Com. v. Eastman, 5 Couch. 390.

4 R. v. Gurney, 21 Cox C. 414.

5 Hooper v. State, 48 Md. 321.

Three persons being in a public house with the prosecutor, one of them, in concert with the other two, placed a pen cil case on the table and left the room. While he was absent, one of the two remaining took the pen out of the case, and put a pair of scissors in its place, and the two induced the prosecutor to pick up the scissors, which he returned into the room, that there was no pen in the case, and the other two took the money. It was held, that the evidence supported a conviction upon a count charging the three with conspiring by false pretenses and fraudulent devices to cheat the prosecutor of his money, although it appeared that he had the intention of cheating one of the three if he could. R. v. Hudson, Bell C. C. 263; 2 Cox C. C. 305.

As will be seen more fully (infra, § 1359), conspiring to cheat a partner by false entries at the time of the settlement of an account, though in a way which if executed by a single individual would not be indictable, is indictable as a conspiracy. R. v. Warburton, L. R. 1 C. C. 274 (1875).

Where the defendants started out on a fox chase and then turned their attention to chasing cattle, some of which were killed, it was held that this was indictable as a conspiracy, and that it was not necessary to prove any original malicious plan toward the party injured. Lowery v. State, 30 Tex. 400.

Mr. Wright (Conspiracy, 35) questions whether an indictment for conspiracy could be maintained in cases where the “proposed deceit is such that it could not have any effect in deceiving the persons intended to be defrauded.” He proceeds to illustrate this by cases where conspiracies are made to effect impossible ends, e.g., to steal non-existent goods. In other words, he confounds unsuitability of means with non-accessibility of objects. This limitation we have already fully discussed, giving the proper distinctions. Supra, §§ 174 et seq. To apply the rules there stated to conspiracies, we may say that a conspiracy to effect a criminal object is indictable, though the means employed are only apparently suitable, and that when a conspiracy to effect such an object is put in the process of execution, it is no defense that the thing which it was intended to attack was unknown to the conspirators removed from the range of its operations.

1 Infra, § 1359; R. v. Turner, 13 East, 252; State v. Straw, 42 N. H. 393. As to R. v. Turner, see comments, infra, § 1359.

2 R. v. Pywell, 1 Stark. 402.

3 R. v. Stratton, 1 Camp. 645, n.

4 Com. v. Pratt, 6 Gray, 127.


Infra, § 1359.

It has been held in Massachusetts that an indictment does not lie for a conspiracy to defraud a firm agent of a promissory note, given for her separate use in consideration of her laborarian shares in an estate. Com. v. Manley, 12 Pick. 173. But the point ruled, though the case has been cited for other purposes, was simply that, in such case, the property of the note being in the husband, the fraud should have been laid as directed against him.

In New Jersey it has been held, under the peculiar statute of that State, not to be an indictable offense for several persons to conspire to obtain money from a bank by drawing cheques on it when they had no funds there. State v. Riseley, 4 Hale. 293. Such a position, however, cannot stand as common law in those States in which obtaining money by false pretenses is by statute indictable, and is punishable at common law. It is not, indeed, a cheat for a party to draw money out of bank beyond his deposits. But if this be done by a combination of persons, by means of tricks, by which the bank is imposed upon, a conspiracy is made up. Supra, §§ 1347, 1357.

The reasoning of the court in State v. Riseley rested principally on the assumption that the Revised Statutes of New Jersey limited conspiracies to the single act of getting an innocent man indicted by false and false evidence. The indictment charged that the defendants conspired "to obtain large sums of money and bank bills, the property of the President, Directors, and Company of the State Bank of Trenton, by means of the several cheques and drafts of the said" defendants "respectively, to be drawn on the cashier of the said President, Directors, and Company of the State Bank of Trenton, when they, the said defendants "had no funds in

194
But it is an indictable offence to conspire to forcibly enter certain premises and exclude from them their owner. 1

§ 1351. The bankrupt acts generally make indictable the removal of goods, in contemplation of bankruptcy, with intent to defraud creditors. Under the English act (and the same rule as to frauds on public justice would apply at common law), a conspiracy to remove goods in contemplation of bankruptcy is complete, even though no adjudication of bankruptcy has taken place. 2 Under the United States statutes, others than the bankrupt may be indictable for a conspiracy with him to violate the provisions of the statute. 3 Such, also, is the case said bank for the payment of the said cheques and drafts. 4 Court acts followed, none of them showing a specific misdemeanor; and with no law a statement of the nature of a prosecution, there is no ground for surprise that the court thought proper to quash the indictment, even had the statutory objection not obtained. There is no averment that the defendants knew they had no funds in the bank; there is no averment that they were to have no funds ready at the time the cheques were presented. The indictment was to be treated in the same way as if it had charged the defendants with an attempt to defraud an individual by drawing bills on them when they had no funds in their hands. To make the offence a misdemeanor, it would be necessary to introduce averments, showing that by some fraudulent means the bank was to be induced to believe that the defendants really had funds in its custody. Now it is plain that unless the drawing cheques on a bank where the drawer has no funds is made penal by statute in New Jersey, the indictment in State v. Rickey was too weak. It showed a conspiracy to effect an object neither per se indictable, nor a misdemeanor at common law. If it had contained such averment the indictment, on the principle of R. v. Gill, would have been good. And so far as State v. Rickey conflicts with the position in the text it is much shaken by State v. Norton, 3 Dab. 38. See State v. Cole, 10 Ves., 204.

In Lambert v. People, 7 Cowen, 167; 9 Id., 579, the indictment was even more general—it merely charging the defendant with conspiring "wrongfully, injuriously, and unjustly, by wrongful and indirect means, to cheat and defraud" the prosecutors of their goods, chattels, and effects, etc. It is certainly loose phrasing, but bad as it was, it was sustained in the Supreme Court, and the judgment on it only reversed in the Court of Errors, after a vigorous struggle, by a majority of one. But the opinion of the majority of the court has been subsequently recognized and reaffirmed. People v. Brady, 14 N. Y. 192-176. 1

§ 1352. The only cases in the books of conspiracies to violate lottery laws arise in Pennsylvania, and were produced by the rigor with which the courts in that State applied the doctrine of variance to the setting out of lottery tickets. When the intentional complexity of lottery tickets is taken into consideration, it is no wonder that the pleader, under the pressure of a rule which held "Burrall" for "Burrall" to be a fatal variance in the setting forth of the ticket, should insure beforehand against any vices in the statutory count, by adding to it a count for conspiracy. This device was count.

1 People v. Underwood, 18 Wend. 1
2 Hawk. II. 25, 60. 540. See supra, §§ 1338-39; Whart. 3 As to Iowa statute, see State v. Harris, 38 Iowa, 242; as to Massachusetts statute, see Com. v. Barnes, 132 supra, § 1348, note, where this case is more fully noticed.
§ 1852. CRIMES. [BOOK II.

A case virtually resting on the authority of R. v. Gill, discussed in a previous section. The defendants were charged, in eight out of nine counts, with the statutory offences of selling lottery tickets, offering them for sale, and advertising them; some of the counts setting out tickets in full, others merely charging the sale of "a lottery ticket," etc., in the language of the act. The first count was for a conspiracy to "sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket and tokens in a lottery not authorized by the laws of the Commonwealth;" therein precisely following the statute. On motion for a new trial, and in arrest of judgment, the court held: 1. That the counts stating the offence in the words of the statute, without setting forth the ticket, were bad from want of sufficient particularity; 2. That there must be a new trial on the count setting forth the ticket, in consequence of a variance between the ticket and the indictment; but, 3. That the conspiracy count was enough to sustain a conviction at common law. This was in 1822; and in 1827, after a conviction on both classes of counts, on an indictment of the same character (except that there was but one defendant, who was charged with conspiring with others to the grand jury unknown), the court inflicted the statutory punishment, being a fine to the Union Canal Company on the statutory counts, and a fine at common law on the conspiracy counts. Two points may be extracted from these cases: 1. That though under the lottery statute in force at the time, the indictment must go beyond the words of the statute and set out the tenor of the ticket, yet for a conspiracy to effect the sale of such a ticket, it is enough to follow the statute strictly without the specification of detail; 2. That the conspiracy, when properly pleaded, may, when covering a distinct offence in a separate count, be punished as a common law offence, without reference to the statutory penalty.

§ 1853. No doubt a conspiracy to get up a public disturbance is indictable, and pointed illustrations of this are found in cases which, in another relation, will be subsequently considered, viz: conspiracies to hiss an actor from the stage, so as to stimulate a riot, and to prevent by violent means the introduction of the English language into a church. Precedents, also, are, not uncommon for conspiracies to commit riots. But whether the rioters themselves, according to the views heretofore expressed could be indicted for conspiracy, is open to doubt.

§ 1854. A conspiracy to commit an assault and battery is held to be an indictable offence at common law.

§ 1855. So no doubt it is with a combination to falsely imprison. Yet in such case it is a good defence that the object was the restraint of a relative believed bond fide, and on probable ground, to be insane.

2 See supra, § 1346.
3 Com. v. Sylvester, 6 Pa. L. J. 288; Brightly R. 331.
4 The first point is abundantly demonstrated in the argument of Duncan, J. After showing that to transcribe the language of the act was not the proper way to frame a count for the individual misdemeanor, he proceeded to recognize the distinction indicated by Id. Mansfield in R. v. Eccles, between a conspiracy to commit an offence and its actual commission, "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indict-
§ 1356. All conspiracies to "excite disaffection," to use the language of Alderson, B., are indictable at common law. And it is sufficient to charge that the defendants did conspire and agree "to raise discontent and disaffection among the subjects of her majesty, and to excite such subjects to hatred and contempt of the government and constitution of this realm as by law established, and to unlawful and seditious opposition to the government and constitution; and also to stir up jealousies, hatred, and ill-will between different classes of her majesty's subjects," etc.

§ 1356 a. By § 5440 of the federal revised statutes, which is a re-enactment of the 30th section of the Act of Congress of Feb. 3, 1867, there where there is a conspiracy "to commit any offence against the government of the United States, or to defraud the United States in any manner whatever, and one or more of the parties to said conspiracy shall do any act to effect the object thereof," the


2 O'Connell v. R., 11 C. & P. 155. But a count charging the defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditive purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because "intimidation" is not a technical word, having a necessary meaning in a bad sense; and, secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. O'Connell v. R., 11 C. & P. 155. Roe v. Roe (by Sir J. F. Stephen) 421.

3 Rev. Stat. § 5440. This section is hereafter discussed in connection with revenue offenses. In re United States, 75 F. Supp. 565. Section 5440 is within the meaning of the act, if it was understood by the party tendering, and the party taking it, as having the force and obligation of an oath. Ibid.

4 As to construction of this clause see U. S. v. Donnan, 11 Blatch. 166, cited infra, § 1373.

For conspiracy to defraud of tax on spirits, see U. S. v. Rindskopf, 2 Biss. 229. In re United States, 75 F. Supp. 565.


Under this section fails a conspiracy to plunder a wrecked vessel within admiralty jurisdiction. U. S. v. Sache, 7 Fed. Rep. 715. For other cases of conspiracies to defraud the revenue, see infra, § 1373.

That unless a defendant was implicated in the conspiracy he cannot be convicted on account of overt act, see U. S. v. R. Hirsch, 100 U. S. 33.


In U. S. v. Gordon, 23 Fed. Rep. 250 (Oct. T. 1884), it was decided by Nelson, J., in the S. District Court for Minn., that under sec. 5440 of the U. S. Rev. Stat. a count is not demariable because it charges simply that the defendants conspired to defraud the government out of certain lands. "It is
§ 1356. A conspiracy to make false or illegal notes is indictable at common law. The rule has been held to apply to the case of a conspiracy to cheat by offering to sell forged foreign bank notes, of a denomination whose circulation is prohibited in the State where the indictment is found, to a conspiracy to induce others to violate the laws forbidding such notes to circulate, and to a conspiracy to destroy or erase an indorsement.

III. CONSPIRACIES TO MAKE USE THEMSELVES THE SUBJECT OF INDICTMENT, TO EFFECT AN INDIFFERENT OBJECT.

§ 1358. This class is here separately mentioned because it has usually been placed under a distinct head by text-writers, though on principle it is difficult to distinguish it from cases where an indictable offence is the direct and immediate object of the conspiracy. In one case the defendants conspire to commit an indictable offence for the sake of itself, in the other they conspire to commit it for the sake of some other object; but when the cases usually put under the first head are analyzed, they will be found, many of them, to fall under the second. Thus, in a conspiracy to produce the marriage of a young woman by coercion, to procure an appointment by corruption, to make a change in government by seditions means, and to fraudulently effect a change in the government of a corporate nature, Yarnbaugh v. S. & N. R. Co., 110 U. S. 651; and in U. S. v. Waddell, 112 U. S. 276, it has been held applicable to a conspiracy to drive by force a citizen of the United States from a homestead entry on unoccupied public lands. It is questioned, however, in the latter case, whether the proceedings could be by information. See Whart. Cr. PI. & Pr. § 89; and see Hays v. U. S., 36 U. S. 12, 352, 1832, 1834.

As to indictment under § 5520 for conspiracy to drive off a voter by force, see U. S. v. Goldman, 3 Woods, 187.

That a conspiracy to make settlements on Indian lands is not within the statute, see U. S. v. Payne, 22 Fed. Rep. 426.


Twitchell v. Com., 9 Barr, 311. See supra, § 1348.

Hazen v. Com., 23 Penn. St. 355. This, in 1854, on a conviction for conspiracy to "collect, induce, and procure" the officers of a particular bank to "violate and disobey the 28th and 49th sections of the Act of 16th of April, 1850," prohibiting the circulation of foreign notes under $5, the Supreme Court declared the conviction good, and that it was not necessary for the indictment to do more than to aver a conspiracy for this purpose, without setting forth the means or contract. Id.

State v. Norton, 5 Barb. 33.
Crimes. [Book II.

§ 1359.]

IV. CONSPIRACIES TO DO AN ACT, THE COMMISSION OF WHICH BY AN INDIVIDUAL MAY NOT BE INDICTABLE, BUT THE COMMISSION OF WHICH BY TWO OR MORE, IN PURSUANCE OF A PREVIOUS COMBINATION, IS CALCULATED TO AFFECT THE COMMUNITY INJURIOUSLY.

§ 1359. We here strike a distinction which is essential to the true conception of conspiracy, as defined by the English common law. On the one side, we have arrayed before us a series of acts which have the essence but not the form of crime; and, wanting the necessary intentional constituents, they escape judicial cognizance. On the other hand, we have a series of indirect acts, not criminal in their essence, and which, therefore, no matter what in shape they are presented (provided that shape be not per se criminal), cannot become the objects of criminal prosecution. Acts of the first class (e.g., immoral acts, unindictable cheats), the courts have held to be invested by conspiracy with a garb which exposes them to the penalties of the law. Before this they had the essence of crime; now, it is argued, by means of a conspiracy which gives an unfair and mischievous advantage to the aggressors, they have its form presented in such definiteness that they can be taken hold of and punished. For two to more persons to cooperate in effecting a fraud, one referring when required by the exigencies of the case to another, and each conspirator vouching the other as an innocent referee, gives to a cheat the quality of “false token” which makes it indictable at common law. It has both of the elements of such indictability—it is latent, and it is so complex as to affect any one whom it may reach. But acts though in themselves immoral may be committed by a confederacy, and yet if not attempted by a fraudulent combination of pretended innocent co-workers, present nothing indictable if they would not be indictable when committed singly by an individual.


2 See supra, §§ 1189, 1347.


R. v. Turner, if it decides that an agreement to make an armed trespass is not a conspiracy, is now sustainable. See remarks of Gilson, G. J., in Millin v. Com., 5 W. & S. 481. Sir J. P. Stephen, in Rocom's Cr. Ev. p. 410, writes: “With regard to civil injuries, it may be observed that wherever a combination to commit such an injury has been held to be criminal the injury has been malicious; that is to say, the parties have not been under a hand-side mistake as to a matter of fact, which, if true, would have justified their conduct. Thus, a combination to walk over a field, or to pull down fences, would not be a conspiracy, if the object was to try a question as to a right of way, though it certainly would be a combination to commit an act unlawful in the sense of being a tort. On the other hand, a conspiracy to commit a fraud may be indictable, though the fraud is not in itself indictable. In the case of R. v. Warburton, the defendant and another person conspired to defraud the defendant's partner of partnership property under such circumstances that the fraud was perhaps not criminal in itself. Cockburn, C. J., in delivering the judgment of (L. R. 1 C. C. 274-77) the Court for Crown Cases Reserved, said: ‘It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretenses to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to
the same distinction is applicable to a conspiracy by two or more persons to use violence, which derives its indictability, as in riot, from the plurality of persons concerned, and to a conspiracy to injuriously affect the body politic.

§ 1360. It is not essential, therefore, it should be repeated, in cases where the offence consists in the union of a plurality of persons either in a joint cheat or a joint application of force, that the means employed should be of themselves of such a character as to make their employment by a single person the ground for indictment. Cases to this effect have been already noticed, and others will be given in the succeeding sections. At the same time it is important to keep in mind, especially at this point, the principles heretofore announced, that indictments for conspiracy, always perils to liberty from the extent and vagueness of the province which they overshadow, are never so perilous as when they undertake to punish acts of whose

An indictment charged the defendants with conspiring to cause goods which had been imported, and on which certain duties of customs were payable to the queen, to be carried away from port without payment of the duties, with intent to defraud the treasury, and there were also counts charging the defendants generally with conspiring to defraud the queen of duties, by false and fraudulent representations of the value and nature of the goods; it was held, that the gist of the indictment being the conspiracy, the indictment was sufficiently certain, without further specifying facts to show either an indictable object or indictable means.


1 Supra, § 1338.

2 Ibid. Supra, §§ 1366 et seq. Supra, §§ 1118 et seq.


1 Supra, § 1346.

4 Supra, § 1338.

§ 1363. An indictment charging the defendants with conspiring to cause goods which had been imported, and on which certain duties of customs were payable to the queen, to be carried away from port without payment of the duties, with intent to defraud the treasury, and there were also counts charging the defendants generally with conspiring to defraud the queen of duties, by false and fraudulent representations of the value and nature of the goods; it was held, that the gist of the indictment being the conspiracy, the indictment was sufficiently certain, without further specifying facts to show either an indictable object or indictable means.


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1 Supra, § 1338.

2 Ibid. Supra, §§ 1366 et seq. Supra, §§ 1118 et seq.


1 Supra, § 1346.

4 Supra, § 1338.

§ 1363.
CRIMES.

§ 1363. And, generally, a conspiracy to debase is indictable. Of this we have a conspicuous illustration in an English case where the prisoners induced the prosecutrix, a girl of fifteen years of age, who had left her place as a servant, to go to their house; where one of them pretended that she had known the deceased parents of the prosecutrix, and said that she should keep her until she got a place, and that they would both assist her in getting one. The prisoners were women of bad character, and the place where they resided was a house of ill-fame. It was false that either of them had known the parents of the prosecutrix, and they took no steps whatever to get her a place, but urged her to have recourse to prostitution. They introduced a man to her, and attempted, by persuasion, and holding out prospects of money, to induce her to consent to illicit connection with him. The prosecutrix refused to consent, and declared her intention of quitting the house; the prisoners refused to give her her clothes, and she left without them. It was held that the offence was conspiracy at common law as well as conspiracy under statute 12 & 13 Vict. c. 76.

1 Com. v. Waterman, 122 Mass. 43.
2 State v. Murphy, 6 Ala. 765.
3 Cole v. People, 84 Ill. 216. In this case two judges dissented on the ground, well put, that the indictment did not specify the fraudulent means.
5 In the last case it might be said that the appropriation of the girl's clothes, and her prior chastity, were essential.

§ 1364. In cases of conspiracy to produce an abortion, it is unnecessary to aver specifically in what stage of pregnancy the mother was, or what were the instruments to be used. If the conspiracy were unexecuted, it is proper, as in all cases of unexecuted conspiracies, for the grand jury to aver that they are unable to set out the particulars of the plan, because it was never carried into execution. But an averment of conspiracy to murder a living infant will not be sustained by evidence of conspiracy existing before the birth of the child, unless the conspiracy be proved to have been pursued subsequently to the birth.

§ 1365. An indictment lies at common law for a conspiracy to prevent the interment of a dead body.

2. To prejudice the Public or the Government generally; as, for instance, by unduly elevating or depressing the Prices of Wages, or Toll, or of any Merchantable Commodity, or by defrauding the Revenue; or to impoverish or defraud any Individual or Class.

§ 1366. The old law in relation to business combinations was an outgrowth of the old system of political economy, and of the theory of absolutism which was essential to the maintenance of that system. Prices of the necessaries of life, at least, were to be fixed by the State; and as labor is as much a necessity as corn, the price of labor was to be fixed in the same way. The arguments for governmental direction in such matters it would be out of place here to recall; though it cannot be denied that in some relations,—e. g.,

Conspiracy to defraud or fraudulently raise or depress the price of labor is indictable.

constituents of the offence. The following case brought up the question separated from these qualifications. The prisoners were found guilty upon an indictment charging them with conspiring to solicit, persuade, and procure an unmarried girl of the age of seventeen, to become a common prostitute, and with having, in pursuance of that conspiracy, solicited, invited, and endeavored to procure her to become a common prostitute. It was held, that although common prostitution was not an indictable offence, it was unlawful, and the indictment therefore good, without averring that the prosecutrix was a chaste woman at the time of the conspiracy. R. v. Howell, 4 F. & F. 160. See discussion of this case in London Law Times, Sept. 3, 1881.

1 Com. v. Demain, Brightly R. 441.
2 See supra, §§ 552 et seq.; Whart.Prent. 239.
3 R. v. Banks, 12 Cox C. C. 893.
4 Hood's Bk. 47. In re, § 1435 a.
§ 1366.

CRIMES.

[BOOK II.]

in sustaining a protective tariff for more purposes of protection, and in excluding certain classes of laborers from the market— they are still appealed to; nor can it be denied that there is a reactionary tendency in Germany, if not elsewhere, to assert both the right and authority of the government to intervene for the purpose of regulating labor. We must also remember that it is now settled by the

1 Thus, in the preface to "Lethals," Lord Beaconsfield declares it is a "principle" that labor requires regulating no less than property.


In R. v. Rowlings, 6 R. & B. 92, Lord Campbell said: "I am not prepared to say that the combination which has been entered into between the parties to this bond would be illegal at common law, so as to render them liable to an indictment for a conspiracy. Such a doctrine may be deduced from the dictum of Grose, J., in R. v. Mawby. Other loose expressions may be found in the books to the same effect, and if the matter were doubtful, an argument might be drawn from some of the language of the statutes respecting combinations. But I cannot bring myself to believe, without authority much more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to be punished by fine and imprisonment. The object is not illegal, and therefore if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high; and I cannot understand why, in the one case, workmen can be considered as guilty of a crime in trying by lawful means to raise them, or, in the other, can be considered guilty of a crime in trying by lawful means to lower them."

On this Sir J. P. Stephen, in Rucee's Cr. Ev. p. 424, comments: "It is difficult to answer this reasoning upon general grounds, but the authorities quoted above appear to prove that the opinion of Lord Campbell's predecessors as to what sort of conduct was highly injurious to the public interest differed from those of Lord Campbell himself. Surely the judgments referred to above are not adequately described by the phrase 'loose expressions.' Of the four cases cited two are decisions of the Court of Queen's Bench, directly upon the very point itself. The dicta of Lord Mansfield and Grose, J. (that the agreement of several journeymen to stand for higher wages is illegal) are closely pertinent to the matters then under discussion, and are the more weighty because each of the judges assumes that the illegality of the combinations in question is so clear that it may be used as a proof of matter in itself more obscure.

§ 1366.

CONSPIRACY.

[§ 1366.]

Supreme Court of the United States that a State has the constitutional power to regulate the prices to be received by railroad corpo-

They are certainly as much in the nature of judgments as Lord Campbell's own language in Hilton v. Ebermeyer; and the language of the now repealed statute of 6 Geo. IV. c. 129, is unintelligible if the legislature did not believe that the combinations which it expressly permitted would have been crimes in the absence of such express permission. The general result appears to be, that all combinations to affect any alteration in the rate of wages, except those which were expressly excepted by 6 Geo. IV. c. 129, ss. 4, 5, were indictable conspiracies at common law.

"The result, however, cannot be regarded as free from doubt, and it would be difficult to find a stronger illustration of the uncertainty produced by the absence of precise and universally binding definitions of crimes than is supplied by this branch of the law. The whole matter is discussed in full detail by Mr. Wright (Law of Criminal Conspiracies, pp. 45-62)."

In R. v. Bunn, 12 Cox C. C. 316, 330, 340, Brett, J., when summing up, said: "Now I shall first ask you this: Was there an agreement or combination, which is practised to the same thing, between the defendants, or by some of them, to force Mr. Trowby, or the Gas Company, to conduct the business of the company contrary to their own will by an improper threat, or improper molestation; and I tell you that there is improper molestation if there is anything done with an improper intent, which you shall think is an annoyance or an unjustifiable interference, and which in your judgment would have the effect of annoying or interfering with the minds of the persons carrying on such a business as this gas company was conducting. . . . I tell you that the mere fact of these men being members of a trade union is not illegal, and ought not to be pressed against them in the least. The mere fact of their leaving their work—although they were bound by contract, and although they broke their contract—I say the mere fact of their leaving their work and breaking their contract is not a sufficient ground for you to find them guilty upon this indictment. This would be of no consequence of itself, but only as evidence of something else. But if there was an agreement among the defendants by improper molestation to control the will of the employers, then I tell you that that would be an illegal conspiracy at common law, and that such an offence is not abrogated by the Criminal Law Amendment Act, which you have heard referred to. This is a charge of conspiracy at common law, and if you think that there was an agreement and combination between the defendants, or some of them, and others, to interfere with the masters by molesting them, so as to control their will; and if you think that the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will, then I say that is an illegal conspiracy, for which these defendants are liable." See, in same general effect, remarks of Drum, J., in R. v. Drutt, 10 Cox C. C. 592.

In Fearset's Political Economy (London, 1869) the subject of trades unions
rations who are common carriers within its borders; and that the
reasoning on which this conclusion rests would authorize the 
and strikes occupies a chapter from which are taken the following conclusions:

1. Any combination to limit the number of workmen is calculated to
depress trade and injuriously affect all classes of the community.

2. As to the abstract question of the union of workmen to strike for higher 
wages there can, it is argued, be no
right. If employers are freely permitted to invest 
their capital to the greatest possible advantage, we concede that the 
employed may equally claim to be allowed to 
obtain the highest wages they can
for their labor. If, therefore, any of 
them choose to form themselves into a 
combination, and refuse to work for the 
warces which are offered to them, they 
are, we think, perfectly justified in 
doing this as capitalists would be if 
they refused to embark their capital 
because the investment offered was not 
sufficiently remunerative. Workmen, 
however, do an illegal and most mis-
chievous act, which ought to be pun-
ished with the utmost rigor of the law, 
file they attempt to sustain the combina-
tion by force, and if they coerce indi-
viduals to join in it by threatening to 
subject those who keep aloof either to 
annoyance or personal violence.

3. The increase of wages implies a 
diminution of profits, and, therefore,
cannot be permanent unless the num-
ber of laborers is restricted.

4. The interests of workmen and 
their employers are often identical in 
the sense in which the interests of 
buyers and sellers are identical, which,
though true in the long run, is not so 
at the immediate moment.

5. Temporary influences giving the 
buyer of labor special advantages over 
the seller may be put right by combi-
nations of workmen. This cannot be 
done in periods of adversity, as in 
such cases strikes rather benefit the 
employer, enabling him to weed out 
his force and reduce his expenses, 
while the results is ruinous to the em-
ployer. In times of prosperity, however, 
strikes, conducted in good temper, and
without such violence as to incur penal 
responsibility, may produce a tempo-
rary benefit. The workman says:

"Why should I wait until you choose 
to arrive at this joint decision (to raise 
wage)?" "The master would very 
naturally persist in his refusal; for he 
would feel confident that the workman, 
being a poor man, could not live with-
out employment; and as the wages 
paid in the trade are uniform, the 
workman would have no chance of ob-
taining higher wages from another em-
ployer." Supposing, however, there 
should be a general union of the work-
men in the business to the same effect,
"the masters would know that they 
|selves would suffer a most severe 
loss, if such a determination were car-
ried out; for their business would be 
stopped at a time when it was most pro-
fitable. They would, therefore, have 
every inducement to grant their work-
men what they claimed, if the demands 
were really justifiable." If the em-
ployers possess a power of combination 
and the laborers do not, then we think 
that one party has a chance of obtain-
ing a better bargain than the other; 
but if this power of combination is ex-
erted by both, then they are both placed 
in a position of perfect equality.

6. Combinations of this class may 
become beneficial to both the employer 
and the employed, these advantages 
being by no means depended upon

"When this power of combina-
nation is fully recognized, all that can 
be received by it will be peaceably 
conceded; and, therefore, instead of 
enmity being perpetuated, increased 
harmony and good will will be guaran-
teed. The workman will become a 
participant in his master's prosperity; 
and if he shares in his prosperity, he 
will learn to suffer with him in the time 
of adverse trade. The workman will 
be thus gradually taught one of the 
most valuable of lessons, namely this, 
that capital is not a tyrannical power 
which oppresses him, but is the source 
from which he obtains his livelihood."

Professor Walker, of Yale College, 
in his work on the Wages Question, 
N. Y. 1876, c. xix., discusses at length 
the question whether any advantages 
may be acquired by the "wages class" 
through strikes or trades unions. That 
these are legal, he properly assumes, 
viewing the old legislation and the old 
jurisprudence to the effect as now ob-
soleto. It is admitted, at the outset, 
that in cases where wages appear in-
adequate, "if bodies of labor can be 
put under discipline so that they shall 
proceed in order and with temper, 
great injury may be avoided, injury 
which once wrought may be perma-
nent." It is stated that illustrations 
might be multiplied "showing how an 
advance of wages which masters were 
unwilling to concede, and which work-
men, through their isolated and mutu-
ally jealous and suspicious action 
would be unable to command, if ef-
tected through united action might 
prove to be for the interest of both 
master and man." While admitting 
that strikes are "only of questionable 
utility in the first stages of the eleva-
tion of masses of labor long abused and
much abused," he justly attributes 
the repeal of the English combination 
statutes, noticed hereafter, to the fear 
produced by the "strikes." A summary 
of subsequent legislation is then 
given. But while for temporary pur-
pse the wages are fixed in other industries 
besides those of the common carrier. Yet, after making all these

On the question of lawfulness, we 
have the following conclusion:

"Where there exists a very high
allowances, though we may not hold absolutely that the government has no right to intereven to settle prices of either labor or produce, degree of civilization, there is a balance of reasons in favor of the non-intervention of governments, but only so as the striking workmen are guilty of no breach of contract and of no crime. . . Conditions of purchasers of labor for the purpose of lowering wages, which are most frequent, though secretly formed, the police power of the State cannot prevent. If now it were attempted to keep the working class alone from endeavoring to correspondingly raise their wages, the impression would become general, and be entertained with right, that the authorities were given to measuring with different standards."

Several English statutes must be taken into consideration in connection with the rulings of the courts. The first is the now repealed Act of 6 Geo. IV. c. 129, making threats to effect certain ends indictable. Under this statute the "threats" of trade unions have been, by some judges, considered included. Washby v. Amley, 3 B. & P. 516; though see contra, R. v. Druitt, 10 Cox C. C. 592; R. v. Selby, 5 Idb. 406, n.; R. v. Sheridan, cited Wright's Conspiracy, 47. This statute, it should be remembered, was only in force in England for a few years, and is not to be found in any of our American codes. A statute also was adopted in England in 1821, 34 & 35 Vict. c. 32, by which agreements in restraint of trade, when no force or fraud is used, are treated as non-indictable; but this statute does not change the common law. Of the statutes regulating breaches of contract by workmen Mr. Wright (Conspiracy, 59) thus speaks:—

"Where, however, the agreement is for conduct involving a breach of contract by workmen, different considerations occur. Acts have been for many years in force for punishing breaches of contract by workmen of most kinds, and an agreement to break those acts, or to procure a breach of them, may be criminal on the general principles established in the seventeenth section. A difficulty may, indeed, occur at the present time from the fact that 'The Master and Servant Act, 1687,' appears to suspend the provisions of most of the former acts for punishing breaches of contract, and to substitute the discretion of a magistrate as to whether the wrong ought to be regarded as criminal or as merely civil, so that a breach of contract may be thought to be of an indeterminate character, both when it is proposed and when it is executed; nor does there seem to be any case in which the effect of this condition of the law has been considered in its relation to combinations. Either view of its effect is attended with difficulty. On the one hand, the provisions of the nineteenth section, which expressly preserves the procedure by indictment in cases of malicious injury to person or property, may perhaps raise some presumption that procedure by indictment was intended to be excluded in the case of other kinds of misconduct within the preview of the statutes whose penal clauses are suspended. On the other hand, it seems unlikely that the legislature should have intended to relieve without express words from the criminality which has long attached to agreements for breaches of contract, where those breaches were in violation of penal acts."

"Agreements for breaches of contracts of service, in cases to which no penal act applies, seem never to have been determined to be criminal."

In Sheridan's Case, 1868 (Wright's Comp. 50), Lush, J., is said to have ruled that there was nothing unlawful either in a strike for compelling a master to comply with certain regulations, or informing him of the object of the strike, or in picking his premises, so long as there was no violence or intimidation.

In R. v. Shepherd, 11 Cox C. C. 325 (1859), the same view was repeated by the same judge.

Rowland's Case, 2 Den. C. C. 334; 5 Cox C. C. 407; 17 G. & C. 671 (1851), is explained by the fact that "molestation" was made penal under 4 Geo. IV. c. 34. infra, § 1867.

"Neither in Druitt's case, nor in Bunn's case," says Mr. Wright, in his work on Conspiracy, "was there any apparent opportunity of obtaining a confirmation or explanation of the rules laid down for the guidance of the jury by appeal on a case reserved for the Court of Criminal Appeal." See Act of 34 & 35 Vict. determining that no act shall be illegal merely because in restraint of trade.

In a New York case, on a statute making it indictable to conspire to commit acts "injurious to trade or commerce," where journeyman shoemakers conspired together and fixed the price of making coarse boots, and entered into a combination that if a journeyman shoemaker should make such boots for a price below the rate thus fixed, he should pay a penalty of ten dollars; and if any master shoemaker employed a journeyman who had violated their rules, that they would refuse to work with him, and would quit his employment; and carried such combination into effect by leaving the employment of a master workman, in whose service was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge him; it was held that the parties thus conspiring were guilty of a misdemeanor. People v. Fisher, 14 Wend. 5. But this decision goes too far, and cannot now be sustained. Master Smith's Ass. v. Walsh, 2 Daly (N. Y.), 1. Undoubtedly to abscond, by fraud or deceit, all of a particular class of the staples, or currency, or labor, in a community, so as to produce a dearth in any actual necessity of life and in this way to produce misery on one side and extortionate gains on the other, is an indictable offence. 1 Hawk. P. C. 80, n. 3; 3 Inst. 196; 4 Bl. Comm. 156; R. v. Webb, 14 East, 406; R. v. Waddington, 1 East, 143; 7 Dane Ab. 38; Morrie Run Coal Co. v. Barkey Coal Co., 62 Pa. 74, 173. And a fortiori is a conspiracy to effect any of those objects indictable. On the same reasoning a conspiracy by coercion or bribes to compel a raising of wages, or prevent a fellow-workman from obtaining employment, is indictable. Com. v. Hunt, 4 Met. 111. But a mere combination between workmen of a particular group not to go for a particular master except for higher wages, when such a combination does not include the whole market, so as to prevent the employer from obtaining other employes, or when the means adopted by those thus combining are not in themselves unlawful (e. g., intimidation through threats of injury), is not in itself the subject of criminal prosecution. If it were, there were few joint operations for money making which would escape indictment. The
§ 1866. [BOOK II.

CRIMES.

A statute is passed (however impolitic it may be) making it a criminal offence to refuse to work at a fixed price, or to sell a commodity at a fixed price, the courts, should such a statute be held constitutional, would be bound to enforce it. But when there is no such statute, the day is passed, either in England or in the United States, a court is justified in pronouncing indigent a combination of laborers agreeing, in furtherance of this combination, only to work at prices fixed by themselves. And this is not merely because such rulings would unduly impair the liberty of the laborer, and rudely interfere with the adjustment of business relations which depend upon the consent of the parties, influenced by the condition of the markets. These are strong reasons against such interference, but there is another reason, which, if not equally strong, is certainly equally practical. We cannot indict employees who combine, without indicting capitalists who combine. If inadequacy of remuneration be no defence for laborers refusing to invest their labor in an enterprise, then inadequacy of remuneration is no defence to capitalists who decline to venture their capital in enterprises in which laborers might be employed. If in the one case it be a crime to agree to withhold labor from the market, in the other case it is a crime to agree to withhold capital from the market. The capitalist would be compelled by indictment to keep his capital constantly active, if the workman is thus compelled to keep his labor constantly active. But I am entitled to sell either my labor or my capital for what I can get; and if I can do this without penal liability when acting by myself, I can do so without penal liability when acting with others.¹

Regulation of industry would be left, not to private enterprise and experience, but to the criminal courts.

As to Pennsylvania legislation, see Com. v. Haines, 15 Phila. 356.

That a combination to raise wages is not by itself indictable at common law, see 3 Steph. Hist. Cr. Law, 210.

¹ As an illustration of the change of opinion in England in reference to trade unions may be mentioned the following:

On Nov. 13, 1829, a deputation of leading trades unionists, men and women, waited upon the Archbishops of Canterbury, at Lambeth Palace, to request them, as President of the National Society, to induce the Society to withdraw a book containing certain passages from sale, and to stop the reading of those passages in the national schools. The objectional paragraphs, which were quotations from Archbishop Whately's "Lessons on Political Economy," were duly read out to Archbishop Tait, and commented upon by various speakers, with the view of showing their injustice and untruthfulness. Archbishop Tait, while speaking highly of Archbishop Whately, as a liberal statesman, went on substantially to say that when Whately wrote, the science of political economy was in its babyhood, and further thought and discussion, from various points of view, have done much to modify principles and conclusions which he announced with absolute confidence; and, upon the other hand, the action of trade unions has within recent years been moderated by the softening temper and improving manners of the times. The book containing the extracts, it was further announced, was consequently withdrawn from among the publications of the society. London World, Nov. 21, 1879.

For a sketch of English law in this relation, see 3 Steph. Hist. Cr. Law, 203. By the N. Y. Penal Code of 1862, § 673, breach of contract by an employer is made under certain circumstances a misdemeanor.

² The policy of subjecting business combinations of this class to the jurisdiction of the criminal courts is discussed by me in 3 Cr. Law Mag. I (Jan. 1885).

216

CHAPEL XXI. [§ 1867. CONSPIRACY.

At the same time I am not entitled, by force or threat or false pretences, to prevent others from accepting the terms which I reject. To assault, to threaten, for the purpose of obtaining from another anything of value, to obtain anything of value from him by false pretences, are offences either at common law or by statute. If so, conspiracies to effect any of these objects or to use any of these means are indictable at common law.¹

§ 1867. As the gist of the offence, according to the view just stated, consists in the unlawfulness of the means, these means must be set forth. Hence it has been held in Massachusetts, that an indictment which charged that the defendants, journeymen boot-makers, unlawfully, etc., confederated and formed themselves into a club, and agreed together not to work for any master boot-maker, or other person, who should employ any workman or journeyman not a member of said club, after notice given to such master or other person to discharge such workman, contains no sufficient averment of any unlawful purpose or means. An indictment for a conspiracy, it was said, which does not directly aver facts sufficient to constitute the offence, is not aided by matter which precedes or follows the direct averments; nor by qualifying epithets, as "unlawful, deceitful, pernicious," etc., attached to the facts averred.²

Yet the means, when unlawful by statute, need not be given in detail. Thus in conspiracy to injure a tradesman, under 5 Geo. IV. c. 120, it is sufficient to allege that the defendants conspired, etc., by "molesting," "using threats," "intimidating," and "in-

217
CRIMES. [BOOK IV.

§ 1369. toxicating" workmen hired by the tradesman, in order to force them to depart from their work; and also that they conspired, etc., to "molest," and "obstruct" the tradesman and the workmen with the same object, and in order to force him to make an alteration in the mode of carrying on his trade; the words used being those employed in the statute, and it not being necessary to set out the means of molestation, intimidation, etc., more specifically. It was also held, that counts framed upon this statute, which charged that the defendants conspired, etc., by "molesting" and "obstructing," and by "using threats and intimidations," to obstruct such workmen as might be willing to be hired by the tradesman, and to prevent them from hiring themselves to him, were sufficient.

§ 1368. On the same reasoning, a conspiracy to prevent, by means of threats or other unlawful means, an operative from obtaining any employment in his business, is indictable. It is also indictable, as we have seen, to conspire to molest and obstruct workmen, with a view to induce them to leave their employment. But force or threats of force must be used to constitute such an offence. More argumentative appeals to induce an operative to leave his employment are not enough.

§ 1369. It has also been held to be indictable to combine to engross by coercion or fraudulent means, under one control, any particular business staple (e.g., wheat, gold, cotton, coal), so as to force its purchase by the community at exorbitant prices. A learned Pennsylvania judge has gone so far as to say that a combination between miners in a particular market, controlling the coal in that market, to hold up the price of coal in such market, is indictable at common law. "When competition is left free," said Agnew, J., "individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Bloomsburg and Barclay mining regions, and controlling their

entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The influence of a lack of supply, or the rise in the price of an article of such prime necessity, cannot be measured. It permeates the whole mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence." But this cannot be sustained unless the combination acts through coercive or fraudulent means, or involves the absorption of an entire necessary staple. If there is no fraud, or no intimidation, in the means adopted, rulings making penal agreements between particular owners to keep up prices, are open to the following objections: (1) They would be futile. Combinations, if desirable to the owners of a particular commodity to keep up its price, would consist of a tacit understanding, which no legal process could reach. (2) If effective, such rulings would cover every combination to obtain remunerative prices; yet without such a combination, no great staples could be brought into the market. (3) They put a prerogative which can be best exercised by individuals, as the exigencies of the time prompt, into the hands of the State, in defiance of the principle that it is not within the province of the State to do that which can be best done by individuals. (4) They establish a standard which is fixed, and therefore often harsh and oppressive, in place of one which is elastic, yielding to the necessities of the market. A governmental standard once determined by law can only be changed by long and difficult processes. But combinations to keep up prices of staples, even if occasionally operative, are short-lived from their own nature. And if all combinations to keep up prices are made indictable, the only reliable guard against sudden and destructive panics is removed. At the same time a secret combination to obtain control, for extortionate objects, of an entire necessary staple, is an indictable conspiracy at common law. On the same reasoning a "pooling" arrangement between several com-

1 R. v. Rowlands, 9 Eng. Law & Eng. R. 433. See to same case a valuable note by Mr. Moak.
3 R. v. Hewitt, 5 Cox C. C. 182.
4 R. v. Norris, 2 Kenyon, 309. See supra. R. v. Moak, § 1366. As to engaging see further, 15 Cox C. C. 82; 13 Moak's infra, § 1661.
5 Morrie Run Coal Co. v. Barclay Coal Co., 93 Penn. St. 173.
mon carriers, having control of the market, by which arrangement exorbitant tolls are to be charged, is indictable. 3

§ 1370. It has also been said that it is an indictable offence for parties attending an auction to agree together that one only of them should bid for each article sold, and that all articles thus bought by any of them should be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among the several parties concerned in the fraud, though this does not apply to combinations between parties bona fide buying property in a block for a business purpose, and not for the purpose of crushing out competition. 4 It is clearly a conspiracy to agree by fraudulent contrivance to cheat at a mock auction. 4

§ 1371. Whenever there is a combination to oppress or defraud the public by a fraudulent or coercive confederacy, such combination is an indictable conspiracy at common law. 8 Thus an indictment

1 See, to this effect, a remarkable opinion by Judge Grier (afterwards of the Federal Supreme Court), in 1842, when sitting in Pittsburg as a Judge of the State District Court, that a "pooling" combination by which all the transportation companies of a particular region agree to enforce exorbitant prices is an indictable conspiracy. See Whart. Proc. of Indictments, No. 688. In this case the defendants, among whom were some of the most prominent citizens of Pittsburg, were indicted for conspiracy, convicted, and then sentenced; but were then pardoned by the governor. The case was in the Quarter Sessions, June 19, 1842, No. 37. See 7 Penna. Mag. 297. The trial was before Judge Patton, before whom the defendants were convicted and sentenced to a fine of $100 and two months' imprisonment. The case came before Judge Grier before the bill was found, on a writ of habeas corpus. The defendants were pardoned by the governor, who, afterwards, in his annual message, stated that by the conviction alone the "conspiracy" had been broken up. The ruling is good

220

221

law in all cases in which the effect of the pooling is to extort by unreasonable rates. Whart. on Cont. § 442 a.


"The ruling in Levi v. Levi," says Mr. Wright, "may be explained on the ground that had the auctioneer known of the combination he would not have knocked down the goods to any of the persons concerned in it; that his consent to the transfer of property was obtained by a false appearance of competition." Wright's Consipir. 34. Perhaps a better view is that for two or more persons to attempt to get property by deceptive reciprocal references is a cheat at common law, in the nature of the presentation of false tokens.

3 Whart. on Cont. §§ 442 et seq.

4 R. v. Lewis, 11 Cox C. C. 404.

5 See supra, § 1549.

§ 1372. It is well to consider that to conspire to fraudulently tamper with an election is indictable at common law when such election is appointed by the applicatory local law. 12 The same principle extends to elections in private corpora

2 R. v. Bailey, 4 Cox C. C. 360; R. v. Hudson, 8 Id. 305.
3 R. v. Roberts, 1 Camp. 399; Gardner v. Preston, 2 Day, 205. See State v. Clary, 64 Mo. 369.
4 R. v. Tarrant, 4 Bur. 2106; R. v. Tanner, 1 Bp. 584; R. v. Ford, 1 Ad. & El. 769; and see 1 East P. C. 461, 402; 9 M. & S. 4309, supra, § 1302.
6 Com. v. Wringley, 6 Phila. 169.
8 Bloomer v. State, 48 Md. 521.
9 Wharton's Proc. 615, as cited supra, § 1399.
10 Supra, § 1332; infra, § 1330.
12 People v. Powell, 20 N. Y. 86.
13 infra, § 1629; Com. v. Moffs, 97 Penn. St. 527. See 7 Cox App. 16; R. v. Hassam, 1 Don. C. C. 73. An to prosecutions under federal statute protecting civil rights, see supra, § 1356 a.
14 U. S. v. Creshby, 1 Huff. 445; Yarborough, ex parte, 110 U. S. 661; U. S. v. Waddell, 113 Id. 176. infra, § 1845 a.
§ 1373. Thus an indictment for a conspiracy alleged that the defendants, fraudulently conspiring to procure the election of certain persons as directors of an insurance company, and thereby cause themselves to be employed in the service of the company, fraudulently conspired to induce persons, by issuing to them fraudulent policies of insurance, to appear at the annual meeting of the company and vote for directors. It was held, that while the ultimate object of the respondents, that is, to procure themselves to be employed by the company, was lawful, the means were fraudulent, immoral, and illegal, it appearing that the defendants had agreed with the insured that the policies should be held and treated as mere nullities for every purpose but that of authorizing the holders to vote thereon at the annual meeting, although the defendants agreed also that the policies should be duly approved by the requisite numbers of directors, not cognizant of the intended fraud, upon applications in regular form, and although the policies might be binding on both parties.  

§ 1378. The general features of § 5440 of the Revised Statutes of the United States, based on the 30th section of the act of Feb. 3, 1867, have been already noticed. It may be here particularly observed that a conspiracy to defraud the government of revenue is indictable under this statute.

§ 1379. We now recur to the same distinction as was announced in discussing cheats at common law. Mere bragging declarations, being matters of opinion, are not indictable; when, however, there is a combination to induce, by means of artful fabrication of fact, the public to take stock in a worthless concern, then the offenders are guilty of conspiracy. Thus, in an English case, tried 1858, the directors of a joint stock bank, knowing it to be in a state of insolvency, issued a balance sheet showing a profit, and the gist of the offence which this section intended to create. The requirement that some act to effect the object of the conspiracy be done by some one of the conspirators is intended to afford a locus ponendae. Until some act be done by some one of the conspirators to effect the object of the unlawful agreement, all parties to the agreement may withdraw, and thus escape the effect of the statute. After such an act all are liable to the penalty. The act to effect the object of the conspiracy, which the statute calls for, is not designated as an overt act, and was not intended to be made an element proper of the offence. The offence is the conspiracy. Some act by some one of the conspirators is required, to show, not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. The offence of conspiracy is committed when to the intention to conspire is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offence intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation.

If then an indictment correctly charges an unlawful combination and agreement as actually made, and, in addition, describes any act by any one of the parties to the unlawful agreement, as an act intended to be relied on to show the agreement in operation, it is sufficient, although, upon the face of the indictment, it does not appear in what manner the act described would tend to effect the object of the conspiracy. For statute see supra, § 1356.  

1 In an English case determined in 1876, the second count alleged that the defendants, who were directors, etc., of a new company, had conspired to deceive the members of the committee of the Stock Exchange, and to induce them, contrary to the interests of certain of their rules, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to pernuade divers persons, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed, and had complied with the said rules, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange. It was ruled (affirming the decision of the Queen's Bench Division below), that the second count contained averments which, if taken to be proved in a sense adverse to the defendants, sufficiently supported the charge of criminal conspiracy. R. v. Aspinall, 36 L. T. Rep. (N. S.) 297; 13 Cox C. C. 563; L. R. 1 Q. B. D. 720. See Whart. on Cont. § 376.
CRIMES.

§ 1375. Thereupon declared a dividend of six per cent. They also issued advertisements inviting the public to take shares, upon the faith of their representations that the bank was in a flourishing condition. On an ex officio information filed by the attorney-general they were found guilty of a conspiracy to defraud.

§ 1375. It has been already observed, that a conspiracy to corruptly procure office is indictable. In an early Virginia case it was held indictable for two justices, in whom was vested certain county nominations, to agree that one would vote for A as commissioner, if the other would vote for B as clerk. But if this principle be logically extended, few legislative or executive compromises could stand.

2. E. v. Pullman, 2 Camp. 229. Supra, § 1371. As to bribery, see infra, § 1563.
4. This principle, however, was declared by the late Judge B. R. Curtis, in his address on behalf of the Whig representatives to the people of Massachusetts, to apply to the coalition, in 1861, of the Free Soil and Democratic representatives in the Massachusetts legislature; the purpose of which coalition was the election of Democrats to State offices and a Free Soil to the U. S. Senate. He thus characterizes it—

"But this is not a coalition. A compact between two distinct parties, having different political principles, for the purpose of dividing public offices between them,—a compact to do this by electing a man for governor in whom the one party does not confide,—is not a coalition, but a factional conspiracy. And when such a compact is made between those who have merely a delegated authority, held in trust, to be used, under the sanction of an oath, to place in office only those in whom the trustees do confide, it is a factional conspiracy to violate a public trust, and as such criminal, not only in morals, but in the law of the land. It is true the statute of the State has not defined this offense, as it has failed to do others. . . .

But the common law which pervades society, and extends into the relations of life both public and private, with its benign but bracing influence, deems such an abuse of a public trust a misdemeanor, punishable by indictment. And there is high authority that a bargain like this, even when made by single persons, and in reference to subjects of far less public concern than this, is an indictable offense. In the year 1855, a case came before the highest criminal court of one of our sister States, wherein it appeared that A and B, were justices of the peace, and as such had the right to vote in the county court for certain county officers; that they agreed together that A would vote for C. for commissioner, in consideration that B would vote for D. for clerk; that they voted in pursuance of that agreement. The statute of the State, like ours, did not reach the case. But their common law, the same as ours, declared: 'The defendants were justices of the peace, and as such held an office of trust and confidence. In that character they were called upon to vote for others, for offices impliedly high trust and confidence. Their duty required them to vote in reference only to the merit and qualifications of the officers; and yet, upon the pleadings in this case, it appears that they wickedly and corruptly violated their duty, and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain, or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior their qualifications to their competitors. It would seem, then, upon these general principles, that the offense in the information is indictable at common law.'


This is the manly and clear response of the common law,—the inheritance of our fathers and ourselves,—not only in that State, but wherever it prevails. And now what are the differences between that crime and the case we lay before you? The parties to that bargain were the electors in the court of a county; the parties to this bargain were electors in the legislature of Massachusetts. The parties to that bargain were two individuals, and their compact controlled two votes; the parties to this bargain were numerous, and their compact controlled many votes; and every reflecting man must see that a conspiracy becomes more criminal the more persons it embraces, and the more power it wields. The parties to that bargain made it 'without reference to the qualifications of the candidates'; the parties to this bargain entered into it with an open declaration that one of the candidates was distrusted by one party, and the person who has to be voted for by the other party was not even selected, nothing being known, except that he was not to act on the principles which one of the parties who were to vote for him had long professed to hold dear. The subjects of the bargain in that case were a county clerk and a county commissioner; the subjects of this bargain were the governor of Massachusetts and one of its senators in the Congress of the United States. And finally, in that case, it does not appear that the officers voted for by the criminals were actually elected; while in this case it is known that this corrupt agreement made one man governor, and caused another to be declared elected a senator in Congress.'


In Marshall v. R. R., 16 How. U. S. 336, the court said, though this was not the point before them, 'that what in the technical language of politicians is termed long-rolling, is a misdemeanor at common law, punishable by indictment.'

1. People v. Powell, 63 N. Y. 88.
2. Shircliff v. State, 98 Ind. 300.
§ 1876. A conspiracy to falsely charge a man with any indictable offence has frequently been held the subject of indictment;1 but it is not an indictable offence for two or more persons to consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion.2 The proof of guilt, however, must be confined in the latter case to the offence charged.3

§ 1877. Even the legal conviction of an innocent man is no bar to an indictment against those who by such combination procured the conviction.4 And an indictment was sustained against three defendants for a conspiracy in combining to arrest one C. O., a resident of the county of Philadelphia, on the false charge of deserting the army of the United States, in the year 1817; and after arresting him, in forcibly carrying him to New York, for the purpose of obtaining the reward of $30, which had been offered by the government for the arrest and safe delivery of a soldier who had deserted by that name.5

It has been held a conspiracy to combine to induce a tavern-keeper to furnish beer on Sunday, and thus to violate the Sunday liquor law.6

1 Foster, 130; 1 Hawk. c. 72, s. 2; Ashley’s Case, 12 Co. 80; R. v. McDaniel, 1 Leach, 45; R. v. Spagg, 2 Burr. 959; R. v. Best, 2 L. Raym. 126; Salk. 174; Comm. v. Tabbett, 2 Mass. 356; Elkin v. People, 88 N. Y. 177; State v. Buchanan, 5 Har. & J. 317; Johnson v. State, 2 Dush. 318; Shearn v. People, 22 Ill. 76. See Davenport v. Lynch, 6 Jones, N. C. 545.

As to extorting bush money see R. v. Hollingsberry, infra, § 1379. That a conspiracy to slander is indictable see State v. Hickling, 41 N. J. L. 206, 1879. Infra, § 1379.

Assumptions for the purpose of extortion are elsewhere discussed. Infra, § 1604.

2 R. v. Best, 1 Salk. 174; 2 L. Raym. 1167; Comm. v. Tabbett, 2 Mass. 356; Comm. v. Leeds, 9 Phila. 568; Comm. v. Dupuy, Brightly, 44. See to as associations to detect crime, Wm. Cr. Pl. & Pr. § 526; People v. Saunders, 25 Mich. 120.


4 Comm. v. McLean, 2 Parsons, 267.

5 Ibid. A count in an indictment for conspiracy, averring that defendants corruptly charged one with being the father of a child to be born bastard, and did various acts to effect the object of the conspiracy, is good. Johnson v. State, 2 Dush. 313.


§ 1378. When the object of the combination is to indict the prosecuting a person who was not guilty, it is inadmissible to prove that the defendants prosecuted other persons who were not guilty, no system being set up. State v. Walker, 32 Me. 353.


2 R. v. Hollingsberry, infra. In this case it was held that the means of extortion need not be stated. See to as threats to extort money, infra, § 1064.

3 Gibson, C. J., in Howard v. Palm, 8 Barr. 337; State v. Hickling, infra, § 1376.


§ 1380. Any confederation whatever, tending to obstruct the course of justice, is indictable.8 Thus, a conspiracy by certain justices of the peace to certify that a highway was in repair, when they knew it to be otherwise, was So to ob. struct pubi. justice, was
hold indictable. So where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such case, and the party who accordingly committed the robbery was afterwards convicted and actually executed, they were indicted for the conspiracy and convicted. It is indictable to conspire to destroy a will, with a view to defraud the devisee. And the same rule applies where the offence is the suppression or false concealment of testimony to be used in a judicial proceeding.

V. GENERAL REQUIRMENTS OF INDICTMENT.


§ 1381. When the conspiracy is executed it is better that the facts should be stated specially, so that not only the record may present a graduated case for the sentence of the court, but also that the case, when it goes to the jury, may not be open to the objection that the grand jury having it in their power, from the examination of the witnesses for the prosecution, to find specially the agency through which the conspirators worked, confined themselves to a general finding of an unexecuted conspiracy. It is not pretended that any of the cases go so far as to prescribe this doctrine, nor is it denied that very frequently, especially in the earlier cases, the courts have sustained counts for unexecuted conspiracies (e.g., conspiracies to cheat by false pretences), where on the trial it appeared that the supposed naked conspiracy had been fully executed, and had resolved itself into an independent misdemeanor. But wherever there has been such execution of the conspiracy, it is prudent to include in the indictment at least one count setting forth specially the overt acts.

2 R. v. McKee, 1 Leach, 45; Fost. 130.
3 State v. De Witt, 2 Hill (S. C.), 263.
5 Supra, §§ 1334 et seq.
6 U. S. v. Crane, 92 U. S. 542; State v. Clary, 64 Me. 369; State v. McKinstry, 50 Ind. 465; Elkin v. People, 28 N. Y. 177.
7 Supra, § 1349.

SUPRA, § 1356.

Overt acts not necessary when conspiracy is per se unlawful.

§ 1352. Hence it is usual to set out the overt acts, that is, those acts which may have been done by any one or more of the conspirators, in pursuance of the conspiracy, and in order to effect the common purpose of it; but this is not requisite, if the indictment charge what is in itself an unlawful conspiracy. The pleading of the offense is complete in the conspiracy; and the overt acts, though it is proper to set them forth, may be either regarded as matters of aggravation, or discharged as surplusage. As has already been seen, in an indictment for conspiracy at common law to effect objects prohibited by a statute, it is enough to follow the words of the statute, without giving overt acts.

§ 1383. How far the overt acts can be taken in aid in charging the part, is thus discussed by Tindal, C. J. —

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CRIMES. [BOOK II.

Overt acts useful as explaining the conspiracy charge.

"But it was then urged by the learned counsel for the crown that supposing these objections to be well founded, this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment the part stating the overt acts, as well as that stating the conspiracy; and Rex v. Spragg 1 was cited as authority that the whole ought to be read together. The point decided in that case appears to have been merely this, that in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without proper cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor.

But if we examine the allegations in this indictment, there is not sufficient description of any act, done after the conspiracy, which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals, upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and if it is said that because it is averred to have been done in pursuance of the conspiracy above mentioned, it must be taken to be an equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods; and, secondly, another answer is, that if the averment is to be taken to be equivalent to one that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective, as not containing a direct and positive averment that he did conspire to cheat and defraud these persons, which an indictment for a conspiracy, where the conspiracy itself is the crime, ought certainly to contain." 3 At the same time, overt acts may be used as indicating the object of the conspiracy. 5 And such overt acts are divisible. 6

§ 1884. In several jurisdictions overt acts are by statute made essential to conspiracy. Yet it is not necessary that these acts should be completed. If they be in any way embodied into shape, it is enough. 4 In Illinois they need not be set forth. 5

Overt acts may be required by statute.

2. Unexecuted Conspiracies.

§ 1885. Where the conspiracy is unexecuted, and nothing more is likely to appear in evidence than a mere impotent confederacy on the part of the defendants to do an indictable act, it would seem prudent to explain the fact of the non-setting out of the features of the offence by stating that it was never consummated, and that the grand jury therefore were ignorant of its particular character. Thus, in a

1 See, to same effect, Conn. v. Shedd, 7 Cush. 514; People v. Arnold, 46 Mich. 293.

2 R. v. Edsall, 1 F. & F. 213. This has been reaffirmed in the following case: An indictment averred that C. died possessed of East India stock, leaving a widow; that the defendants conspired, by false pretenses and false swearing, to obtain the means and power of obtaining such stock; that, in pursuance of such conspiracy, they caused to be exhibited in the Prerogative Court of Canterbury a false affidavit made by one of them, in which the deponent stated that C.'s widow had died without taking out administration to C., and that defendant was one of her children; and that the defendants fraudulently obtained for defendant, as one of the children of C., a grant of administration on his estate. On motion to arrest the judgment, on the ground that a charge of conspiracy to obtain the means and power of obtaining the stock did not describe any offence, it was ruled that the statement of the overt act done in furtherance of the objects of conspiracy was so interwoven with the charge of conspiracy itself, as to show an unlawful conspiracy. Wright v. R. (in error) 14 Q. B. 1748. But it was held, that at all events the overt acts in themselves constituted a misdemeanor on which the court could legally pronounce judgment. Ibid.

3 See Whart. Cr., Pt. I., § 133.

4 People v. Mathur, 4 Wend. 299; People v. Chance, 16 Barb. 493; State v. Norton, 3 N. Y. 39; State v. Porter, 26 Iowa, 524; State v. Stevens, 30 Id., 389. See infra, § 1400; supra, § 1335.

5 See supra, § 1335.

6 Cole v. People, 84 Ill. 315.
leading case already cited, Tindal, C. J., pointedly intimates that where the prosecutor is shown to have had it in his power to describe any of the objects of the conspiracy, a failure to do so is a sensible defect; and his reasoning leads to the position that, where a material gap exists, the pleader should aver specially the reasons why the description of the offence is not complete. That this course is pursued in indictments for forgery, where the grand jury are unable to describe the forged instrument from the facts of its loss or destruction, is shown, and the same reasoning may be not inapplicable applied to the present case. At the same time it is clear that when the conspiracy is to do an act per se indictable, neither means nor overt acts need be stated.¹

§ 1386. Whenever the court deem it necessary, a bill of particulars may be required.


§ 1387. The policy of our courts, as has already been seen in a kindred line of offences, has permitted a joinder of counts, which, though originally disallowed in England, can work no injustice to the prisoner, and may save great expense and loss of time. Thus, counts for robbery and for attempts to rob; for rape and attempts to ravish; for burglary and attempts to commit burglary, are frequently joined in the same indictment.² When the defendant is tried on the two charges together, he has the advantage of being tried to bear on the lighter offence the full number of challenges awarded to him on the heavier; nor can he be said to be embar-


CHAP. XXI. ]
CONSPIRACY.

§ 1888. A conspiracy must be by two persons at least: one cannot be convicted of it, unless he has been indicted for conspiring with named persons, or with persons to the numbers unknown.³ So on an indictment for conspiracy against two, the acquittal of one is the acquittal of the other.⁴ But where three persons were engaged in a conspiracy, and one was acquitted and another died before trial, it was held that the third could nevertheless be tried and convicted.⁵ Whether a conviction can take place when two defendants being joined, one of them was insane at the period of the alleged offence, has been rightly questioned.⁶ Certainly if one defendant is incom-

1 See supra, § 1344.
2 R. v. Barry, 4 F. & F. 369. Two or more persons necessary to offence.
3 supra, §1334.
4 State v. Tom, 2 Dev. 869.
5 People v. Obst, 2 Johns. Cas. 301.
6 supra, § 1334.
7 State v. Kimmervely, 1 Sri. 103; R. v. Nicolls, 2 Ibid. 1297; R. v. Kenrick, 5 Q. B. 49; D. & M. 508. infra, § 1329.
8 Brackenridge's Law Miscellaneous,

164; as to effects of allegation "unknown," see Whart. Cr. Pl. & Pr. §§ 104, 111. infra, § 1334.
104, 111. infra, § 1334.

136; as to convictions, ² 535; see supra, § 1344.
1 See supra, § 1334.

§ 1390. It is within the discretion of the prosecution to include only as many of the alleged co-conspirators in the indictment as it may deem expedient; and the non-joinder of any such, provided there is enough alleged on the record to constitute the offence aliquando, is not matter for exception, although the party omitted was a particeps criminis. Nor is it necessary that a co-conspirator referred to, either specifically or as a person unknown, should be indicted.

§ 1391. Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried.

§ 1392. A man and his wife, being in law but one person, cannot be convicted of the same conspiracy, unless one or more other parties are charged and proved to be concerned. But it is otherwise of a conspiracy consummated before their marriage.

§ 1393. An indictment charging the defendant with conspiracy with persons unknown is good, notwithstanding the names of some of the persons alleged unknown must necessarily have transpired to the grand jury. But it might be otherwise if all the co-conspirators were known to the grand jury.

§ 1394. On indictments for conspiracy the judgment should be against each defendant severally, and not against them jointly.

§ 1395. Where two or more persons have been convicted of a conspiracy, a new trial of one involves a new trial of all.


§ 1396. It is essential to set forth the names of the parties to be injured if they are capable of definite ascertaining, unless a good reason be given for their non-specification. Thus, Tindal, C. J., is no ground of severe de novo for a mis-trial if the trial proceeds against both, no suggestion of the death being entered on the record. R. v. Kenrick, 5 Q. B. 49; R. v. Nicholls, 15 B. & C. 422; supra, § 1388; infra, § 1407.


Where an indictment charged a man and his wife with conspiring with a person unknown to extort bough-money, etc., it was held that A., although alleged by the prosecution to be the person averred unknown, was admissible as a witness for the defence, he not appearing to be a party on the record. Com. v. Wood, 7 Bost. Law Rep. 65.

In a case in 1851, before the Queen's Bench, the defendants, A., B., and C., were charged with conspiring "with diverse persons unknown." The evidence applied only to A., B., and C., none being given as to the "persons unknown." The jury found that A., had conspired with either B. or C., but that they could not say which. Lord Campbell, C. J., said: "I think that under those circumstances the verdict against A. cannot be supported.

It is concurred, that if there be an indictment against two persons for a conspiracy, the acquittal of one must invalidate the conviction of the other. Then, I cannot draw a distinction between the cases of two and of three persons, if one only is found guilty. If three are indicted, and two found not guilty, the third must also be acquitted. But then it is argued that B. and C. may be included in the words, dates persons to the jurors unknown; but I cannot say that they can come under the category of persons who were not known to the jury." R. v. Thompson, 4 Eq. L. & Eq. 287; 16 Q. B. 322; 5 Cox C. C. 126; R. v. Denton, Deas. 166; 6 R. v. Delfont, Deas. C. C. 3.


4 Com. v. McAlpin, 2 P. & M. 231.

said: "Mr. Pashley, for the plaintiffs in error, argued that the
indictment was bad, because it contained a defective state-
ment of the charge of conspiracy; and we agree that it is
defective. The charge is, that the defendants below conspired to cheat and defraud divers liege subjects, being
tradesmen, of their goods, etc.; and the objection is, that these
persons should have been designated by their Christian and surnames,
or an excuse given, such as that their names are to the
jurors unknown; because this allegation imports that the intention of
the conspirators was to cheat certain definite individuals, who must
always be described by name, or reason given why they are not;
and if the conspiracy was to cheat indefinite individuals, as,
for instance, those whom they should afterwards deal with or afterwards
fix upon, it ought to have been described in appropriate terms,
showing that the objects of the conspiracy were, at the time of
making it, unascertained, as was in fact done in the case of Rex v.
De Berenger, 2 and The Queen v. Peck; 3 and it was argued that if,
upon the trial of this indictment, it had appeared that the intention
was not to cheat certain definite individuals, but such as the conspi-
rators should afterwards trade with or select, they would have
been entitled to an acquittal: and we all agree in this view of the
case, and think that the reasons assigned against the validity of this
part of the indictment are correct."

Where, therefore, the persons injured were defined at the time of
the conspiracy, and ascertainable by the pleader, their names should
be specified in the indictment. 4 Where, however, the conspiracy
was to defraud a class not capable of being at the time resolved
into individuals, or to defraud the public generally, then the specifi-
cation of names is impracticable, and hence unnecessary. 5

An intent to cheat A. as an individual is not sustained by evi-
dence of an intent to cheat the public generally. 6

1 R. v. King, 7 Q. B. 806, reversing S. C., 7 Q. B. 792; D. & M. 741. See
3 3 M. & S. 67. 9 Ad. & El. 486. 4 See People v. Arnold, 46 Mich.
6 infra, § 1405.
VI. EVIDENCE.

Proof of Conspiracy.

§ 1398. The actual fact of conspiring may be inferred, as has been said, from circumstances, and the concurrence of the defendant need not be directly proved. Any joint action on a material point, or collocation of independent but cooperative acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer conduct by an innocent agent of one of the conspirators for this purpose. In Bernard's Case, 1 F. & F. 240 (see supra, § 287), a question occurred whether a person could be indicted in England for having counselled in England the murder of an alien in Paris. The defendant was acquitted; and the point was not determined; but in 1861 the 24 & 25 Vict. c. 100, s. 4, provided for conspiracies and other offences of this kind, not, however, by applying to them the general clauses relating to accessories, but by a special enactment making the offence a misdemeanour. See 1 Russ. by Gr. 700, 907; and see, also, supra, §§ 979, 987 et seq. In Kohn's Case, 4 F. & F. 68 (1864), a conspiracy was formed in England by the defendant and others for casting away a foreign ship in order to prejudice the underwriters. The ship was scuttled, when out of the jurisdiction, by the defendant and others, who appear all to have been foreigners. Willes, J., is reported to have told the jury that the ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal in our law. And this case does not raise the question which arose in R. v. Bernard, as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. For the principal offence . . . the prisoner could not be indicted in this country, as he is a foreigner, and the ship was foreign, and the offence was committed on the high seas." Rocque, at supra. But see fully, supra, § 287.


§ 1399. All who join a conspiracy at any time after its formation become conspirators; and, as will be seen, the prosecutor may go into general evidence of the conspiracy, before he gives evidence to connect the defendants with it. It is not necessary, therefore, to show a conspiracy in prior stages unnecessary.

1 R. v. Cope, 1 Sta. 144; Com. v. Crowninshield, 10 Pick. 467.
2 R. v. Murphy, 8 C. & P. 297; Com. v. Warren, 8 Mass. 72.
3 "The prosecutions for criminal conspiracies," says Judge King, "the proof of the combination charged must almost always be extricated from the circumstances connected with the transaction which forms the subject of the accusation. In the history of criminal administration, the case is rarely found in which direct and positive evidence of criminal combination exist. To hold that nothing short of such proof is sufficient to establish a conspiracy would be to give immunity to one of the most dangerous crimes which infect society. Hence, in order to discover conspiracies, we are forced to follow them through all the devious windings in which the natural anxiety of avoiding detection teaches men to circumstances to envelop themselves, and to trace their movements from the slightest, but often erring, marks of progress which the most shrewd cunning cannot so effectually obliterate, as to render them unaccountable to the eye of the sagacious investigator. It is from the circumstances attending a criminal, or a series of criminal acts, that we are able to become satisfied that they have been the result not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; but which may be so linked together by circumstances, in themselves slight, as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole; that they have sprang from a common object, and have in view a common end. The adequacy of the evidence in prosecutions for a criminal conspiracy to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury." Com. v. McClean, 2 Barb. 363, 363-9. See to same effect, R. v. Parsons, 1 W. Bl. 502; R. v. Whitehouse, 6 Cox C. C. 38; U. S. v. Babcock, 3 Dill. 551; U. S. v. Graff, 14 Blatch. 495; U. S. v. Cole, 5 McLean, 518; Kelley v. People, 65 N. Y. 666; Nendeser v. Kohlberg, 81 N. Y. 237; People v. Lyon, 40 N. Y. 623; Tarbox v. State, 38 Ohio St. 581; Bloomer v. State, 48 Md. 521; State v. Arnold, 48 Iowa, 661; Jones v. State, 64 Ind. 462; State v. Sterling, 34 Iowa, 443; Hardin v. State, 4 Tex. App. 386; Loggins v. State, 13 Id. 211.


§ 1400. CRIMES. [BOOK II.

Meplicity of the defendants in the preliminary stages of the offence. Thus, on an indictment for a conspiracy to defraud by false representation of solvency, it was held by Lord Campbell that defendants may be convicted who had no knowledge of the transactions which resulted in insolvency, provided they were aware of the result, and concurred in the representations in furtherance of the common design, even though they did so with no motive of particular benefit to themselves.\(^1\) Nor does the entrance of new parties affect the identity of a conspiracy.\(^2\)

§ 1400. The offence of conspiracy, so it is said, is rendered complete by the bare engagement and association of two or more persons to break the law, without an overt act committed by the conspirators;\(^3\) but this must be construed to mean a conspiracy evidenced in fact, since it is impossible to see how a conspiracy can be proved except by adding facts which are more or less overt acts. A word or a sign is as much an overt act as a battle, yet no conspiracy can be proved without proving words or signs.\(^4\) But in any view the active consent of two or more is essential.\(^5\)

If any overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties.\(^6\)

If any overt act is introduced as descriptive of the offence and as limiting the conspiracy charge, a variance in the statement of the act is fatal.\(^7\) It is otherwise when the conspiracy charge is complete in itself, in which case the overt act may be treated as surplusage. In some jurisdictions, as has been seen, overt acts are essential to the offence.\(^8\)

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1. Queen's Case, 2 Brod. & Bing. 234. Supra, § 1309.
3. The authorities are thus noticed by Sir J. F. Stephen, Recr. Cr. Ev. 414:

"It is a question of some difficulty how far it is competent for the prosecutor to show, in the first instance, the existence of a conspiracy amongst other persons than the defendants, without showing, at the same time, the knowledge or concurrence of the defendants, but leaving that part of the case to be subsequently proved. The rule laid down by Mr. East is as follows: 'The conspiracy or agreement among several to act in concert for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner, and this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts.'" 1 East P. C. 96. But it is observed by Mr. Starkie that in some peculiar instances in which it would be difficult to establish the defendant's primity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's primity. 2 Stark Ev. 234, 24 ed. So it seems to have been considered by Mr. Justice Buller, that evidence might be, in the first instance, given of a conspiracy, without proof of the defendant's participation in it. "In indictments of this kind," he says, "there are two
§ 1402. But it needs something more than a proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy. There must be shown some sort of active participation by the parties charged. Of this we have an illustration in an English trial before Martin, B., where certain wharfingers and their servants were indicted for a conspiracy to defraud by false statements as to goods deposited with them and insured by the owners against fire. It was held, that evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters, and that afterwards the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing the falsehood and knew of the devices used to conceal it, was not sufficient to sustain the charge of a fraudulent conspiracy between the employers and servants. There must be a concurrence in the common design. And we may also hold that mere sympathy with a conspiracy not exhibiting itself in overt acts does not make a person a co-conspirator.

§ 1403. Any material variance as to the means used is fatal.

things to be considered: first, whether any conspiracy exists; and next, what share the prisoner took in the conspiracy. He afterwards proceeds, Before the evidence of the conspiracy can affect the prisoner materially, it is necessary to make out another point, viz. that he consented to the extent that the others did. R. v. Hardy, Gurney's ed. vol. 1, pp. 308, 309; 2 Stark. Ns. 254, 25 ed. It has since been held, that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case was said to fall within R. v. Hunt, 3 B. & Ald. 566, where evidence of drilling at a different place two days before, and issuing an enormous person, was held receivable. R. v. Free, 9 C. & P. 129; 2 Russ. by Greave, 700. See infra, § 1404.

1 See supra, §§ 211 d, 227, 1541 n.
2 supra, § 327.
4 R. v. Boulton, 12 Cox C. C. 87.
5 supra, § 211 d; State v. Cox, 65 Mo. 29; Commonw. v. State, 1 Wis. 199; People v. Lith, 52 Cal. 251.
6 R. v. Whitehouse, 6 Cox C. C. 38.
8 In R. v. Whitehouse, supra, the indictment alleged that I. W., C. W., and J. W., being persons in indigent circumstances, and intending to defraud trademark who should supply them with goods upon credit, conspired to cause J. W. to be reputed and believed to be a person of considerable property and in a difficult circumstances, for the purpose and with the intent of cheating and defrauding divers persons, being trademark, who should bargain with them for the sale to I. W. of goods, the property of such last-menioned persons, of great quantities of such goods, without paying for the same, with intent to obtain to themselves money and other profits. This, it was held, was not supported by proof that C. W. and J. W., being the wife and daughter of I. W., represented that they were in indigent circumstances, their income being interest of money received monthly; at another time, when engaging lodgings, that they were not in the habit of living in lodgings, and that they obtained various goods from trademark on credit, under circumstances that showed an intent to defraud, but no proof being adduced that those goods were obtained by reason of any of those general statements. It was further ruled that a count charging the defendants with conspiring, by divers subtle means and false pretences, to obtain goods and chattels from a trademark, without paying for them, with intent to defraud him thereof, is supported by proof of overt acts from which a conspiracy may be inferred, without proof of any such false pretence as is required in an indictment for obtaining goods by false pretences. Ibid.

§ 1404. Whether, in an indictment for a conspiracy to commit a wrong, evidence of an attempt about the same time, by the same defendants, with the same or similar means, to commit a similar wrong, has been elsewhere generally discussed. On the one hand, it is argued that such
evidence was proper to show the conspiracy; on the other, that it should be excluded as showing a distinct and substantive offence. On an indictment tried before Lord Ellenborough, at nisi prius, charging that the defendants, being persons of evil fame, and in low and indigent circumstances, conspired together to cause themselves to be reputed persons of considerable property, and in opulent circumstances, for the purpose of defrauding one A. B., evidence being given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune, a witness was called to show that at a different time they had made a similar representation to another tradesman. It was objected that the evidence formed a new offence; and that the prosecutor having elected in his indictment to press a particular charge, it was not just to enable him to spring another on the defendants without notice. The court, however, admitted the evidence, and the defendants were convicted. But in a later case, where the defendant was charged with conspiring with other persons unknown “to cheat and defraud J. D. and others,” and the overt acts laid were, that the defendant did falsely pretend to J. D. that he was a merchant named G., and did, under color of pretended contract with J. D., for the purchase of certain goods of “the said J. D. and others,” obtain a large quantity of the goods “of the said J. D. and others,” with intent to defraud “the said J. D. and others,” it was held by the judges that the words “and others,” throughout this indictment, must be taken to mean the other partners of J. D., and not other persons wholly unconnected with J. D., and that, on the trial of the indictment, was part of a system with that under trial. Tarbox v. State, 38 Ohio. St. 581.

In R. v. Hunt, 9 B. & Ald. 666, it was held that on an indictment for conspiring and unlawfully meeting for the purpose of exciting discontent and dissension, resolutions passed at a former meeting, in another place, and at which one of the defendants presided, the professions of which meeting was to fix the meeting mentioned in the indictment, are admissible to show the intention of such defendant in assembling and attending the meeting in question, at which he also presided.

It was further held that on proof of systematic co-operation between several bands of rioters, the various misconduct of the members of one band was admissible against the members of another band. See Whart. Cr. Br. §§ 23 et seq.


§ 1404.] CRIMES. [BOOK II.

§ 1404. Evidence was not admissible to show that the defendant attempted to defraud other persons wholly unconnected with J. D.1

§ 1405. Each co-conspirator is liable for the overt acts of his confederates, committed in pursuance of the conspiracy, during its continuance; and it has been shown that each is liable in the place of an overt act.2

§ 1406. The declarations of one conspirator, in furtherance of the common design, are admissible against his co-conspirators, though such declarations cannot be received if made after the termination of the conspiracy, nor are they admissible to prove the conspiracy.3 A party acting as a decoy cannot be regarded as a co-


On an indictment for a conspiracy in inveigling a young girl from her mother’s house, and retailing the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been relieved on a habeas corpus, was allowed to be given in evidence. Resp. v. Hervis, 2 Yeates, 134. So where the defendants were charged with a conspiracy, in several counts, alleging several conspiracies of the same kind on the same day, the prosecutor was permitted to give evidence of several conspiracies on different days. R. v. Leroy, 2 Stark. 466; but see R. v. Steel, C. & M. 337.


3 Supra, §§ 287, 1397. See Whart. Cr. Br. § 693.

4 Whart. Cr. Br. §§ 695 et seq., where the cases are given in detail. See, also, supra, §§ 213-234. "It seems to make no difference as to the admissibility of this evidence, whether the other conspirators be indicted or not, or tried or not; for the making of them co-defendants would give no additional strength to their declarations as against others. The principle upon which they are admissible at all in that the acts and declarations are those of persons united in one common design; a principle wholly unaffected by the consideration of their being jointly indicted." 2 Stark. Br. 237, 2d ed., supra, p. 88. Where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a chartist association, and that Jones was also a member, and that in the evening of the 5th of November the defendant had been at Jones’s house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones, in the forenoon of the same day, to certain parties to meet on the race-course, was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to the New Inn, it was held, that what Jones said at the

245
§ 1407. CRIMES. [BOOK II.

Conspirator, so as to make those with whom he acts responsible for what he does. 1

VII. VERDICT.

§ 1407. Two or more defendants must be joined to constitute the offence; and if only two are joined, an acquittal of one is an acquittal of the other, unless there be allegation and proof of co-defendants unknown. 2 Nor can a conviction of one of two co-conspirators be sustained when the jury do not agree as to the other. 3 A husband and wife cannot be joined as the sole conspirators. 4

New Inn was admissible, as it was all part of the transaction. E. v. Sheppard, 9 C. & P. 277. The letters of one of the defendants to another have been, under certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participant in the fraud. R. v. Whitehead, 3 Dow. & Ry. N. P. 61. 5 Roco. Cr. Rv. p 418.

1 Williams v. State, 55 Ga. 391.
4 Supra, §§ 1337-9, 1322-3; Whart.
5 Cr. Pl. & Pr. 305.

Where a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. O'Connell v. R., 11 Cl. & P. 164.

Upon a count in an indictment against eight defendants charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that five of them are guilty of conspiring to effect some, and not guilty as to the residue, of these objects, is bad in law and repugnant; inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. Ibid.

In a case already noticed (supra, § 1343), A. was indicted for conspiring with Y. and Z., and other persons to the jurors unknown. The evidence was confined to A., Y., and Z., and the jury were of opinion that A. conspired with either Y. or Z., but said that they did not know with which. Y. and Z. were thereupon both acquitted. It was held that A. was entitled to be acquitted also. R. v. Thompson, 16 Q. B. 532; 5 Cox C. C. 168; R. v. Denison, Dears. C. C. 3.

As has been already seen, where one defendant in conspiracy dies between the indictment and trial, it is no ground of a non sui causa for a mistrial, if the trial proceeds against the remaining defendants. Ibid.
CHAPTER XXII.

NUISANCE.

I. GENERAL CONDITIONS.

Nuisance must be an offense to the community at large, § 1410.
Not enough if offense is special, § 1411.
Not necessary that nuisance should be detrimental to health, § 1412.

Offence against public advantage, not indictable, § 1413.

Annoyance must be reasonably such, § 1414.

Prescription no defence nor recency of population, § 1415.
Collateral public advantage no defence, § 1416.

No defence that similar nuisances existed, § 1417.

No defence that thing complained of has no other place, § 1418.

Prior conviction no defence, § 1419.
Want of evil intent is no defence, § 1420.

Nec sit good intent, § 1421.

All concerned are principals, § 1422.

Persons undertaking public duties liable for neglect, § 1423.

A licence from government no excuse for nuisance, § 1424.

Nuisance must be in causal relation with defendant's act, § 1425.

II. JURISDICTION. See supra, § 296.

II. ADMISSION FOR.

Nuisance may be stopped by abatement, § 1426.

IV. PROOF.

Nuisance to be proved inferentially, § 1430.

V. OFFENCES TO RELIGION.

Whatever shocks the common religious sense is a nuisance, § 1431.

Unnecessary labor on Sunday a statutory offence, § 1431 a.

Limitations as to kind of labor, § 1431 b.

Necessary occupations excepted, § 1431 c.

VI. OFFENCES TO PUBLIC DECENCY.

Whatever shocks public decency is indictable, § 1432.

Indecent treatment of dead body, § 1432 a.

Noise and indecent conduct on public streets, § 1432 b.

VII. OFFENCES TO HEALTH.

Whatever is likely to generate disease may be a nuisance, § 1433.

As in case of exposure of putrid or infectious food or drink, § 1434.

But mere unwholesomeness is not sufficient, § 1435.

And so as to communication of diseases, § 1436.

VIII. OFFENCES TO INDUSTRIES.

Nuisances when in populous places, § 1438.

And so in city limits, § 1439.

CHAP. XXIII.

NUISANCE.

Whether such industry must recede in other cases is a question of expediency, § 1440.

IX. EXPLOSIVE AND INFLAMMABLE COMPOUNDS.

Must be carefully kept, § 1441.

X. NUISIBLES OF PERSONAL DEPARTMENT.

Common scolds are indictable at common law, § 1442.

And so of common drunks, § 1443.

And so of common brawlers, § 1445.

And so of common hangers-on, § 1445.

And so of common swearers, § 1445.

And so of persons habitually and openly lewd, § 1446.

And so of common drunkards, § 1447.

And so of false newspaperers, § 1448.

XI. BAWDY, DISORDINARY, AND TIPPLING-HOUSES.

Bawdy-house and disorderly house indictable at common law, § 1449.

Enough of facts constituting nuisance to be averred, § 1450.

Character of house to be proved inferentially, § 1451.

Bad reputation of visitors admissible, § 1452.

Ownership to be proved inferentially, § 1453.

Tipping houses indictable at common law, § 1454.

Married woman indictable for keeping house, § 1455.

Proof of general nuisance is enough, § 1456.

Evidence not to be terrorized, § 1457.

A room or a tent may be a "house," § 1458.

Letting house of ill-fame indictable at common law, § 1459.

Cognizance of object sufficient, § 1460.

XII. GAMES.

Scandalous or disorderly games are indictable, § 1461.

So of bowling-alleys when disorderly, § 1462.

So of billiard-rooms, § 1463.

So of public spectacles, § 1464.

Gambling when may be indictable, § 1465.

Gambling is staking on chance, § 1465 a.

Made indictable by statute, § 1465 b.

Also made indictable by whatever excites a disturbance, § 1465 c.

Also by involving minors, § 1465 d.

In pleading statutory requisite must be followed, § 1466.

Evidence is inferential, § 1467.

Betting a statutory offence, § 1467 a.

XIII. EXPOSURE OF PERSON.

Indirect exposure of person a nuisance, § 1468.

Publicity must be averred, § 1469.

Place must be open to public, § 1470.

Intent to be inferred, § 1471.

To be a nuisance there must be witnesses, § 1472.

XIV. OBSTRUCTING HIGHWAYS AND STREAMS.

Obstructing road on which public has right of way is indictable, § 1473.

Whatever interferes with travel is an obstruction, § 1474.

Prescription is no defence, § 1475.

Unlicensed or excessive obstruction by railroad may be indictable, § 1476.

Nuisance to obstruct or pollute public waters, § 1477.

Collateral benefit no defence, § 1478.

Not necessary that tide should flow, § 1479.

Indictment may lie for obstructing fish, § 1480.

Wharf may be a nuisance, § 1481.

And so may docks, § 1482.

And so may oyster-beds, § 1483.

249
§ 1410. WHATEVER openly outrages decency, or is injurious to public morals or public health and comfort, is a common nuisance, and a misdemeanor at common law. It is not necessary that all members of the community should be affected by the nuisance, nor is it a defence that there were some persons by whom the nuisance was approved. It is enough if the liberty of all members of the community be abridged by their being precluded from approaching without risk the thing complained of. In other words, it is no defence that I might avoid being offended by a nuisance, if my liberty would be abridged by my having to avoid it.

§ 1411. The offence must not be confined to individuals, but must have within its range the community or vicinage as a class.

"Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

"Every one shall be guilty of an indictable offence, and shall upon conviction thereof be liable to one year’s imprisonment with hard labor, who knowingly and wilfully exposes, or causes to be exposed, for sale, or has in his possession, with intent to sell for human food, articles which he knows to be unfit for human food. (See infra, § 1454.) Every one who is convicted of this offence, after a previous conviction for the same offence, shall be liable to two years’ imprisonment with hard labor."

1 Comm. v. Harris, 101 Mass. 22.

The definition in the English Draft Code of 1873, s. 150, is as follows:

"A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her majesty’s subjects.

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year’s imprisonment, who commits any common nuisance which endangers the lives, safety, or health of the public, or which injures the person of any individual.

Hence it is not a nuisance to dig and forcibly keep up, within a neighbor’s inclosure, a pit which exposes him to danger as he goes to and fro on his own soil. It is a nuisance, however, to dig a pit in front of that neighbor’s house, in the public road, so as to imperil all persons passing and repassing. So for a man to make a noise on a particular occasion before a limited audience is not indictable; but it is otherwise if he makes loud noises continuously and habitually to the disturbance of the citizens at large. The offence must be in a populous neighborhood, or in a place sufficiently contiguous to a public highway, to affect persons passing and repassing. In other words, a nuisance, to be indictable, must have within its range either the community generally, or those persons passing and repassing on a public road, or chancing to be on public resorts.

§ 1412. It is not necessary, in order to make an alleged nuisance indictable, that it should be detrimental to public health. It is sufficient for this purpose if it be generally offensive to the senses of smell or of hearing, so far as concerns the public at large, or if in any other way it produces general physical discomfort. Following this distinction it has been held indictable to start or continue—

3 In Comm. v. Harris, 101 Mass. 20, where the indictment was for a nuisance in making a noise on a public street, it was said by Chapin, C. J., that "the act must be such as a nature as tends to annoy good citizens, and does in fact annoy such of them as are present and not favoring it." On the other hand, a complaint that the defendant rang a church bell and announced that P. was dead and was to be buried the next day, which was untrue, to the annoyance of P. and his family, does not a criminal offense. State v. Riggs, 22 Vt. 521.
§ 1412. CRIMES. [BOOK II.

(1) A swine-yard or even a pig-sty in a city; 1
(2) A tanmer in a city; 2
(3) A petroleum manufactory in a city; 3
(4) Slaughter-houses in a city or in a closely settled neighborhood; 4
(5) Tallow chandlery in a closely populated neighborhood; 5
(6) Storage of gunpowder and other explosive compounds in such a way as to impair or even terrify the community; 6
(7) Noises, when made in such a way as to harass the community; 7


In State v. Kaster, 26 Iowa, 221, the indictment charged that the defendant "unlawfully and injuriously did erect, continue, and use a certain inclosure or pen in which cattle and hogs were confined, fed, and watered, and the excrement, decayed food, slop, and other filth were retained," whereby it was occasioned "noxious exhalations and offensive smells greatly corrupting and infecting the air; and other annoyances dangerous to the health, comfort, and property of the good people residing in that immediate neighborhood," etc. The prosecution offered evidence that the noise made by hogs in said pen was very great and annoying at night to persons residing in that neighborhood. It was ruled by the Supreme Court that while the evidence offered was not admissible under the general charge of "other annoyances," it was admissible as constituting a part of the facts connected with the nuisance charged, and also as corroborative of the fact that hogs were kept in the pen at night. It was further held, in conformity with the law hereafter expressed (infra, § 1416), that in a prosecution for nuisance, the defendant will not be permitted to show that the public benefit resulting from his acts is equal to the public inconvenience.

3 Com. v. Kidder, 107 Mass. 188.
Infra, § 1441.


5 Bliss v. Hall, 4 Bing. N. C. 158; 5 Scott, 500.


8 Cooper v. Wooley, L. R. 2 Eq. 38; Rich v. Basterfield, 4 C. B. 780; 2 C. & K. 228; Simpson v. Savage, 1 C. B. N. S. 347; Smoke, even without noise or noxious vapors, may be itself a nuisance. Crump v. Lambert, L. R. 3 Eq. 400.


10 State v. Close, 36 Iowa, 570; Donges v. State, 4 Wis. 357. Infra, §§ 1473 et seq.


12 Grove v. Fort Wayne, 41 Ind. 429; see Garland v. Towns, 55 N. H. 55.


14 Cooper v. Wooley, L. R. 2 Eq. 38; Rich v. Basterfield, 4 C. B. 780; 2 C. & K. 228; Simpson v. Savage, 1 C. B. N. S. 347; Smoke, even without noise or noxious vapors, may be itself a nuisance. Crump v. Lambert, L. R. 3 Eq. 400.


16 State v. Close, 36 Iowa, 570; Donges v. State, 4 Wis. 357. Infra, §§ 1473 et seq.

17 State v. Bull, 50 Me. 391.

18 Grove v. Fort Wayne, 41 Ind. 429; see Garland v. Towns, 55 N. H. 55.


20 See Cooper v. Wooley, L. R. 2 Eq. 38; Rich v. Basterfield, 4 C. B. 780; 2 C. & K. 228; Simpson v. Savage, 1 C. B. N. S. 347; Smoke, even without noise or noxious vapors, may be itself a nuisance. Crump v. Lambert, L. R. 3 Eq. 400.


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25 State v. Close, 36 Iowa, 570; Donges v. State, 4 Wis. 357.

CRIMES.

[BOOK II.

annoyed by the kicking and stamping of the horses, though it is otherwise as to stables conducted with unnecessary offensiveness; 1

(2) Brick-kilns, unless managed in such a way as to be specially offensive; 2 though burning bricks in a populous place so as to offend and annoy the neighbors is a nuisance. 3 But brick-making is not per se indicible as a nuisance. 4

(3) Gas-works, when essential to a city, and when conducted with proper care. 5

§ 1415. In discussing the question of nuisance in such cases, the degree of populousness is to be taken into consideration.

Some trades are per se offensive; yet they are necessary to the community, and must be carried on somewhere. But where? The distinction herebefore alluded to is here to be applied. For conducting such trades in secluded and thinly populated districts no indictment lies. 6 But a gunpowder manufactory, not a nuisance per se, may become so when placed in a populous neighborhood. 7

§ 1414. It is not enough for a thing to be annoying to the community, but it must be reasonably so. Gas, for instance, on its first introduction, was declared to be deleterious to the health of the community, and in some communities steam railways were at one time so offensive to particular local authorities, that attempts to prosecute them as nuisances were not infrequent. So, in times of high political feeling, the presence,

2 Aldrich v. Howard, 8 R. I. 245.
5 In re, § 1440.
7 Anonymous, 12 Mod. 242; Wier's Appeal, 74 Penn. St. 230. See State v. Kent, 54 Mo. 30; People v. Sands, 1 Johns. 70; Bradley v. People, 56 Barb. 72. (In re, § 1441.)
8 Huenkenstein's App., 70 Penn. St. 102.
9 Bamford v. Tansley, 3 B. & S. 62; overruling Hale v. Barlow, 4 C. B. N. S. 384; Casey v. Laidbitter, 13 Id. 470.

CHAP. XXII.

NUISANCE.

[§ 1415.

in a community almost unanimous, of a small outspoken minority is very distasteful, and such minority may readily be regarded by the majority as a nuisance, deserving of condign chastisement. The keeping of kerosene, also, by individuals in a populous neighborhood may to some persons be a cause of anxiety; and so may the retention in a family of persons prostrated by a virulent contagious disease. But in all such cases it is necessary, in order to convict, that the annoyance complained of should be substantial, and needlessly inflicted. If the grievances of the prosecutors be sentimental or speculative, 1 if the defendant in the act complained of be simply exercising a constitutional right, then, no matter how much he may offend the community, process of this kind cannot be used for his correction. 2

§ 1415. No length of time legitimates a nuisance; and, in fact, time, by bringing an accession of population to a particular district,

1 See Scott v. Firth, 4 F. & F. 349.
2 In re, § 1428.
3 1 Hawk. bk. 1, c. 32, s. 8; Weld v. Hornby, 7 East, 199; R. v. Cross, 3 Camp. 227; Bilston v. Feetham, 2 Bing. N. C. 134; Blax v. Hall, 4 Id. 185; State v. Falls Co., 49 N. H. 240; Com. v. Tanner, 2 Pick. 44; Com. v. Upton, 6 Gray, 473; Mills v. Richards, 2 Wend. 318; Dygent v. Schenck, 23 Id. 446; People v. Cunningham, 1 Denio, 524; Taylor v. People, 6 Park. C. R. 347; People v. Mallory, 4 Thomp. & C. 367; Com. v. Alturger, 1 Whart. 469; Philadelphia's App., 78 Penn. St. 39; Ashbrook v. Com., 1 Bush, 139; Ellis v. State, 2 Burn. 543; Denny v. State, 3 Wis. 387; State v. Phibbs, 4 Ind. 515; State v. Rankin, 3 S. C. 438; R. v. Bawrater, 8 Up. Can. (C. P.) 308. See, however, Allegheny v. Zimmermann, 28 Penn. St. 287, cited in re, § 1474; and see Wood on Nuisance, § 724.

"It is a public nuisance to place a wool-stack in the street of a town before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for it is against law to prescribe for a nuisance. Fowler v. Sandars, 3 Ex. Jno. 446. In one case, however, Lord Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that it was such a fair or market legally instituted. R. v. Smith, 4 Rep. 111." Rouse v. CR. Br. p. 795.,

As to how far steam-printing works, by working the machinery so as to produce a greatly increased vibration and noise, it may become a nuisance, see Heather v. Pardon, 37 L. T. 383.
when such district is set apart by the State as a village or city, may make a thing a nuisance ultimately which was not a nuisance in its inception, though it may not so operate as to a district not so set apart, and in respect to which the movement of settlement is capricious and speculative. But it is otherwise, even as to a district not set apart as a village or city, when the progress of population towards the objectionable structure is in obedience to the fixed laws of expansion of population. Hence, in the latter case, it is no defence that a nuisance was erected in a comparatively secluded place, remote from habitation, and that the complaining parties subsequently voluntarily built within the range of its noxious odors. Even a charter, granted before the site became populous, may fail to protect. At the same time, when a question of the dedication by the owner of a particular spot to a particular purpose arises, lapse of time may be used to sustain such dedication.

1 Douglass v. State, 4 Wis. 387. Thus, in Com. v. Vansticks, Brightly, 69 (4 Clark, 104), which was an indictment for maintaining a large establishment for pigs in the limits of the old city of Philadelphia, Judge Sergeant properly charged the jury that though when the establishment was first opened it was not a nuisance, it became so when population gathered largely in that neighborhood.

2 If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near it that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases, the party is entitled to continue his trade, because it was legal before the erection of the houses in the one case, and the making of the road in the other. Per Abbott, C. J., 20, C. R. & C. 483. See Ellis v. State, 7 Blackf. 534.

3 As the city extends, such nuisances (slanderous-houses) should be removed to the vacant ground beyond the immediate neighborhood of the residences of citizens. This public policy, as well as the health and comfort of the population of the city, demands. Brady v. Weeks, 3 Barb. 157.


7 The effect of time in legalizing a nuisance is not in itself that effect, but the fact that the given state of things is of very long standing may be evidence that it is not, in fact, a nuisance. See cases in 1 Russ. Cr. 421. 442. The view taken by the criminal law commissioners is rather different.

§ 1416. A mere volunteer, starting an enterprise for his own benefit, cannot, if prosecuted for nuisance proved to arise from such enterprise, set up collateral benefits to the community arising from his act. Evidently this is the case with stoppages of public highways or navigable streams. These are sacred to public use; and no one can justify himself in choking them by reason of general benefit to the community collateral to his act. But it is otherwise with works of public improvement constituted or authorized by the State. They may work injury to particular neighborhoods: e. g., a railroad may take away the business of a country town on the line, or a canal basin may breed local malaria; but these special injuries cannot be treated as public nuisances, and as such indicted. When, however, the managers of such roads by negligence engender a nuisance, an indictment lies. It has been also held that municipal authorities are not indictable for a nuisance in causing vapor and smoke to arise from burning infected clothing and bedding, the object being to check the spread of an epidemic disease.

§ 1417. Nor is it a defence that nuisances, equally objectionable with that under indictment, have been tolerated by the public authorities.
§ 1422. CRIMES. [BOOK II.

No defence that thing complained of has no other place.

§ 1418. Many necessary trades—e. g., gunpowder making—have particular places assigned to them by the authorities. It is, however, no defence that the nuisance complained of, though necessary, has had no such place assigned to it. It may be no nuisance if carried on in a sequestered site. It may become a nuisance when it exposes a large population to anxiety and risk.

§ 1419. As each period in which a nuisance is continued exhibits a distinct offence, a prior acquittal or conviction for the maintenance of a nuisance is no bar to an indictment for continuing the nuisance on a subsequent day.

§ 1420. As the object of the prosecution is to remove an injury to the public with which the intent of the defendant has nothing to do, his intent is irrelevant. As illustrating this may be given the cases elsewhere cited, where the principal is held responsible in this form of action for the servant's negligence.

§ 1421. Nor is it a defence that the intent was to benefit the community. If the act be a nuisance to the community, the question of intent is irrelevant, and evidence of good intent is immaterial. Nor is lucrē causa essential.

§ 1422. That all parties concerned, whether agents or organizers, are principals, follows from the familiar doctrine that in misdemeanors all are principals. To nuisance this doctrine has been frequently applied in cases where an agent

1 State v. Hart, 34 Me. 56. See Wier's Appeal, 74 Penn. St. 230. Supra, § 1418.
2 Whart. Cr. Pl. & Pr. § 475; Beckwith v. Griswold, 29 Barb. 29; People v. Townsend, 3 Hill (N. Y.), 479.
3 See Hunte v. State, 19 Minn. 271. Supra, § 119.
4 Supra, § 247; infra, § 1422; R. v. Stephens, L. R. 1 Q. B. 702; Tode v. State, 22 Ind. 10.
5 See State v. Portland, 74 Me. 268.
7 In Jennings v. Com., 11 Pick. 60, it was doubted whether lucrē causa is essential to the offence; but that it is not, is now settled in all cases of nuisance. Com. v. Ashley, 2 Gray, 356. Infra, § 1459.
8 Supra, §§ 223, 246; Com. v. Mann, 4 Gray, 213; Com. v. Garnett, 1 Allen, 7; Com. v. Tryon, 60 Mass. 442; Com. v. Kimball, 106 Ibid. 465; Stevens v. People, 67 Hil. 587; State v. Potter, 30 Iowa, 587. R. v. Stannard, L. & C. 249, cited infra, §§ 1448, 1460, apparently conflicts with R. v. Medley, 6 G. & C. P. 292, and other cases noticed supra, §§ 135, 341, 1452; and with the general rule that all concerned in a misdemeanor are principals.

CHAP. XXII. NUISANCE. [§ 1423.

sets up as a defence that he acted only for another, who is the real principal and manager of the enterprise, controlling it, and enjoying its profits. But the agent is nevertheless held responsible if he have in any sense a control over the place or thing from which the nuisance arises. The converse is also true, that the principal is indictable for the acts of his agent, performed by the agent within the orbit of his delegated office. And if he share the profits, he is penalty responsible for his agent's acts creating a nuisance within the range of employment, though these acts were done without his knowledge and contrary to his general orders. But a principal is not indictable for a collateral nuisance by a contractor; and a landlord is not responsible for a tenant's nuisance that he could not have removed. The occupier in such case is responsible.

§ 1423. Neglects and omissions, as has heretofore been shown, are virtually commissions; for he who undertakes to do a thing and neglects or omits his duty does the thing wrongfully. But to make a neglect or omission indictable for a nuisance produced by it, it is essential that the mischief should have been the natural consequence of the omission, and not the result of an act of the principal. The agent acts under the authority of his principal, and his responsibility as to the act is the same as if it had been done by the principal. But the agent is not responsible in a collateral transaction, unless the principal has given him authority to do that which he did, or unless the agent, with the knowledge of the principal, has procured the malice, or at least the commission of the act by another. In such cases the principal, who has given authority to the agent, is not responsible; but the agent is so responsible, provided the principal knew of the act and gave his consent thereto. And in such cases the principal is not responsible for the acts of his agent, performed by the agent within the orbit of his delegated office.

1 Com. v. Park, 1 Gray, 553; Com. v. Nichols, 10 Met. 239; Lowenstein v. People, 54 Barb. 539; Com. v. Gillespie, 7 S. & R. 489; State v. Bell, 5 Porter, 365; Thompson v. State, 5 Humph. 125; 2 Rob. 599; State v. Mathews, 1 Hill (S. C.), 37; Com. v. Major, 6 Dana, 223. See supra, §§ 247, 341.
2 Supra, § 279; R. v. Williams, 1 Sulk. 364; 10 Me. 63. "We do not think that the misdemeanor of unlawfully selling, committed by a servant, can be said as a matter of law to amount to maintaining a nuisance, unless he has assumed a temporary control of the premises, or in some other way originated from his subordinate position to aid directly in maintaining it." Holmes, J., Com. v. Churchill, 130 Mass. 151.

6 Supra, § 279; R. v. Williams, 1 Sulk. 364; 10 Me. 63. "We do not think that the misdemeanor of unlawfully selling, committed by a servant, can be said as a matter of law to amount to maintaining a nuisance, unless he has assumed a temporary control of the premises, or in some other way originated from his subordinate position to aid directly in maintaining it." Holmes, J., Com. v. Churchill, 130 Mass. 151.
7 See Rich v. Easterfield, 4 C. B. 783; Pretty v. Rickmore, L. R. 8 C. P. 201.
8 Broder v. Sallard, L. R. 2 Ch. D. 692.
9 Supra, §§ 126 et seq.
§ 1425. CRIMES. [BOOK II.

Person undertaking public duty is indictable for neglect.

§ 1424. Lawful authority to do a particular thing is no defense to an indictment for doing such thing so negligently or badly as to create a nuisance. But if the license be strictly followed, and a nuisance results, no prosecution can be maintained, where there is no negligence or excess alleged on part of the defendant. Hence a gas company, duly chartered by an act of legislature to supply gas to a city, cannot be convicted of nuisance where the acts complained of were necessary to the exercise of its trust, and were performed carefully and judiciously. The same distinction applies, mutatis mutandis, to railroads. Specific legislative authority will protect a railroad from prosecution in occupying roads and running trains.

§ 1425. A defendant is not liable for a nuisance unless it is a natural and ordinary consequence of his conduct. Hence it has

1 R. v. Wharton, 12 Mod. 510. supra, §§ 125 et seq. infra, § 1476.
2 R. v. Medley, 6 C. & P. 292; People v. Corporation of Albany, 11 Wend. 593; Indianapolis v. Blythe, 2 Ind. 75. infra, § 1475.

CHAP. XXII.

NUISANCE. [§ 1426.

been correctly held that a party is not guilty of a public nuisance, unless the injuries consequences complained of are the natural, direct, and proximate result of his conduct. If such consequences are caused by the culpable acts of others so operating on his acts as to produce the injuries consequences, then he is not liable.

II. ABATEMENT FOR.

§ 1426. Independently of judgment of fine and imprisonment, there may be, when the offence is continuo and there is a continuo in the indictment, a judgment by the court that the nuisance abate. But for this purpose the continuo is essential. The usual course is to order the abatement; and if the defendant neglect or refuse to obey, to direct an abatement by the sheriff. A private nuisance is a nuisance which distinctively affects a private person, and which is exonerated for removing when he can do so without public disturbance or invasion of another's rights. A public nuisance is one which, as we have seen, annoys the public as such; and a public nuisance may be

unless there be causal relationship proved. R. v. Barnett, Bell C. C. 1; cited supra, §§ 125, 154, 169, 166, 247.
1 State v. Rankin, 3 S. C. 488; and see R. v. Medley, 6 C. & P. 292; Moses v. State, 52 Ind. 185. supra, § 1418. infra, §§ 1441, 1484. And see U. S. v. Rider, 4 Cranch C. C. 507. infra, § 1498.
2 State v. Noyes, 10 Foster, 279. infra, § 1487.
4 R. v. Stead, 3 T. T. 142; R. v. Pappin, 2 Strange, 608; State v. Haines, 30 Mo. 65; State v. Noyes, 10 Foster, 279; Munson v. People, 5 Park. C. R. 18; Taylor v. People, 6 Idbd. 347; Del. Canal Co. v. Com., 60 Penn. St. 367; Woot v. People, 8 Md. 416; Smith v. State, 23 Ohio St. 539.
5 Taggart v. Com., 21 Penn. St. 527; Barlow v. Com., 35 Ind. 505; McLaughlin v. State, 45 Ind. 388; Campbell v. State, 16 Ala. 144; Crippen v. People, 8 Mich. 117.
6 State v. Noyes, 10 Foster, 279. infra, § 1487.
7 Munson v. People, 5 Park. C. R. 18; Smith v. State, 23 Ohio St. 539; McLaughlin v. State, 45 Ind. 328. See Meigs v. Lister, 35 N. J. Eq. 459; Campbell v. State, 16 Ala. 164; and supra 19 Cent. L. J. 49.
abated by private sufferers injured when there is not time or opportunity to secure the intervention of the public authorities, and when without such intervention serious damage will ensue; but even in such case the party causing the nuisance should, when this can be done without injurious delay, be called upon to remove it. And when the nuisance becomes the object of public prosecution, legal proceedings being instituted to test the right, then the right of private citizens to abate ceases. The abatement may be enforced even to the destruction, if necessary, of the property from which the nuisance springs. But this is not permissible when the nuisance can be abated without such destruction. Thus the destruction of a tipping

§ 1426. [BOOK II.]

CRIMES.

§ 1427. [Book II.]

NUISANCE.

1 Low v. Knowlton, 26 Me. 128; Hopkins v. Crumble, 4 N. B. 520; Arundel v. McCalloch, 10 Mass. 70; State v. Keenan, 5 L. 125; State v. Keenan, ibid. 497; Renwick v. Mose, 7 Hill (N. Y.), 576; Wetmore v. Tracy, 14 Wend. 240; Meeker v. Van Reeselaar, 15 ibid. 397; Rens v. Stoneberger, 2 Watts, 23; Barclay v. Const., 26 Penn. St. 508; Melfett v. Brewer, 1 Greene, Iowa, 348; Manhattan Man. Co. v. Van Keuren, 23 N. J. Eq. 251; State v. Dibble, 4 Jones (N. C.), 107; King v. Saunders, 2 Bro. 111. As to right of self-defense in this relation, see supra, § 37, 97 a. That an impoundment in the highway may be removed by individual action, see Wood v. Nuisance, § 520; Turner v. Holtman, 64 Md. 148. This is applied to removal of boughs overhanging a road. Lonsdale v. Nelson, 2 B. & C. 302, 311. As to limitations of right to abate, see Wood v. Nuisance, § 720; 19 Cent. L. J. 42.

2 Jones v. Williams, 11 N. & W. 176, and cases above cited.

3 Com. v. Erie & N. E. R., 27 Penn. St. 339. The more prudent course in cases of disputed right is to leave the question of abatement to the courts. See Taggart v. Const., 21 Penn. St. 527. It has been said that when a breach of the peace would ensue the right cannot be exercised. Day v. Day, 4 Md. 262. But as the right is absolute, this qualification is not good. It might as well be said that the right of self-defense ceases when its exercise involves a breach of the peace. See supra, §§ 97-102. The distinction is that the right cannot be sustained when its exercise involves a breach of the peace more disturbing to the community than the continuance of the evil until the result of legal procedure.

That the mayor of a city may interfere to abate a public nuisance, see Fields v. Stokely, 39 Penn. St. 306. See criticism in 28 Alb. L. J. 244.

4 Pearson's Case, 5 Co. 100; Penna. v. Wheeling Bridge Co., 13 How. 518; Lancaster v. Rogers, 2 Barr, 114.

In State v. Parrott, 71 N. C. 311, it was held that individual citizens were justified in tearing down a railroad bridge over Neuse River, when by so doing they removed obstructions to the free navigation of the river. See to same effect, State v. Dibble, 4 Jones, 167, citing Wilson v. Forbes, 2 Day, 35; Collins v. Bankruptcy, 5 Ired. 277; R. C., 5 ibid. 118; Pierce v. Arminda, 11 Ired. 438; Wilson v. Blackbird Creek Marsh Company, 2 Peters, 248.

5 Robers v. Rose, 3 H. & C. 162.

§ 1426. [Book II.]

house and house of ill-fame cannot be defended on this ground. This right, at the same time, is a part of the right of self-defence; and it may be exercised in behalf, not only of self, but of others whom the party is called upon to protect, as well as of the community of which the party interfering is a member, if he be among the injured parties. But the right cannot be exercised wantonly or by a mere volunteer.

In cases of indictments against municipal corporations for neglect in repairing roads, the order of abatement goes virtually to the reparation of the road, which may be compelled by fine.

Dogs, when habitually ranging the highways or marauding in fields so as to imperil life or property, or when disturbing a neighborhood by incessant and distressing noise, may be killed by any one thus annoyed or injured.

1 Brown v. Perkins, 12 Gray, 89.


4 See supra, § 97; Aldrich v. Wright, 53 N. B. 393; State v. Keenan, 5 R. L. 487; State v. Dibble, 4 Jones N. C. 107. See infra, §§ 1549 et seq.


6 Dimes v. Petty, 15. R. 276; Brown v. Perkins, 13 Gray, 89; Bowden v. Lewis, 13 R. 190; Fort Plain Bridge v. Smith, 30 N. Y. 44. And as to the indubitable of cruelty in such cases, see supra, § 1082 et seq.


8 Dangerous and troublesome dogs,—That a dog which attacks persons or property (e. g., sheep) may be killed by those who are assaulted, see Whart. on Neg. § 912; Jansen v. Brown, 1 Camp. 41; Read v. Edwards, 17 C. B. N. S. 245; Sanders v. Blackman, 4 C. & P. 300; Brown v. Hubinger, 52 Barr. 15; though it is said that this is only justifiable in immediate repulsion of an attack. Wells v. Head, 4 C. & P. 608; see Morris v. Nuygent, 7 Ibad. 672. But it is otherwise when a dog becomes a common nuisance, ranging the roads, and alarming or disturbing the neighbors and those passing and repassing; in which case he may be killed by any one who is exposed to the annoyance. King v. Kline, 6 Barr. 317, by Collier, J.; Brown v. Carpenter, 26 N. I. 639; and see supra, § 1412. But this does not apply to dogs kept on the owner's premises; see Brock v. Copeland, 1 Rep. 362; Perry v. Phillips, 10 Ired. 289; and so far as concerns the question of nuisance, habitual troublesome ones must be made out.
III. INDICTMENT.

§ 1427. The technical term "common nuisance" is essential as a term of art, when the indictment is at common law. But this is not by itself enough. The term "common nuisance" must be so directed as to be pointed, not at particular individuals, but at the community at large; e.g., the offence must be declared to be the "common nuisance" of all the citizens of the said State residing in" the neighborhood; or "of all the citizens of said State there passing and repassing." 1

§ 1428. The indictment, also, must show an offence not private - but public, 2 and the defect is not cured by the averment of a public nuisance. 3 Thus, frequenting houses of ill-fame, if done secretly, is not indictable; the indictment, to make the offence a nuisance, must aver it to be done openly, notoriously, and scandalously. 4 So, when those concerned in the control of an alleged noxious object are indicted for a nuisance, it must be alleged to be so situated as to make it a nuisance to the public, or, at least to all persons passing or repassing the offensive object; 5 and when a dam is claimed to produce stagnant water and to corrupt the air, this must be alleged to be in such a way as to affect a populous neighborhood, or persons passing on a public highway. 6

See cases cited in Whart. on Neg. § 912. Single cases of annoyance are not enough on the ground given by Lord Cockburn that "every dog is entitled to at least one worry." 7 Campbell on Neg. § 27. And see supra, §§ 97, 97 a.

1 R. v. Holmes, 20 Eng. Law & Eq. 597; 3 C. & K. 366; State v. Stevens, 40 Me. 559. When the offence is statutory, the term is unnecessary unless prescribed by statute. Ibid.
3 See Wertz v. State, 42 Ind. 161; State v. Kester, 35 Iowa, 221; State v. Cline, 35 Iowa, 576; Chute v. State, 264 Minn. 271. Thus an indictment for polluting a stream must show that the stream was one in which the public had rights. Messersmith v. People, 40 Mich. 437.
4 State v. Houck, 73 Ind. 37.
6 Horner v. State, 49 Md. 277; State v. Purse, 4 McCord, 472. That the averment "to the nuisance of all persons then and there passing and repassing along said public highway" is enough, see Com. v. Swanson, 73 Illa. 572.

§ 1429. The generality of the indictment in nuisance, as in conspiracy, in many cases entitles the defendant to a bill of particulars, the practice as to which is elsewhere stated at large. 8

IV. PROOF.

§ 1430. Whether the acts complained of are nuisances to the community is to be determined inferentially from the facts in the case, as well as from testimony of experts as to the probable operation of the constituents of which the nuisance is composed on the health or comfort of the community. But only the nuisance specifically charged in the indictment can be proved. 9 "General reputation," of course, cannot be admitted to prove or disprove nuisance. 10 But, as will be seen, the bad character of persons haunting a house of ill-fame may be put in evidence. 11

V. OFFENDERS TO RELIGION.

§ 1431. Any public act that grossly and wantonly shocks the religious sense of the community as a body is a nuisance.

Hence it is a nuisance to disturb public rest on Sunday by any

1 Supra, § 1419; Whart. Cr. Pl. & Fr. §§ 187, 702; and see R. v. Carr, Fr. § 164; Com. v. Boynton, 12 Cush. 574; 5 Nev. & M. 366.
2 People v. Cunningham, 1 Denio, 13 Met. 366.
4 See supra, § 1440; Com. v. Brown, 13 Met. 366.
5 See supra, § 1380; Whart. Cr. Pl. Infra, § 1451.
CRIMES. [Book II. 

§ 1481.] 

unnecessary conspicuous and noisy conduct. Hence, also, public, gross, and scandalous profanition is a nuisance; though it is essential that such profanition should be alleged and proved to be in the hearing of divers persons, and that it should be continuous, since a single profane oath cannot ordinarily be a public nuisance.

1 In Rea, § 1449; Com. v. Jeandelle, 2 Grant, 206; 3 Phila. 509; Com. v. Dunphy, Bright, 44; Lindenmüller v. People, 32 Barb. 549. As to disturbing congregation, see infra, § 1486.


3 State v. Pepper, 68 N. C. 259; Goom v. State, 71 Ala. 7. See infra, § 1442. As to blasphemous libels, see infra, § 1005; Gaines v. State, 7 Lea, 410.

In State v. Pepper, 68 N. C. 259, Rodman, J. said: "The only question which it is necessary to consider arises on the face of the indictment. Does it charge any criminal offence?" "It charges that the defendant, in the public streets of the town of Lancaster, with force and arms, and to the great displeasure of Almighty God and the common nuisance of all the good citizens of the State then and there being assembled, did, for a long time, to wit: for the space of twelve seconds, profanely curse and swear, and take the name of Almighty God in vain, etc."

CHAP. XXII. 

nuISANCE. [§ 1431a. 

§ 1431 a. As embodying the principle just stated, statutes prohibiting secular labor on Sunday have been held constitutional; and

profanition was to the nuisance of all such citizens of the State as were then and there assembled, it is not a direct positive averment that any citizens were so assembled. The averment might be true, although there were no persons assembled. It is not the same as saying, in the presence of divers persons being then and there assembled, for that contains a direct averment of the presence of divers persons.

We were referred to State v. Roper (1 Dev. & Bat. 268), as an authority that it was not necessary to charge the act to have been done in the presence of any person, it being charged to have been done in a public place.

In that case the indictment charged the defendant with an indecent exposure of his person on a public highway, but omitted to allege that it was in the presence of divers persons or of any person.

Gaston, J., delivering the opinion of the court, says: that such an allegation was unnecessary; it was sufficient if it was probable from the circumstances that the exposure could have been seen by the public, and the indictment was sustained. The authority upon which that decision professes to be founded is R. v. Crumum, 2 Camp. 89. But we conceive that case does not sustain the form of indictment adopted in State v. Roper.

The form of the indictment in R. v. Crumum is given in 2 Chit. Cr. Law, 41, from which it appears that it was charged in both counts that the defendant exposed himself naked in a public place, and in the presence of divers of the king's subjects. The evidence was that the defendant bathed in the sea at Brighton, near to and in front of a row of inhabited houses.

Although there was no direct evidence that any occupant of the houses or others had seen him, yet clearly there was evidence from which the jury might have inferred that they did. The most that can be gathered from that case is, that if one person (the witness) saw the indecent exposure, and others were actually present and might have seen it, though there is no proof that they did, yet the law recognizes the probable risk of their seeing it as sufficiently proximate to be dealt with as a reality."

See further, § 1432. 

1 State v. Gurney, 37 Me. 149; State v. Barker, 18 Vt. 183; Com. v. Harrison, 11 Gray, 368; Specht v. Com., 8 Barr, 314; Com. v. Jeandelle, 2 Grant, 508; S. C., 5 Phila. 509; State v. Chess.
§ 1431 a. The statutes in most jurisdictions designate the particular kind of labor that is prohibited; and when this is the case, the offence, unless it becomes a nuisance, is confined within the limitations of the statute. But the terms are construed by the courts in harmony with the object in view, which is the preservation of Sunday as a day of rest. Thus, in Pennsylvania driving an omnibus is held to be a "worldly employment," a term handed down from a Quaker ordinance; while in other States "common labor" is construed to include all kinds of secular business by which the rest of the day may be disturbed. "Work," or "servile labor," has received a similar meaning. When the term "usual avocation" or "ordinary calling" is employed, it covers the particular business, if secular, in which the party in question is concerned. But under prohibitions of this order do not fall business transacted, for the furtherance of their distinctive purposes, by religious and philanthropic associations.

§ 1431 c. In some of the statutes the exception of necessity is expressed. In others it is implied, subject to the general distinctions as to necessity which have been already stated. By the courts the following occupations have been held to be necessary either as statutory or common law exceptions: Driving to religious worship; rectifying a switch on a railroad; opening locks on canals which are public highways; protecting any industry or property from immediate destruction; carrying the mail under federal statute, though this has been held not to protect unnecessary travelling in the mail.

1 Johnston v. Com., 22 Penn. St. 102.
2 Cincinnati v. Rios, 15 Ohio, 225.
4 See R. v. Whiting, 7 B. & C. 585; George v. George, 47 N. H. 27; Voglinsong v. State, 9 Ind. 966; Whart. on Cont. § 385.
5 People v. Young Men's Society, etc., 66 Barb. 317; see, as a curious illustration of the expansion of this exception, Feital v. R. R., 109 Mass. 388.
6 Sopran, § 95.
7 See this question discussed in its civil relations in Whart. on Cont. § 388.
§ 1431 a. [BOOK II. CRIMES.

Baking by a baker, for Sunday use, bread which could have lasted over for a day, has been held to contravene the statute, though it is otherwise with baking meat necessary for immediate use.¹

VI. OFFENCES TO PUBLIC DECENCY.

§ 1432. Any public exhibition of gross and wanton indecency is in like manner a nuisance.² Hence it is indictable to indulge in habitual, open, and notorious lewdness;³ to permit dependents (in old times, slaves) to roam the streets in a state of nakedness;⁴ to openly and notoriously haunt houses of ill-fame;⁵ to use habitually indecent or profane language in the presence of passers-by and the public generally;⁶ to parade stude horses through a city, letting them out to mares on the public streets;⁷ and to be addicted to public and notorious drunkenness.⁸ The exhibitor of an unnatural and monstrous birth is thus indictable;⁹ and so is a herbalist who publicly exposes and exhibits in his shop, on a highway, a picture of a man naked to the waist, and covered with eruptive sores, thus constituting an exhibition offensive and disgusting, although there is nothing immoral or indecent in the picture, and his motive is innocent.¹⁰

² As to indecent exposure of person, see infra, § 1496. As to indecent exhibitions, see infra, § 1396. As to Indiana statute, see McAdams v. State, 10 Ind. 140.
³ Delany v. People, 10 Mich. 241; Peak v. State, 10 Humph. 99; State v. Moore, 1 Swan, 136; Crouse v. State, 16 Ark. 569; infra, §§ 1443, 1447, supra, § 1428. As to statute, see infra, § 1446.
⁴ Britain v. State, 3 Humph. 293.
⁵ infra, § 1906.
⁶ See Brooks v. State, 2 Yerg. 482; State v. Cagle, 2 Humph. 414; State v. Branson, 2 Bailey, 149.
⁸ As has been seen, the statute must be "in the presence and hearing of divers persons then and there assembled," and the acts must have been so repeated in public as to have become an annoyance and inconvenience to the public. The words also must be given in the indictment. State v. Barham, 75 N. C. 640; aff. State v. Peper, 58 Ibid. 269; State v. Powell, 70 Ibid. 67. See, under Georgia statute, Brady v. State, 48 Ga. 311.
⁹ Nolen v. Mayor, 4 Yerg. 123.
¹⁰ infra, § 1435. See Smith v. State, 1 Humph. 396; State v. Waller, 3 Marp. 229; State v. Sowers, 52 Ind. 211.

¹¹ Haring v. Watson, 1 Russ. on Cr. 6th ed. 436.
§ 1432 a. Indecency in treatment of a dead human body is an
offence at common law, as an insult to public decency.

Hence, it is indictable to expose such a body without
proper burial, 2 to wantonly or illegally disturb it, 3 to sell
it, for more purposes of private gain, for dissection, 5 or
to disinter it, unless so directed by the deceased in his life or
by his relatives after his death, with consent of the public authorities
and of the owners of the ground, where this is requisite. 4

Wanted of

1 R. v. Saunders, L. R. 1 Q. B. D. 76; 13 Cox C. C. 116; People v. Jack-

2 son, 3 Denis, 101; Knowles v. State, 3

3 Day, 103. See R. v. Gray, 1 P. & P.

4 73; Jocko v. State, 22 Ala. 73.

5 In Com. v. Hariston, New Bedford, Mass.,

6 1873, the defendant was indicted for the

7 exposure in a shop-window of a nude

8 statue of Antinoua. The charge left

9 the question of indecency to the jury,

10 who did not agree. See pamphlet re-

11 port in Harvard Library. As to nude

12 pictures, see Com. v. Daubert, 126

13 Mass. 465; infra, § 1605 et seq. As to

14 exposure of person, see infra, § 1468.

15 As to demoralising exhibitions, see fur-

16 ther, Tharber v. Sharp, 13 Barb. 627;

17 Willis v. Warren, 1 Hilt. N. Y. 590;

18 Jocko v. State, 22 Ala. 73; Fike v.

19 Com., 2 Duval. 89.

20 State v. Waller, at supra. A seminal

21 placed in such a way on public

22 grounds as to be generally accessible,

23 and to be conspicuous in a populous

24 neighborhood, may be a nuisance.

25 Chisholm v. Paul, 22 W. R. 538; see

26 Vernon v. Vestry, L. R. 16 Ch. D. 449;

27 and see infra, § 1470.

28 Kanavan’s Case, 1 Greenl. 226.

29 2 East P. C. 522; R. v. Giles, R. &

30 R. 517; R. v. Sharpe, 7 Cox C. C. 214;

31 40 Eng. L. & E. 594; State v. Little, 1

32 272

Vs. 333; Com. v. Loring, 8 Pick. 370.

33 See Com. v. Cooley, 10 Pick. 37; Mc-

34 Namur v. People, 31 Mich. 473. All

35 concerned in the outrage are principals.

36 Tate v. State, 6 Blackf. 110.

37 In R. v. Condick, D. & R. (N. P.) 13;

38 R. v. Feist, D. & B. 590; 8 Cox C. C.

39 18; R. v. Lynn, 2 T. R. 733; Com. v.

40 Cooley, 10 Pick. 37; State v. McClure,

41 6 Blackf. 328.

42 R. v. Sharpe, 7 Cox C. C. 214; Com.

43 v. Loring, 8 Pick. 370; Com. v.

44 Marshall, 11 Pick. 359; Tate v. State,

45 6 Blackf. 110. See Whart. Priv. §§ 821

46 et seq.

47 "An indictment charged (inter alia)

48 that the prisoner, a certain dead body

49 of a person unknown, lately before

50 deceased, wilfully, unlawfully, and in-

51 dicipently did take and carry away,

52 with intent to sell and dispose of the

53 same for gain and profit. It being

54 evident that the prisoner had taken

55 the body from some burial-ground, thon

56 from what particular place was uncer-

57 tain, he was found guilty upon this

58 count; and it was considered that this

59 was no clearly an indictable offence

60 that no case was reserved. R. v. Giles,

61 1 Russ. by Grev. 464; Russ. & Ky.

62 366(a). So to take up a dead body, even

63 for the purpose of dissection, is

64 in indictable offence. Where, upon

65 an indictment for that offence, it was

66 moved in arrest of judgment that the

67 act was only one of ecclesiastical con-

68 niscence, and that the silence of the

69 older writers on crown law showed that

70 there was no such offence cognisable

71 in the criminal courts, the court said

72 that common decency required that the

73 practice should be put a stop to; that

74 the offence was cognizable in a crim-

75 inal court as being highly indecent, and

76 contra bonos mores; that the purpose

77 of taking up the body for dissec-

78 tion did not make it less an indictable

79 offence; and that as it had been

80 the regular practice at the Old Bailey in

81 modern times to try charges of this

82 nature, the circumstances of no writ of

83 error having been brought to reverse

84 any of those judgments was a proof of

85 the universal opinion of the profession

86 upon this subject. R. v. Lynn, 2 T.

87 R. 733; 1 Leach, 387. See also, R. v.


89 And it makes no difference what are

90 the motives of the person who removes

91 the body; the offence being the removal

92 of the body without lawful authority.

93 R. v. Sharpe, Dears. & B. 100; 26 L.

94 J. M. C. 45, where the defendant, from

95 motives of filial affection, had removed

96 the corpse of his mother from its bury-

97 Vol. II.—18

98ing place. The defendant had in this

99 case committed a trespass against the

100 owner of the soil of the burying place;

101 but, quere, whether if no such trespass

102 was committed the offence might not

103 be still complete."—Rance Cr. Ky. p.

104 429.

105 R. v. Vann, 2 Ten. C. C. 325; 5

106 Cox C. C. 379.

107 See infra, § 1665; Betteison, in re,

108 L. R. 1 F. 294; 12 Eng. R. 565 with

109 Mr. Maok’s note. The offence in the

110 text is regulated in most States by

111 statute. Philanthropic or scientific in-

112 tentions are in such cases no defenses.

113 Com. v. Cooley, 10 Pick. 37; 1 Russ.

114 464. See supra, § 119; and compare

115 articles in 18 Alb. L. J. 482-7 et seq.;

116 1 Am. L. Rev. N. S. 57. As to statutes,

117 see Com. v. Loring, 8 Pick. 370; Com.

118 v. Slack, 19 Pick. 307. In R. v. Stew-

119 art, 12 A. & B. 773, 779, it was held

120 that the person under whose roof an-

121 other person dies is under a legal duty

122 to carry the corpse, decently covered,

123 to the place of burial, if there is no one

124 else who is bound to bury it.

125 Steph. Dig. C. L. art. 175. That

126 is the case when a body is buried

127 in such a way as to obstruct the coroner

128 in his duties, see R. v. Stephenson, 13

129 Q. B. D. 531.

130 R. v. Price, L. R. 12 Q. B. D. 247,
§ 1488. CRIMES. [BOOK 11.

It is also an offence at common law to wantonly deface tombs, monuments, and graves; and to be concerned in a disturbance in a graveyard. The passage of time does not withdraw from graveyard this protection, though they have been long disused. But acts of the legislature, or of competent municipal authorities, for the transfer of dead bodies from one burying place to another are not unconstitutional.

1482 b. Loud and unnecessary noises in the public streets made habitually, so as to disturb the neighborhood, are a nuisance. Hence, keeping an inclosed lot for rifle shooting, so as to draw together numbers of disorderly persons, many of them armed and noisy, is a common law nuisance; and so where noisy crowds are drawn together, to the annoyance of the neighborhood, night after night, by fireworks. Theatres, when conducted in such a way as to draw together disorderly people, and, by immoral plays and spectacles, to degrade those who frequent them, are nuisances at common law. The same doctrine was held as to a circus, carried on for eight weeks near dwelling-houses, and making continuous uproar.

[As to exposure of person, see infra, § 1468.]

VII. OFFENCES TO HEALTH.

§ 1488. Any acts or omissions which, in the regular course of events are likely to generate disease or communicate infection, expose the person so acting or omitting to act to an indictment for nuisance. It is not necessary qualifying the law laid down in 2 Black, Com. 508; Steph. Com. bok. 91, part 11. cap. vii. 8th ed. 189.


1 Com. v. Oaks, 113 Mass. 8. "It is sufficient," said Colt, J., "if the acts proved are of such a nature as tend to annoy all good citizens, and do in fact annoy any one present and not favoring them." Ibid. See State v. Graham, 3 Sued, 134. Supra, §§ 1411, 1412, and as to cases of noise on highways, infra, § 1474.


1 Supra, § 1422; Hawkins, L. 362, § 7; Wood on Nuisances, 52, citing People v. Baldwin, 1 Crim. Rep. (N. Y.) 286. As to crowds so collected see infra, § 1474.

1 Ingbold v. Robinson, L. R. 4 Ch. 385. See supra, § 1422.

CHAP. XXII. [§ 1484.

NUISANCE. [§ 1484. That the result should certainly flow from the cause. In view of the great stakes involved, and of the anxiety which the defendant's misconduct is likely to produce, a high probability of disease is sufficient.

1. Unwholesome Food or Drink.

§ 1484. Whoever knowingly and willfully exposes for sale, or has in his possession with intent to sell for human food, articles which he knows to be unfit for human food, is indictable for a nuisance; but to sustain the indictment, it is necessary that the food must be something that it does not purport to be, e.g., that it must be putrid or infected with some disease or other injurious quality, making it prejudicial to health. Guilty knowledge is necessary to constitute As in case of exposure of putrid or infectious food or drink.


Allowing noxious waters or other filth to pass from the defendant's land to the land of neighbors, may be a nuisance. Hardman v. R. R., L. R. 3 C. P. D. 108. See Fletcher v. Rylands, L. R. 1 Eq. 206; L. R. 3 H. L. Ca. 330; Humphries v. Convins, L. R. 2 C. P. D. 229. And see as to noxious vapors, Short's Iron Co., 7 App. Ca. 518; Crump v. Lambert, L. R. 3 Eq. 409; supra, § 1412.

That over-crowding houses with poor people in time of infection, so as to endanger the health of the community, is a nuisance, see Rolfe's Abr. 129, pl. 3; Wood on Nuisances, § 71; Meeker v. Van Rensselaer, 15 Wend. 387; State v. Purse, 4 Md. 472; infra, § 1486. Blackburn's Case, cited supra, § 1538.

274

275
the offence. The carrier who knowingly brings such food to the market is equally responsible with the vendor; but if the meat is to be used for other than human food, the indictment does not lie. The same rule applies to the furnishing others with unwholesome water, and to the furnishing others (children at a military asylum) with unwholesome bread, and to the pollution of water, and to the drawing together of water in pools in such a way as to stagnate and poison the air. But preparing a single portion of deliciious food for a single person, though it may be an attempt or assault, is not a nuisance.

The pollution of a spring or stream of water, and the supplying a market with food likely to engender disease, are, independent of the question of nuisance, misdemeanors at common law. Whether supplying deliciious food or drink is an assault is elsewhere considered.

§ 1435. It should be remembered that much food is unwholesome which it is not indictable to sell as human food; e.g., rich and highly seasoned dishes. Hence it is not enough in the indictment to aver the selling of “unwholesome food,” but the kind of food (e.g., beef) must be mentioned, and it must be averred to be diseased, or so spoiled or infected as to make it unwholesome. But the offence is completed by the sale of the food the seller knows to be diseased and poisonous, without proof of sickness caused thereby, or averment or proof that the food was sold to the vendee to be eaten by them, if

1. Ibid. See supra, § 67; Whart. Crim. Ev. § 38.
6. Infra, § 1474.
10. State v. Smith, 5 Hawkes, 378, and cases cited in prior notes.
11. Supra, § 610.
13. Sir J. P. Stephen (Dig. C. L. art. 187) thus states the law:—
14. Publicly and wildly exposing or causing to be exposed for sale articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health or life of the public within the meaning of this article. This is defective in not averring “for human use.”

§ 1436. For the same reasons, it is indictable to expose to the public a human being or brute animal having a contagious disease; nor is it necessary in such case that the indictment should aver a nuisance. And so, as has been seen, doing anything, or maintaining any building or institution, likely to generate infection, is indictable.

VIII. OFFENSIVE INDUSTRIES.

§ 1437. Can an industry which is essential to the public welfare, be convicted and abated as a nuisance, because it is offensive to the vicinity? This is a question that has been already discussed, and will be noticed in some of its relations hereafter. It has been seen that no prescription can be pleaded for a nuisance, and that neither its collateral benefit to the community, nor the good intent of the projector, is a defence. It has been seen that it is enough in such case to sustain a conviction that the comfort of the community was impaired. It has also been seen that when population moves up to a nuisance, which previously was in a solitude, then, as a

2. Ibid.
3. Supra, § 1120.
4. R. v. Vantandolle, 4 M. & S. 73; R. v. Burnett, 4 Ibid. 272; R. v. Hanson, Dearm. C. C. 24. See Smith v. Baker, U. S. C. C. N. Y. 1864; 30 Alb. L. J. 163; 1 Am. L. Journ. 363; where it was held that to take a child with whooping-cough to a boarding-house whereby boarders were induced to leave, and the plaintiff’s (the landlord’s) child caught the disease, gives the plaintiff a right to damages.
5. Supra, § 1433.
6. Supra, § 1415.
7. Supra, § 1419.
8. Supra, § 1421.
9. Supra, § 1410 et seq.
general rule, the nuisance must recede. As, however, this is a rule subject to some exceptions, it is better to view it as it bears on three distinct conditions of fact.

§ 1438. First, when the industry is originally planted in a populous community. Here there can be no question. The industry, if a nuisance, must be abated.

§ 1439. Secondly, when the industry is originally planted within the limits of an incorporated city or village, but where there are no dwelling-places in the vicinity at the time of its origination. The law, in this case, is clear. Whoever builds in a district set apart especially by the law for urban purposes, does so with notice that anything inconsistent with such purposes must be abandoned when the comfort of the population requires the surrender.

§ 1440. Thirdly, when the industry is originally planted in an uninhabited district, not part of an incorporated city or village, and is subsequently approached by population to whom it is a nuisance. Here the law also is, that in such case the industry must retire, to take up its seat in a district to which population has not yet reached. Yet it is impossible to study the cases without seeing that the question is treated as one of expediency, as the issue (that of comfort) indeed invites. Whose expulsion would produce the most general inconvenience—the nuisance or the population? If the nuisance be essential to the community at large,—if it cannot be pushed into remoter and more desolate regions with great inconvenience,—if the population affected by it can with comparatively little inconvenience retire,—then the latter cannot claim that the former be expelled. Of such cases as these we have illustrations in various public works instituted by government, and in chartered corporations for travel.

1 Sura, § 1415.
2 See Balf v. Roy, L. R. 8 Ch. 469; Broder v. Saillant, L. R. 2 Ch. D. 392.
3 See Ellis v. Stowe, 7 Blackf. 354.
4 See supra, § 1434. Thus, on the ground that a gas manufacture is essential to the comfort and safety of cities, it has been ruled, in a case already cited, that when such a manufacture is chartered for the purpose by the legislature, no indictment lies when the processes adopted for the purpose are the best that can be applied, and when due care and dil-

CHAP. XXII.

NUISANCE. [§ 1441.

On the other hand, when the "nuisance" can be readily sequestered to a more secluded spot, while the population has taken root, and cannot readily be moved, then the former must give way to the latter. It should be remembered, however, that no mere sentimental or nervous sensibility will be ground for a conviction. The "nuisance" must be reasonably offensive.

IX. EXPLOSIVE AND INFLAMMABLE COMPOUNDS.

§ 1441. It is a nuisance at common law to keep or manufacture explosive or inflammable compounds in such a way as to be productive of terror or peril to the community. Licenses for such keeping or manufacturing are to be strictly construed, and their restrictions conformed to closely. Nor will they be stretched to authorize any offence they do not expressly cover. Thus a license from government to manufacture or keep on hand petroleum, under such conditions as will prevent explosion, is no defence to an indictment against the manufacturer of such petroleum in such a way as to diffuse unwholesome and offensive vapors. The same distinctions apply to gunpowder.

Spring guns, also, may be proceeded against as nuisances.

1 See supra, § 1434.
2 See supra, § 1441.
3 See supra, § 1441.
4 See supra, § 1441.
5 See supra, § 1441.
6 See supra, § 1441.
7 See supra, § 1441.
8 See supra, § 1441.
9 See supra, § 1441.
10 See supra, § 1441.
11 See supra, § 1441.
X. NUISANCES OF PERSONAL DEFEATMENT.

§ 1443. When a woman is habitually addicted to scolding at and before persons in general, on the highway, or in a populous neighborhood, so as to disturb paseers-by, she may be indicted as a common scold; and it is enough if the indictment simply aver her to be such. Anger or malice is not a necessary constituent of the offence. Ducking, however, which was the old common law punishment, is now obsolete.

§ 1444. A common brawler is a person addicted to constant noisy public brawling and quarrelling. The offence is in some States indictable by statute; in others at common law. It is not necessary to constitute this offence, or that of a common scold, that the brawling and scolding should be in the public streets. If it takes place within a house, and yet is so vehement and vituperative as to disturb the public peace outside, it is indictable. A common profane swearer, or user of indecent language, has been said to be in like manner and with like limitations, indictable at common law.

§ 1444. A common barrator, e.g., a person who habitually foments vexatious and groundless litigation among citizens, irrespective of any private relations he may sustain to them, is indictable as a nuisance at common law. The gratuitous or venal fostering of litigation, under the name of chancery and maintenance, is hereafter considered. Common thieves are indictable in some States by statute, but in such cases habitual thieving must be proved.

§ 1445. Eavesdropping may, in like manner, be indictable as a nuisance. It should, however, to be indictable at common law, be habitual, and combine the lurking about eavesdroppers. And so of common dwellers, and other places where persons meet for private intercourse, secretly listening to what is said, and then repeating it abroad. It is a good defence that the act was authorized by the husband of the prosecutrix. The offence, it is said, may be committed by stealthily lurking around a grand jury, and repeating their secret proceedings.

§ 1446. Open and gross lewdness is in some jurisdictions indictable by statute, and so is at common law, with the qualifications above stated. Lewdness, however, is not a designation of character, but a conclusion of law, of which it is necessary to state the promises of fact. And to sustain a charge of haunting houses of ill-fame, there must be a scienter. The evidence by which such an indictment may be sustained is necessarily circumstantial.

Night-walkers, i.e., persons who stroll the streets at night for immoral purposes, are indictable at common law.

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1 R. v. Foxby, 6 Mod. 14; U. S. v. Royall, 3 Cranch C. C. 618; Com. v. Pry, 12 Pick. 359; Com. v. Foley, 99 Mass. 497; Com. v. Davis, 11 Pick. 433; Com. v. Mohr, 52 Penn. St. 243.
3 The offence must be to the public, not to an individual alone. State v. Schottmann, 52 Mo. 104.
5 U. S. v. Royall, at supra.
7 See Com. v. Foley, 99 Mass. 477, as to Massachusetts statute; and see also, Com. v. Harris, cited supra, § 1412.
8 See infra, § 1492.
9 Infra, § 1453, 1854.
10 World v. State, 60 Md. 49.
11 U. S. v. Royall, at supra.
13 Com. v. Lovett, supra.
14 State v. Pennington, 5 Head, 299.
15 So in Massachusetts, where it was held that indecent exposure of person was "gross lewdness" under the statute.
16 Com. v. Wardell, 122 Mass. 62; State v. Millard, 16 Vt. 574. See supra, § 1446; Grisham v. State, 2 Yerger, 588; where it was held that to an indictment against two for lewdness, it is no defence that the parties were married by rites not recognized by the State as legal. And see Com. v. Mangum, 122 Mass. 460; infra, §§ 1726, 1747, 1748; Peak v. State, 10 Humph. 39. Supra, § 1452. See, however, contra, State v. Brunson, 2 Bailey, 149. For illicit cohabitation, see infra, § 1747.
17 Supra, § 1432.
18 Damron v. State, 8 Mo. 404.
19 Brooks v. State, 2 Yerger, 482.
20 Peak v. State, 10 Humph. 39; Myatt v. State, 8 Iowa, 47.
21 State v. Dovers, 45 N. H. 542. See supra, § 441.
§ 1447. Common drunkenness may be treated as a nuisance when it is such as habitually to shock, molest, and disturb the community at large. "Common" does not in this sense mean constant. It is enough if the drunkenness be frequent. By statute private drunkenness is in some jurisdictions made indictable.

§ 1448. Publishers of false alarms, or of intelligence calculated to disturb the peace of a community, on the same principles on which common scolds and common barrators are indictable, are subject, if the offence be continuous and directed at the community generally, to penal discipline. Under this head may be classed a case in which it was held that it is an indictable offence to tamper with telegraph wires, so as to give a false alarm of fire.

XI. DISORDERLY, BAWDY, AND TIPPLING-HOUSES.

§ 1449. A bawdy-house (or a house of ill-fame as it is sometimes called) is a house kept for the reception of persons who choose to resort to it for the purpose of illicit sexual intercourse, and is indictable atcommon law. But the manner above stated, constitutes, in whatever light it may be viewed, a common nuisance, cannot, we think, be well questioned; that it is injurious to both the comfort and health of a large number of persons in the community in which the report has been put in circulation is self-evident, because its tendency is to fill the mind with anxiety, fear, and alarm, to the absolute destruction of the comfort and happiness of many, and by this means is, to a greater or less extent, injurious to the health of persons brought under such influence."

That to falsely and maliciously announce a man’s death and tell the tale for it, is not indictable, see State v. Briggs, 22 Bl. 321, cited supra, § 1411.

To make a house, as a disorderly house, a nuisance at law, it must be resorted to in common by other women than its keeper when a woman. It is immaterial "whether indecent or disorderly conduct is perceptible from the outside." A disorderly house is a house kept in such a way as to disturb, annoy, or scandalize the public generally, or the inhabitants of a particular vicinage, or the passers in a particular highway, and is indictable at common law, and an inn, or building, to which the public have access generally may be "disorderly" when the disorder is only inside, and is not heard outside, if it disturb those who have right of access to the house. So, though a mere tippling-house is not per se a nuisance at common law, yet it is otherwise with a house kept for promiscuous and noisy tippling, promoting drunkenness in a community, or when unlawful sales are made to all parties applying. But to make a house, as a disorderly house, a nuisance at law, the conduct of the house causes outside disorder, this makes a disorderly house.

U. S. v. Stevens, 4 Cranch C. C. 541; Jennings v. Com., 17 Pick. 80; Com. v. Lewis, 1 Met. 151; Com. v. Kimball, 7 Gray, 328; Cadwell v. State, 17 Com. 467; Jacobson v. People, 6 Hun. 554; Barncosdotta v. People, 10 Ibid. 157; King v. People, 82 N. Y. 557; State v. Williams (30 N. J. L.), 1 Vroom, 162; State v. Krous, 5 Ind. 405; Billings v. Com., 12 B. Mon. 21; State v. Bents, 14 Mo. 27; Birchfield, ex parte, 52 Ala. 377.


*infra*, § 1456; State v. Mathews, 2 Dev. & B. 424. The converse is true, when the conduct of the house causes outside disorder, this makes a disorderly house.


It is no defence when the character of the house is such as to promote disorder, that its keeper interfered in quiet brawls. Com. v. Cobb, 120 Mass. 385. *infra*, § 1424. State v. Mathews, 2 Dev. & B. 424. The converse is true, when the conduct of the house causes outside disorder, this makes a disorderly house.
The disorder must be in a place to which the public at large have access. What is disorder, however, is conditioned by circumstances; and what is not disorderly on a secular day may be disorderly on Sunday. Disorderly, tippling, and bawdy-houses are plainly distinguishable. As, however, they may be joined in separate counts in the same indictment, or may be blended in one count; and, as the decisions bearing on them speak generally of the offence thus made up, they will here be considered under one general head. It is to be remembered, however, that to constitute a bawdy-house it is not necessary that there should be any disorder visible or audible from outside; and to constitute a disorderly house it is not necessary that there should be any public prostitution.

Offences of this class need not be committed luceri causa. The indictment, when the offence is statutory, must contain the statutory terms. When at common law, if it contain averments that the house was unlawful, and disorderly, and a common nuisance, specifying in what respect it was disorderly, this is usually enough. That it is sufficient simply to charge the defendant with keeping a "common disorderly house" has been sometimes argued. But this is a loose mode of pleading, for the question of disorder is a wide one, and there are many kinds of disorder which are not indictable, and of which it would be intolerable tyranny for the law to attempt to take cognizance. The proper course is to specify what

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1 See Cheek v. Com., 79 Ky. 359.
2 Iowa, 1454; Malin v. State, 42 Ind. 397.
3 See supra, 1431; U. S. v. Columbus, 6 U.S. 568; Hall v. State, 4 Haring. 132.
4 Com. v. Ismaili, 134 Mass. 201.
7 Iowa, 1457.
8 As to Massachusetts, see Com. v. Lavonais, 132 Mass. 1.
12 State v. Patterson, 7 Ind. 70.
13 Com. v. Hopkins, 133 Mass. 381.
15 Supra, § 1449.
16 See supra, § 1449.
17 Supra, § 1449.
18 See supra, § 1449.
19 See supra, § 1449.
mon law a "house of ill-fame," as a scandal to the community, is per se indictable; or whether because no other proof can often be had; it has been held, though on questionable authority, that the "ill-fame" or "bad reputation" of the house may be proved. But however this may be, it is settled that the bad reputation of the persons visiting the house may be put in evidence. It is, in any view, error to charge the jury that they are to convict if the house has a bad reputation. They must only convict if they believe the house to be one of ill-fame, or a bawdy-house, as the case may be; and the fact that a house kept bond fide for public convenience is sometimes resorted to by persons of ill-fame does not necessarily make it a house of ill-fame. All concerned in "keeping" such house, if they take part in its government, are "keepers," no matter what may be its extent; though the fact that a prostitute

under Maine statute, State v. Boardman, 64 Me. 523. That the "character" of a "liquor nuisance" may be shown by the prosecutor, see State v. Haley, 52 Vt. 475; Whart. on Cr. Br. § 57. As to statute, see infra, § 1438 b. Prostitution in the house need not be proved if the house was used as a dance-house to get up assignations. Com. v. Cardone, 119 Mass. 216. That indictment following statute is sufficient, see Com. v. Laverneus, 132 Mass. 1; State v. Field, 25 Ind. 228. 1 Cadwell v. State, 17 Conn. 467; State v. Blakely, 38 Ind. 393.


& R. 342; Henson v. State, 62 Md. 231;
Toney v. State, 60 Ala. 299.


That single illicit acts will not constitute a bawdy house, see State v. Garing, 74 Me. 122; State v. Evans, 5 Ind. 603; Smalley v. State, 11 Tex. Ap. 147.

3 State v. Bremner, 39 Wis. 435.


5 Com. v. Gannett, 1 Allen, 7; Harrow v. Com., 11 Bush, 619; People v. Buchanan, 1 Idaho, N. S. 681. In 1439.

§ 1452.] CRIMES. § 1455.

is an inmate of such a house does not by itself make her a keeper. 1

§ 1455. Ownership may be proved by admission, or by acts of authority, or by record. 2 It cannot be shown by reputation, 3 but is to be inferred from the circumstances in proof. 4 It is not proved by occupation of a particular room in the house. 5

§ 1454. Tipping-houses, when conducted noisily and in such a way as to breed disorder and crime, are, as has been seen, indictable at common law; nor will a license to sell liquor shield the defendant when tried specifically for the nuisance. 6 Nor, in prosecutions for a nuisance, can a tavern-keeper, or the keeper of any building open to the public, defend himself on the ground that the disorder is exclusively inside the house, and is not heard outside. 7 Wherever the public has access, there disorder is a public nuisance. But in a private house, to which the public has not access, the disorder must be such as to annoy passers-by or neighbors. 8 And of a tipping house, as such, it is an essential condition that there should be habitual selling, directly or indirectly, of spirituous liquor by retail. 9

§ 1455. A married woman may be indicted for keeping a house of ill-fame, either with or without her husband, 10 and a husband living in the house, and there exercising acts of control, cannot defend himself on the ground that the house was owned by his wife, under the married woman's

Married woman

1 Toney v. State, 60 Ala. 87.


4 State v. Wells, 46 Iowa, 622; Comch v. State, 24 Tex. 357.

5 Toney v. State, 50 Ala. 97.

6 supra, § 1449, where the cases are given; and see more fully infra, § 1450.

7 supra, § 1424; State v. Buckley, 5 Har. 508; State v. Mulhollan, 8 Blackf. 306; See U. S. v. Elder, 4 Cranch C. C. 607; Smith v. Ambe, 20 Mo. 214; Archer v. State, 10 Tex. Ap. 482.

8 supra, § 1449.

9 R. v. Williams, 1 Salk. 184; 40 Well. 521; Com. v. Lewis, 1 Met. 151; Com. v. Cheney, 114 Mass. 281; State v. Rents, 11 Mo. 201.
§ 1457. *CRIMES.* [BOOK II.

acts, who lived there, carried on the premises, and received all the
profite. 1

§ 1456. So far as concerns disorderly houses, nuisance to all the
neighborhood need not be proved, 2 nor, if the house be
shown to be disorderly, is proof of outside riot or disorder
enough. 3 On the other hand, a
single riot does not create a disorderly house, 4 nor does
a single act of lewdness, nor even continuous acts of lewdness by
one person, make a bawdy-house. 5 But the offence must be to the
public in general. 6 Thus, upon a charge of keeping a disorderly
house, where it appeared that the defendant lived in the country,
remote from any public road, and that loud noises and uproar were
often kept up by his five sons, when drunk, whom he did not
encourage (save by getting drunk himself), but would sometimes
encourage to quiet, by which disorder only two families, in a thinly
settled neighborhood, were disturbed, this was held not to amount
to a common nuisance. 7

The question of admissibility of reputation is elsewhere
discussed. 8

A house of assignation, where parties meet for the purposes of
debauchery, is indictable as a bawdy or disorderly house, though
no prostitutes live there. 9

§ 1457. That the offence need not be luceri causa, has been
mainly determined as a matter of pleading. 10 But on
principle the expectation of pay is not essential to the
offence. 11

1 Com. v. Wood, 97 Mass. 225. See
2 Com. v. Davenport, 2 Allen, 299.
3 R. v. Rice, L. R. 1 C. C. 21; U. S.
4 Columbus, 5 Cranch C. C. 304; State
5 v. Webb, 25 Iowa, 235. See Sylvester
6 v. State, 42 Tex. 496.
8 Supra, § 1449; Maha v. State, 42 Ind.
9 397; Dumas v. State, 9 Yerg. 390.
10 State v. Evans, 3 Ind. 493, and
11 cases cited supra, § 1422. See R. v.
Pierscion, 1 Salk. 392.
12 Hunter v. Com., 2 S. & R. 298;
Main v. State, 42 Ind. 397.

CHAP. XXII. *NUISANCE.* [§ 1459.

§ 1458. Proof of the use of a single room for purposes of gen-
ereal prostitution will support an indictment for keeping a
"house" for such purposes. 1 And a canvas tent may be
a "house" in the same sense; 2 and so may a boat on a
erver, when used as a habitation. 3

§ 1459. At common law it is an indictable offence not only
to keep a house of ill-fame, or to be in any way concerned
in the same, 4 but to let a house, knowing it is to be used
for the purposes of prostitution; 5 though in New York
the last point was once ruled differently, and it was laid
down that to rent a house to a woman of ill-fame, with
the intent that it should be kept for purposes of public prostitution,
is not in itself an offence punishable by indictment. 6 Subsequently,
however, the doctrine held in the latter case was qualified, and it
was declared that when it appeared that the owner of lands had
either created a nuisance, or continued, or in any way sanctioned
its creation or continuance, he is indictable. 7 At present the law,
even in New York, is, that such letting or hiring, with a guilty
knowledge, makes the landlord indictable as a principal in keeping
the house, supposing the house to be so kept. 8 If, however, the

1 Com. v. Howe, 13 Gray, 26; Com.
v. Hill, 14 Idaho, 24; Com. v. Buxton,
116 Mass. 456; State v. Garity, 46 N.
R. 61; State v. Main, 31 Conn. 572;
In People v. Bixby, 67 Barb. 221; 4
Eun, 636, an immoral exhibition of
women in a room which was not open
to the public generally, but only to
such as were permitted to enter and
paid therefor, was held to be in a "pub-
lic place" within the statute against
indoor exposure. But see State v.
Barr, 39 Conn. 40. As sustaining text
see State v. Main, 31 Conn. 572; State
v. Mullin, 35 Iowa, 199.
though see Callahan v. State, 42 Tex.
43.
4 State v. Mullin, 35 Iowa, 199.
5 Supra, § 1449; Harlow v. Com., 11
Bush, 618.
6 U. S. v. Gray, 2 Cranch C. C. 676;
Com. v. Harrington, 3 Pick 26; Smith
v. State, 6 Gill. 429; People v. Sand-
ders, 29 Mich. 269; State v. Potter, 30
Iowa, 587.
7 That a landlord is responsible for
whatever he causes or is able to prevent
or correct, see James v. Harris, 35 L.
T. 240; Gandy v. Jutter, 5 B. & S. 78;
311.
8 That the lessee may be charged as
keeper of the house, see State v. Lewis,
4 Tex. Ap. 567; Stevens v. People, 67
Ill. 587.
9 People v. Brookway, 2 Hill (N.Y.),
558.
10 People v. Townsend, 3 Hill, 479.
11 See, also, to same effect, Ross v. Com.,
2 B. Monr. 417.
12 Com. v. Harrington, et al., People
v. Erwin, 4 Donic, 129; Smith v.
landlord has absolutely no control, and when leasing was ignorant of the intended use, he is not responsible for letting the house with the unlawful purpose in view. And in any view the indictment should be special, charging him not with keeping, but with knowingly letting, the house.

§ 1460. To make a party liable for knowingly permitting his house to be used for the purposes of prostitution, it is said in Iowa to be necessary that he be shown to have done some act, or made some declaration, sufficient to show his assent to such use after he had knowledge of it. Mere inactivity, it is said in the same case, or failure to take steps to prosecute, does not make him liable. But, however this may be under the Iowa statute, acquiescence involves a party in the common law offence, where the lease is renewed (as in cases of leases week by week, or month by month) after knowledge by the lessor of the use made by the lessee. Here the lessor supplies the machinery for the maintenance of the nuisance, and continues week after week to renew the supply, and knowingly to give each week fresh impulse to the nuisance. In such case, according to the views hereinbefore unfolded, he becomes (the offence being a misdemeanor) a principal in the nuisance. The same rule applies to all persons mixing in the management, supposing the offence is charged as a nuisance. Thus, it is no defence to an indictment of this class that the defendant, who is proved to have control of the


In Ohio the offence is indictable by statute. Act of April 11, 1856.


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2 R. v. Barrett, L. & C. 329, commented on in succeeding note. And see, also, State v. Pearsall, 43 Iowa, 430.

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8 State v. Abrahams, 6 Iowa, 117. See Com. v. Adams, 100 Mass. 344.

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4 See supra, § 1422; R. v. Stannard, L. & C. 343, so far as it conflicts with the principles just stated, cannot be accepted as law. See supra, § 1422.

So far as it lays down the rule that a landlord's failure to give notice to quit does not involve the landlord in liability as a "keeper" of the house, the rule is consistent with what has been stated as to "omissions." But on the only question put in R. v. Stannard, the ruling is not inconsistent with the text. The indictment charged that the defendant kept the house. "But he was not the keeper of the house," said Pullock, C. B., "and the conviction must be quashed." See supra, §§ 135 at supra.

Harlow v. Com., 11 Bush, 610, and cases supra, § 1422.

§ 1461. Here we touch a point that has heretofore been incidentally discussed. Are public games to be discouraged and depressed? Much depends on this point on the policy of the community in respect to the physical and moral condition of the young men; but much also, when the question of nuisance presents itself, depends on the moral bias of the community. Where public sentiment is scandalised by the public exhibition of a particular game, then the public exhibition of such game may be a nuisance. But the sentiment thus to be protected must be that of a community, and not that of a few persons, no matter what their prominence and excellence. Applying this criterion, we can understand why decisions as to what public games are nuisances should vary in different communities.

§ 1462. Bowling-alleys, when attended by noise, and drawing to them crowds of idlers, may be nuisances in thickly inhabited
CRIMES.

§ 1463. Unless conducted in such a way as to attract offensive crowds, billiard rooms are not common law nuisances; and though it has been held that when the loser has to pay for the table the play may become gambling; the better opinion is that the game is not necessarily a game of chance. But when disorderly they may become indictable as nuisances.

§ 1464. Public spectacles are to be governed by the considerations just named, with this addition, that whatever tends to need-

[Book II.

quiet communities; though when charged as a common law nuisance proof of great habitual disorder should be given. Nor can the game be properly regarded as a game of chance or as a nuisance, unless conducted in a disorderly way.

§ 1465. It is at common law not indictable for persons to engage in gaming in private; or to conduct a single game of chance in a public place. But when gaming is there publicly known to be carried on, however secluded the place may be, and when unwary and inexperienced persons are there induced and seduced, then the parties concerned are indictable for nuisance, irrespective of any particular statutes.

And a public faro table when so operating is, per se, a nuisance. Nor is it necessary that a house, to be a public place, should be one exposed to all passers-by. It is enough if persons ordinarily applying are to be received. All concerned in keeping the house are principals.

[§ 1465.

CHAP. XXII.

NUISANCE.

legally collect a crowd of idlers, and block up streets, becomes a nuisance. That the exhibition of obscene pictures may be a nuisance at common law is elsewhere seen.

[§ 1465.

1 State v. Currier, 23 Me. 43; State v. Hay, 29 Ind. 421; Haines v. State, 30 Ind. 65; Tamar v. Trustees, 5 Hill (N. Y.) 121. See State v. Records, 4 Harring. 554; Needham v. State, 1 Tex. 139.


3 Supra, § 1405-8; supra, § 1432.

4 In Hawkins C. C. 719; see Hinds v. Mole, 6 Ex. Rd. 6; Hinds v. Mole, 6 Ex. Rd. 130. See further, lenora's case, 1 Ex. C. 100.

5 State v. Currier, 23 Me. 43; State v. Hay, 29 Ind. 421, under statute; Needham v. State, 1 Tex. 139, for keeping without license; Com. v. Humes, 9 Mass. 6; Smith v. State, 22 Ala. 54; Harris v. State, 22 Ala. 57, under statute; Longworth v. State, 41 Tex. 102.

6 Armstrong v. State, 4 Blackf. 247; it was said that the inference from a single set of gaming is for the jury.


8 As to gambling under Virginia statute, see Nuckolls v. Com., 32 Gratt. 834. As to Alabama statute, see Toney v. State, 61 Cal. 1.

9 State v. Doon, R. M. Charl. 1.

10 Rice v. State, 10 Tex. 545.

11 That, under the English statute, a railway carriage is a public place, see Langrish v. Archer, L. R. 10 Q. B. 44. As to what is a public place, see State v. Book, 41 Iowa, 550; Smith v. State, 52 Ala. 384; Diskey v. State, 65 Ind. 508; Lowrie v. State, 43 Tex. 662; Shepherd v. State, 1 Tex. App. 304; Askey v. State, 16 Id. 638.

12 As to the game of "tan," see People v. Ah Con, 56 Cal. 188. Supra, § 1456 a.

13 That under statute declaring that persons playing faro and other games
§ 1465 a. Fair and honest contests of skill and strength have been always regarded as sustained by the common law, notwithstanding the fact that a prize is attached to success. This has been so from the days of tournaments, where prizes were given for valor to the victors in fair encounters in the arena, to the days of county fairs, where prizes are given to those who bring in the fleetest horses, the fattest pigs, the rarest fruit, and the finest needlework. The mere fact, therefore, that a prize is offered to the conqueror in a contest of skill or strength does not make it illegal; nor, to advance a step further, is mere private gaming for money, when the game is fair, and when there is no offence to the public, indictable at common law. 1 On the other hand, not only in the United States, but in England, statutes have been repeatedly passed to prohibit "gaming" as an illegal act, to be distinguished from the playing of games. Keeping this distinction in view, the meaning of "gaming," as a criminal offence, is plain. To play chess for a prize is not "gaming," nor is it "gaming" to play foot-ball or cricket, or to engage in contests of strength in a country fair, though a prize is to be awarded to the winner. On the other hand, it is "gaming" for parties to stake money on chance. 2 The chance must be the controlling factor in the game. It is not enough to say that wherever chance enters in any appreciable degree into a contest, then there is gaming. There is no contest—forensic, literary, artistic—in which chance does not so enter. A lawyer may accidentally lose his brief before beginning his speech; or an author may be misled by a wrong argument on which he casually strikes; or an artist may find that colors he took due care for money shall be deemed common gamblers, single acts may constitute the offence, see State v. Melville, 11 R. I. 417; Cameron v. State, 15 Ala. 383; Towner v. State, 13 Mo. 355; Patterson v. State, 13 Tex. Ap. 252; Schlueter v. State, ibid. 175; supra, § 14726.

1 See Hirt v. Molebury, L. R. 6 Q. B. 130; State v. Currier, 33 Me. 43; Conv. v. Emmens, 98 Mass. 6; Hansen v. State, 57 Ind. 627; State v. Hayden, 31 Mo. 35; Needham v. State, 234 1 Tex. 139; Longworth v. State, 41 ibid. 102.

8 This is adopted in In re Lea Tong, 5 Crim. Law Mag. 67; see State v. Gitt, a Tex. 420; 1 West Coast Rep. 37; 18 Fed. Rep. 250.

In People v. Winthoff, 51 Mich. 214, Cooley, J., said: "Let a stake be laid upon the chances of a game, and we have gaming."

A learned note on "games of chance" will be found in 5 Crim. Law Mag. 529.

in selecting turn out from some casualty not to stand. This, however, does not make a contest, in which lawyer, author, or artist may be concerned, "gaming." All competitive examinations are affected in some degree by chance, yet no competitive examination is "gaming." So as to games of skill. In such games chance may have very little part. If so, playing these games, even for reward, is not gaming. It is otherwise when the game depends more largely on chance than on skill. Hence gaming as a penal offence, under the statutes making it such, may be defined as a taking by agreement on chance.

Dog-racing dependent upon training, is not a game of chance, nor is horse-racing, when also dependent on training, and for the improvement of stock; though if chance be made the preponderating element, it is otherwise. 4

"Cock-fighting," being cruel and wanton, and mainly dependent on chance, is gaming. 6

Ninepins.—Whether the game of ninepins is a game of chance depends upon whether it is a game in which chance or skill predominates. When fairly conducted, it is to be regarded as an athletic sport, not indictable at common law.

The following games have been held lawful even when played for a stake:

2 Hirt v. Molebury, L. R. 6 Q. B. 130.
3 Oliphant on Horse, 412; Coombes v. Dibble, L. R. 1 Exch. 242; Hirt v. Molebury, L. R. 6 Q. B. 130; Danforth v. Hutchinson, 16 N. H. 57; Bentvick v. Conwty, 5 Q. B. 693; Chatham v. Bray, 1 Bowl. Pr. (N. S.) 728; Evans v. Pratt, 4 Scott, N. R. 376; Holmes v. Sixsmith, 7 Exch. 602. See also Stephen on Search of a Horse, 20 ed. 1866; Harlow v. U. S., 1 Morris, 139; State v. Hayden, 31 Mo. 35; but see State v. Ness, 2 Ind. 499.
5 See supra, §§ 1087, 1085
6 See Com. v. Tilson, 3 Met. 392; Baxter v. State, 1 Humph. 468. See Coombes v. Chose, 11 Met. 79. See State v. Dawson, 10 Exch. 237. 7 supra, § 593 of N. Y. Penal Code of 1882. The game is condemned by Lord Ellesbergh in Squires v. Whiskeah, 3 Camp. 140, and held unlawful in R. v. Howard, 3 Keo. 610, where it is said that "the defendant being convicted of keeping a common cock-pit, the court construed it an unlawful game... at common law." And see supra, § 573.
7 See supra, § 1462.
Foot-ball; wrestling matches, provided they do not take the shape of public prize-fights, rowing matches; coursing matches; quoits; cricket, bowls; foot-racing; billiards; backgammon; dominoes; shuffleboard.

Verdicts of juries finding that the following games are games of chance have been sustained:—

"Rondo;" "Draw Poker;" "Pool;" "French Pool;" or "Paris Mutual;"


That consent cannot validate a prize fight when it is a breach of the peace, see supra, § 538. That consent cannot validate a boxing match, see State v. Bernham, 55 Va. 445. And it is no defense that such performances are sustained by usage. Ibid.

1. Bootb v. E. R., 5 M. & Dig. 274.
4. Jeffreys v. Walter, 1 Wms. 236.
6. Hodson v. Terrill, 1 C. & M. 797.
7. Sigal v. Jobb, 3 Stark. 2. As to bowling alleys, see supra, § 140; and see State v. Records, 4 Harris, 554.
11. Parsons v. Alexander, 1 Jur. N. B. 600. See supra, § 1463. A "billiard table" need not have pockets. Sikes v. State, 67 Ala. 77. As holding that billiard playing when the loser pays for the game is gambling, see Ward v. State, 17 Ohio St. 32; State v. Book, 41 Iowa, 250; see, however, Harbaugh v. People, 40 Ill. 294; Biewett v. State, 34 Miss. 698.

But that billiards is not by itself a game of chance, see Wortham v. State, 59 Miss. 179.

16. See State v. Lewis, 12 Wis. 454.
17. Stith v. State, 12 Ark. 680; Wren v. State, 70 Ala. 1. But in Nichols v. Com., 32 Ga. 884, it was held that "poker" is not of the same class as faro, keno, and the like.
19. In Rice v. State, the Court of Appeals of Maryland, on March 12, 1858, decided that the selling of cards and tickets at a "mutual pool" on horse races is not keeping a gambling table under the Maryland Statutes; four judges dissenting, three dissenting. From the opinion of the majority the following is extracted —

"We are now prepared to examine the evidence which was admitted in the Criminal Court. If the persons who purchased the tickets in the various pools were playing at a game of chance, then the appellants were keeping a gambling table and a place for gambling. The object of purchasing these tickets was to wager money on certain horse races. No ordinary interpretation of language would describe their conduct as that of the playing of a game. When a man hazards his money on the rise or fall of prices of stocks, cotton, grain, or other commodities it cannot, in the proper use of language, be said that he is playing at a game of chance, nor can the place where such ventures are made or registered be designated as a gambling table.

"Bets are made and money hazarded on many of the uncertainties and contingencies of life, but in the common use of language, these transactions are not called games of chance. The contingency on which these appellants wagered their money was the result of a race. In one event they would win, in another they would lose. It may be said that many elements of uncertainty were involved in the wager by reason of the various combinations which might be made in the pools. But, nevertheless, the thing which was to determine gain or loss was the success of the horses chosen. If by any singular accident or discourse a horse race could be shown to be a game of chance, by the same reason we must hold it was played on the race-course, and that the horses were the players. Such disquisitions are very far removed from the ordinary method of thought prevailing among men. It is not consistent with the just and benign spirit of our law to give to a criminal statute an interpretation which can be maintained only by a keen and scholastic ingenuity. The meaning of the law which consigns a man to prison or deprives him of his property should be plain and obvious. Betting money is not an offence by the common law, and is punishable only in the particular cases which are made criminal by statute. Horse races have been in some measure favored by our legislation. By the 15th section of article 56 of the code, the clerks of the Circuit Courts are authorized to issue licenses for the sale of spirituous and fermented liquors at horse races, and the Maryland Jockey Club was incorporated by the act of 1872, chapter 56. Persons may attend the races and hazard their money as freely as they choose by betting on the horses, and they will not thereby become amenable to any legal penalties. The jockey club holds its meetings for those races under the authority given by the Legislature in its charter of incorporation. If betting money on the horses were regarded by the law as playing at a game of chance the race-course would be a place of gambling within the meaning of the statute, and the jockey club would be indictable for maintaining it. But we have seen that they have the express authority of the Legislature for these races. It may be urged that, wagering money on a horse-race is as immoral and as evil in its consequences as playing at a gambling table, and that these pool-rooms present to the idle and dissipated all the temptations which belong to any form of gambling. But such arguments do not justify us in extending the statute beyond the bounds of a just and reasonable construction of its language. It is for the legislature to make such changes in the law as it may consider the public good to require. Our functions are limited to interpreting and enforcing the legislative will when it has been declared, and it would be very unwarrantable in us to permit any private sentiments of our own to affect the construction which we give to these statutes."

1. People v. Ak Cor, 56 Cal. 188.
2. Wyatt's Case, 6 Rand. 694; Mun-
§ 1465 b. We have already had occasion to notice that the playing at games, so far from being in itself illegal, has been encouraged by a just public sentiment in all cases in which such games tend to the nurturing among young men of personal strength and martial spirit. The same may be said, though with less emphasis, of games by which recreation of mind or body is obtained by those who need such recreation. In its popular sense, we are told, the word "game," in this relation, is used in three senses: (1) Sport, as where Shakespeare speaks of "pastime and pleasing game." (2) A contrivance to furnish sport or recreation, as "games of chance," "games of skill."
courts will not regard variances in mode or details as material. Hence a contest for a wager, in a matter more or less of chance, is gambling, and so of staking money directly on any game of chance or skill, and agreeing that it should be determined by a throw of cards who should pay for a drink or for the expenses of a table. Giving a prohibited game a new name does not take it out of the statute; and under any general term descriptive of gaming used as a nomen generalissimum, specific types of gaming are to be regarded as included. Those concerned in managing a social club are indictable for gaming permitted by them. And so of those concerned in a proprietary club managed by a committee who elected members.

(2) Under the statutes the playing a single prohibited game may constitute the offence. It has been said that when a series of prohibited games are played at one sitting this constitutes but one offence; and this may be true when these games form one transaction. But when they do not they can no more be consolidated in one offence than can a series of illegal drinks taken successively in a drinking saloon.

(3) All concerned are principals, even if not participating, if they take part in the management of the game or table. But in some statutes the permitting persons to play on the defendant's premises is made a substantive offence.

§ 1465 c. Hence, from what has been already stated, whatever is likely to excite a disturbance (e.g., dispensing intoxicating drinks) may give to gaming that incident of disorder and discomfort to the community which may make it a nuisance.

§ 1465 d. It has been already stated that, while gaming by itself is not a nuisance at common law, it becomes so when accompanied with incidents which make it contribute to the discomfort and disorder of the community. This is the case when minors are drawn together at gaming tables in such a way as to engender dissipated habits on their part, to take them from their home and business duties, and to draw together idlers so as to create a disturbance. In many States to permit minors to attend gaming tables is made indictable by statute, even though the gaming itself be of a character which is not specifically indictable.

§ 1466. As to the framing of indictments for gambling and for gaming-houses the following points are to be noted:

Statutory terms.—These must be used, though it is not enough when they charge conclusions of law.

2 Supra, §§ 1461 et seq.

3 E.g., Com. v. Tilton, 8 Met. 332; Com. v. Price, 8 Leigh, 757; State v. Black, 9 Ind. 378 (Raffin, C. J.); State v. Terry, 4 Dav. & R. 185 (under statute); Ray v. State, 50 Ala. 172 (under statute); Campbell v. State, 55 Id. 69 (under statute); Colb v. State, 9 Tex. 42 (under statute); O'Brien v. State, 19 Tex. 404. And so as to the laws of the Lord's Day. State v. Fearnot, 2 Md. 310, cited supra, § 29; and citing Whart. Cr. PI. & Pr. § 474.

4 See supra, §§ 301 et seq. For a statute holding this is indictable at common law. State v. Anderson, 30 Ark. 131 (under statute); supra, § 1431, etc., as to joinder of defendants, see Whart. Cr. PI. & Pr. §§ 301 et seq. That the parties with whom the defendant played need not be averred, see O'neal v. State, 18 Ark. 640; Goodman v. State, 41 Id. 228. See infra, § 1630.
Matters unknown.—As to such, specifications can be excused by stating that they were unknown to the grand jury.1

Joinder of defendants.—All parties in joint gambling may be indicted jointly,2 but not unless they were engaged at the same time in the same game.3

Exceptions.—When the exceptions to the statute are contained in the enacting clause of the statute and limit the offence, they should be negative in the indictment. It is otherwise when they are in provisions or subsequent exceptions, and are matters of defence.4

Names of parties.—The names of parties playing need not be specified in the indictment when the offence is charged as of the nature of a nuisance, or, as is the case with keeping gaming tables, is not dependent on the character of the parties engaged.5 It is otherwise when the offence is qualified by the character of the parties engaged, in which case the names should be given, or they should be averred to be unknown; and, it is otherwise, also, when certain persons are required to be present in order to constitute the offence.6

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32 Ibid. 173; Butler v. State, 5 Black. 280, 284; Alexander v. State, 48 Ind. 394; Jester v. State, 14 Ark. 555 (that a variance is fatal). In R. v. Moss, 1 Dees. & B. 205, it was held to be unnecessary to aver from whom the defendant won.

1 Com. v. Ternan, 4 Grat. 845; Com. v. Gardiland, 5 Met. (Ky.) 478; Parsay v. State, 2 Carlt. (Ind.) 489 (Blackford, J.), Medlock v. State, 18 Ark. 398; State v. Ward, 9 Tex. 376. But it is a variance if currency be charged and negotiable paper be proved. Tato v. State, 5 Black. 174.

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Nature of game.—When the statute makes playing a specific game or device indictable (e.g., faro), it is necessary that the game should be specified in the indictment as falling under the statute.6
§ 1467. The proof is necessarily, to a greater or less degree, inferential, such as possession and use of implements for gambling; or the testimony of participants in games of whose character the jury is to judge. When individuals are prosecuted as gamblers, may be inferred from the illicit use of such implements elsewhere. How the defendant's control is to be proved is elsewhere shown. Betting at a game does not necessarily involve participation.

Windsor's Case, 4 Leigh 880, it was held that if the game were averted it should be proved that the State need not elect between several games, as held in Hinton v. State, 68 Ga. 322.

1 See Gibbons v. Com., 14 Grat. 562; State v. Dela, 3 Blackf. 394; Webster v. State, 8 Ibtd. 400 (but holding that some descriptions of the game should be given); Moore v. State, 65 Ind. 213, 383; Pemberton v. State, 55 Ibtd. 507; State v. Ritchie, 2 Dev. & E. 29; Bryan v. State, 26 Ala. 65; Harris v. State, 29 Ibtd. 73; Johnston v. State, 7 Sm. & M. 55; Monteval v. Com., 3 J. J. Mars. 185; Campbell v. State, 2 Tex. Ap. 187. In Johnston v. State, 7 Sm. & M. 163, the reason is given, quoting from Judge Peck in Dean v. State, Mart. & Y. 127, that "adopts at gaming play for money without any game, where their invention for names has been exhausted." In infra, § 1513.


4 Com. v. Hopkins, 2 Dana, 418. See supra, §§ 347, 348, 1453. Leasing a house weekly, with a billiard table in it for gambling, makes the lessor liable, if notice is brought home to him. Com. v. Adams, 108 Mass. 344. But unless knowledge can be imputed to the defendant, he cannot be convicted. Padgett v. State, 68 Ind. 46. Whether gambling in stocks is penal, see Kirkpatrick v. Bousall, 72 Penn St. 186.

5 Ah Yem, ex parte, 53 Cal. 246. A variance as to the place held by way of local description may be fatal. (Com. v. Bane, 2 Va. Ca. 18.) And so where there is a variance as to the

§ 1467 a. We have already noticed cases in which betting is indictable as an incident of gambling, and betting on elections will be hereafter distinctively discussed. We may now observe that in some jurisdictions betting is made distinctively indictable by statute. Betting in this sense is an agreement by two or more parties that one will pay another a specific sum on the occurring of a future contingency. When betting in this sense is illegal, all parties concerned are indictable. The indictment must adopt the technical terms of the statute. When the offense is in the nature of a nuisance, or when the form is one prescribed by statute, then the amount of the bet need not be described. But it is otherwise, at common law, when a specific bet is charged. When averred the facts in detail must be proved. To indictments for betting, ignorance is no defense. Betting on elections is hereafter considered.

A conspiracy to cheat by betting is indictable at common law. Betting on horse racing is, in some States, made specifically indictable by statute.


1 Supra, § 1455 a.

2 In infra, § 1455 b.


4 State v. Holland, 22 Ark. 292; Anderson v. State, 3 Tex. Ap. 177. In Warren v. State, 18 Ark. 95, "gaming device, commonly called a faro bank," was held good under "statute prohibiting any gaming table or gambling device, ... or any faro bank," etc.


6 Wagner v. State, 65 Ind. 250; State v. Kilgore, 6 Humph. 44 (where the indictment, which was held bad, only averred a bet of goods, wares, and merchandise).

7 Bonn v. State, 66 Ala. 185.

8 Supra, § 58.

9 In infra, § 1545 b.

10 Supra, § 1571.

11 See State v. Lovell, 39 N. J. 458, 463. Whether horse racing is gambling, under the statutes, depends upon the character of the race. If the object is by fixed exhibitions to encourage the development and advance of the breed of horses, then such race cannot be so classified. Holmes v. Sixsmith, 7 Ks. 802; Bentick v. Connop, 5 Q. B. 635; Coombe v. Dibble, I. R. 1 Ex. 245; State v. Hayden, 31 Mo. 35; Harless v.
XIII. EXPOSURE OF PERSON. 1

§ 1468. We have already seen that a public exhibition of gross and wanton indecency is a nuisance at common law. 2 We have now to observe that an intentional or negligent indecent exposure of the private parts of the person to public view is a nuisance at common law. 3 A mere exposure of the naked person down to the waist is not enough; the private parts must be exposed; or at least as much as is usually hidden, and the exposure of which tends to scandalize, or to excite lascivious desires. 4

§ 1469. That the exposure is in a public place, where it can be seen by persons having opportunity of access to such place, is the essence of the offence. 5 Whether, however, it is necessary to aver the exposure to be in the sight of divers persons, has been doubted. In North Carolina, in a case which has the high authority of Judge Gaston, it was held enough to allege the exposure to be to public view in a public place, 6 but this decision has been subsequently (1879) practically overruled in the same State, it being declared that it should appear that the exposure was in sight of others. 7 But it is clearly sufficient to aver an exposure to the view of divers persons. Thus in Massa-


On the other hand, a horse race, when conducted recklessly, without police supervision, may be a public nuisance; and when the object of the race is not the improvement of stock, but the promotion of betting or gambling, the case may be one of gambling, under the statute. State v. Poxe, 1 Humph. 384.

And blocking up a public road by a horse race is specifically indictable as a nuisance. State v. Fuller, 7 Humph. 508.

1 For forms, see Whart. Prec. 765 at seg.
2 Supra, § 1422.
4 See R. v. Gallard, 1 Supra.
5 See Aardy v. State, 55 Ind. 328.
6 See Lorimer v. State, 76 Ind. 495; Moett v. State, 43 Tex. 346; State v. Griffin, Ibid. 538.
7 As to what is a public place, under the gambling statutes, see supra, § 1465.
8 State v. Roper, 2 Dev. & Iat. 206.

chusetts, an indictment for indecent exposure, which alleges that the defendant, devising and intending the moral of the people to debauch and corrupt, at a time and place named, in a certain public building there situate, in the presence of divers citizens, etc., unlawfully, scandalously, and wantonly did expose to the view of said persons present, etc., his body, etc., sufficiently sets forth the offence. 1

Nor in Massachusetts need the indictment conclude “to the common nuisance of all the citizens,” etc. And in that State an indecent exposure of person to a child in private may be “gross lewdness,” under a statute. 2

An indictment charging the offence to have been committed on a highway is not sustained by evidence that the offence was committed in a place near the highway, though in full view of it. 3

§ 1470. A urinal, fixed in a market-place, open to the public for the purpose of making urin, and on a public foot-path, is an open and public place,” so as to sustain an indictment for this offence, 4 and so of the inside of an omnibus, 5 and of the sea-beach, when visible from inhabited houses, 6 or from a public path frequented by females, 7 and of the roof of a house, visible from other houses, 8 and as we have seen, of a room or booth where all persons desiring are admitted for pay to witness an indecent exhibition. 9

Bathing near a public footway, frequented by females, is unlawful, and renders the party so bathing liable to be indicted for exposure. Nor is it any defence that the place has been always used as a resort for bathers; or that the exposure has not been beyond what is necessarily incident to such bathing. 10

It is not necessary to constitute a public place, in the above sense,

1 Con. v. Haynes, 2 Gray, 72. See 597; Dear. C. C. 207; 8 Cox C. C. State v. Gardner, 28 Mo. 90; State v. Rose, 32 Ibid. 590.
2 Con. v. Haynes, 2 Gray, 72.
3 Con. v. Wardell, 128 Mass. 52.
4 R. v. Farrell, 9 Cox C. C. 449.
5 R. v. Harris, 11 Cox C. C. 659, overruling E. v. Orchard, 1 Ibid. 246; 29 Eng. L. & Eq. 598.
7 R. v. Crunden, 2 Camp. 89.
8 R. v. Reed, 12 Cox C. C. 1.
11 People v. Bixby, 67 Barb. 221; 4 Hun, 386.
12 R. v. Reed, 12 Cox C. C. 1.
§ 1472.] CRIMES. [BOOK II.

that it should be a place to which the public have a right to resort; it is enough if it be at the time resorted to.¹

§ 1471. The intent with which the act was done, when intent is averred, may be a material ingredient in the offence, and is a question of fact for the consideration of the jury, under all the circumstances of the case; and it has been held that a charge which withdraws that question from the consideration of the jury as a question of fact is erroneous.² But intent is to be inferred from recklessness; nor can it be questioned that a negligent exposure in a thoroughfare may be indictable.

§ 1472. It has been properly held that if a man indecently expose his person to one person only, this is not an indictable misdemeanor.³ It is otherwise if there are other persons in such a situation that they may be witnesses of the exposure.⁴ It is by dwelling on this point that we may reach a solution of an apparent conflict. An intentional indecent exposure of the person to one individual in private may be indictable as an assault,⁵ but not as a nuisance,⁶ though under statute it may be indictable as a lascivious act.⁷ When the exposure is in the nature of an indecent exhibition, it is indictable at common law as an offence against decency.⁸ When it is in a

² Miller v. People, 6 Barb. 209.
³ The ruling in this case, so far as it assumes intent to be necessary, cannot be sustained. Bathing naked in the sea, for instance, near the highway, may have been with the sole intent of taking a bath; yet it is none the less an indecent offence, since no one has a right to expose a naked person without first looking to see whether the exposure would be seen by neighbors or passers-by.
⁴ Supra, § 1468.
⁶ See R. v. Elliott L. & Eq. 103. Whether an indictment which charges A. with having "in a certain public place, within a certain victualling alehouse," indecently exposed his person to the presence of M. A., the wife of B., and other of the like subjects there, is gostrict quasus. But if it appear that the exposure was to M. A., the wife of B., only, the defendant ought not to be convicted. R. v. Webb, 2 C. & R. 393; S. C., 1 Den. C. C. 338.
⁸ In R. v. Elliott, L. & Eq. 103, where limitation was omitted beside an open road, but where only one witness who saw the parties was produced, and there was no evidence that they could have been seen by other parties, the court was equally divided.
⁹ See supra, § 612.
¹¹ State v. Millard, 18 Va. 574.
¹² See supra, § 1482. Infra, § 1605; State v. Sharpless, 2 S. & R. 91; and other cases cited, infra, § 1606, where it was held enough that one person saw an indecent exhibition.
¹³ Com. v. Trocker, 2 Pick. 44; Root v. Com., 28 Penn. St. 170; State v. Randall, 1 Strob. 110; Berry v. State, 12 Tex. Ap. 108, 249; and see Whart. on Neg. §§ 514, 515. For indictments against municipal authorities for neglect, see infra, § 1544 c. An entrance to the rear of certain houses not opening into the main street is not per se a highway. People v. Jackson, 7 Mich. 432. That the road must be shown to have been duly set apart for public use, see Martin v. People, 13 Ill. 341.
ṣ As to roads which are not thoroughfares, see State v. Rye, 35 N. H. 368; Com. v. Trocker, 2 Pick. 44; State v. Randall, 1 Strob. 110. For indictments in Texas, see Day v. State, 14 Tex. Ap. 20; Bickley v. State, 10d. 57. That a new road has been opened is no excuse for obstructing the old, unless the old road is formally abandoned, see State v. Harden, 11 S. & R. 945.
be such a right, in the public, obstruction of travel even by the owner of the soil, is a nuisance. Any public square, any space of ground, dedicated and accessible to the public use, falls within the same general category. Nor does it matter that the road is owned by a private corporation. Supposing that the public has a right, on payment of a fixed toll, to travel on it, an indictment for nuisance lies for its obstruction. The same protection is thrown over bridges, navigable rivers, and harbors in the sea and great lakes.

\section*{CRIMES.}

\section*{CRIMES.}

\subsection*{1. Mercur v. Woodgate, L. R. 5 Q. B. 31.}

\subsection*{2. Infra, \$ 1474 a; State v. Canterbury, 6 Phot. N. B. 195; State v. Atkinson, 24 Vt. 448; Com. v. Bowman, 3 Barr, 282; Rugg v. Sheneberger, 2 Wats. 29; Com. v. Ruse, 14 Penn. St. 385; State v. Conmillis, 3 Hill (S. C.), 149; see R. v. Middlesex, 2 B. & Ad. 201. As to toll, see North Cent. R. R. v. Com., 90 Tenn. St. 306. Infra, \$ 1476.}


\subsection*{4. Whart. on Neg. \$ 877; R. v. Middlesex, 3 B. & Ad. 201; R. v. Derby, 147; R. v. Kerehen, L. R. 2 C. C. 88, 12 Cox C. C. 682; State v. Canterbury, 8 Porter, 192; Com. v. Bridge, 9 Pick. 142; Com. v. Bridge, 2 Gray, 239. And see Clinton Bridge, in re, 10 Wall. 454; Binghamton Bridge, in re, 3 Wall. 61; State v. Raynolds, 32 Kan. 450.}

\subsection*{5. See R. v. Beets, 10 Q. B. 1022; Thompson v. River Co., 54 N. H. 546. Infra, \$ 1477.}


\subsection*{7. Wood on Nuis. \$ 529. Sir J. R. Stephen gives the following illustrations of nuisances of this class: Each of the following acts is a nuisance to a highway: (1) Digging a ditch, or making a hedge across it, or ploughing it up. 1 Russ. Cr. 465. See Kelly v. Com., 11 S. & R. 345; Justice v. Com., 2 Va. Co. 171; State v. Middlum, 2 Ind. 440; Henline v. People, 81 Ill. 269. (2) Allowing wagons to stand before a warehouse for an unreasonable time, so as to occupy a great part of the street for several hours by day and night. R. v. Russell, 6 East, 427. (3) Keeping up a boarding in front of a house in the street, for the purpose of repairs, for an unreasonable time. R. v. Jones, 3 Camp. 230. (4) Excavating an area close to a foot-path, and leaving it unflushed. Barnes v. Ward, 9 C. B. 332. (5) Blasting stone in a quarry so as to throw stones upon the houses and road. R. v. Mulholl, L. & C. 489. supra, \$ 1475 b; Com. v. R. R., 112 Mass. 469; Com. v. Oakes, 113 Ibid. 8; People v. Cunningham, 1 Denio, 524; Barker v. Com., 19 Penn. St. 412; Ball v. State, 1 Swan, 42; Sanders v. State, 18 Ark. 199. So as to provoking public disturbance by an exhibition of a "stuffed Paddy." Com. v. Haines, 4 Clark (Pa.) 17. supra, \$ 1412, 1485. A regatta on a canal conducted in such a way as to bring a crowd trespassing on the land of riparian owners, may be a nuisance. Restock v. R. R., 1 De G. & S. 584. See R. v. Moore, 3 B. & Ad. 154; Walker v. Brewer, L. R. 5 Eq. 25. Obstructing the stream of passage on a public street by putting into it agents with pictures and papers to draw attention to a particular business or show may be an indictable nuisance. R. v. Sarnon, 1 Burr. 315. In re, \$ 1478.}

\subsection*{8. See State v. Hughes, 72 N. L. 25.
§ 1474. [BOOK II.

CRIMES.

guns pointed to the highway, by which life is endangered; to place on or near the highway objects likely to frighten horses when placed near highways; and to wantonly and violently run a horse up and down a highway.

The same rule applies to a stall placed on the sidewalk of a public street for the sale of fruit and confectionery, although the defendant pays rent to the owner of the adjoining premises for the use of so much of the pavement as he occupies; and to front steps of a dwelling placed in such a way that they protrude into the highway; to obstacles on the untravelled parts of a highway; to things over-hanging or encroaching on a highway so as to endanger passage. But the obstruction must be unlicensed. Hence telegraph posts, erected by the municipal authorities, and in execution of a statutory power, are not indictable as nuisances, though it is otherwise when they are not so licensed. Therefore, in cases of non-license, telegraph posts on a highway are a nuisance, though the posts are not placed on the repaired and travelled part of the highway, nor on an artifi-

Lewis, London Law Times, Dec. 17, 1851, the defendant was tried before Grove and Lopes, JJ., in the High Court of Judicature, for a nuisance in exhibiting, in his shop windows, in the city of Manchester, sensational pictures of statesmen and ecclesiastics, sometimes in ludicrous positions, in such a way as to draw large crowds and block the streets. The defendant was convicted, and bound over not to repeat the nuisance. The fact that the defendant's counsel was Sir J. Holker shows that the defence was fairly presented to court and jury. S. P., R. v. Carlisle, 6 C. & P. 627. As to such exhibitions, see supra, § 1432 b.

1 State v. May, 32 Conn. 473. See cases cited in Wharton on Neg. § 348. Supra, §§ 484, 507.

2 See Youtube v. Fargo, 107 Mass. 294; Dimock v. Suffield, 39 Conn. 132; Ayer v. Norwich, 29 Id. 376; Clinton v. Howard, 42 Id. 295.

3 State v. Ellis, 6 Bact. 549.

4 Com. v. Wentworth, Brightly, 318; J. 167.

§ 1474 a. As has just been seen, it is a nuisance to encroach upon ground dedicated to the public use or enjoyment so as to impair its utility or beauty for such purpose. The remedy, however, is said to be injunction, at the suit of the attorney-general, in cases where there is a mere trespass on public property, when such trespass is not a public nuisance.

§ 1475. A grant from lapse of time will not be presumed of a part of a public square or street so as to bar an indictment for a nuisance. Thus, where the travelling public had for ten years ceased to use a portion of a road established by public authority, and had by use acquired a right to a portion of the land of the trustees of a church for highway purposes, instead of the said portion of old road; it was held that the acquisition of a right of way over the land of the trustees did not estop the State from asserting its claim to the old road, nor shield the individual obstructing it from punishment.

When license is a defence has been already discussed.

1 R. v. United Kingdom Tel Co., 3 P. & F. 752; 9 Cox C. C. 174.

2 Farny v. Ashton, 11 L. 7 1 B. D. 314.


That the location and terminal points of the highway must be specified, see State v. Crumppler, 88 N. C. 647.

That shade trees so planted as not to interfere with travel are not a public nuisance, see Clark v. Dasso, 39 Mich. 58; Everett v. Council Bluffs, 46 Iowa, 66.

* Supra, § 1474.

* State v. Woodard, 23 V. 92; State v. Atkins, 24 Id. 448; Com. v. Wilkinson, 10 Pick. 175. As to encroachment on public waters, see infra, § 1477.

* Attorney-General v. Richards, 2 Arst. 603; People v. Vanderbilt, 28 N. Y. 399.


* Enick v. State, 3 Humph. 543.

* Supra, § 1424; infra, § 1464.
§ 1476. A railway train, crossing an ordinary highway, being productive of anxiety, if not of danger, to those passing such highway, is indictable as a nuisance, unless chartered by the State. Such charter is to be strictly construed; and is not to be regarded as authorizing the railroad to cross any highways except in the line specifically prescribed. Hence railroad corporations have been held indictable for nuisance in keeping their rails several inches above the level of a crossing; or in sending their trains across a turnpike at a very rapid rate without warning; or in unnecessarily leaving cars or other structures on a crossing whose effect is to frighten horses or to obstruct travel; or in constant and habitual failure to give due signals of passing trains; or in appropriating a street in excess of the authority given by the legislature; or in neglecting to open a new ground required by the legislature to take the place of one occupied by the railroad; nor is it any defence that the principal officers of the corporation had no knowledge of the nuisance, or that great care was exercised in the proceedings complained of. Even when authorized to cross a particular highway, the corporation may be indictable for a nuisance if its right is negligently or oppressively exercised. But evidence that daily twenty trains on a

railroad, and about as many vehicles on a highway, passed over a place where the railroad crossed the highway at grade, which was in full view from the highway at any point within a hundred and fifty feet, and where the public authorities never required the establishment of a gate, station agent, or flagman, although the crossing had existed for many years, is insufficient to warrant a finding that the railroad corporation was guilty of negligence in omitting to provide there any such safeguard. And if the trains are kept closely within the range of the charter, no indictment can be maintained against the corporation for a nuisance because of alarm to horses and passengers produced by the locomotives. And what is said of the license of railroads applies to the license of all other agencies whose effect is to inconvenience more or less the community.

§ 1477. It is a nuisance, on the same principle, to pollute the waters of a stream used to supply drinking water to a community

indictment will lie against a corporation, not municipal, for the creation and maintenance of a public nuisance. 2031 v. Great North of England Railway, 9 Q. B. 315; Dater v. Troy R. R. Co., 2 Hill, 539; Chestnut Hill Turnpike v. Rutter, 4 S. & R. 6; Delaware Div. Canal Co. v. Commonwealth, 60 Penn. St. 367. The mere construction of a railroad track across a public highway, in pursuance of law, is no nuisance. Danville R. R. Co. v. Commonwealth, 207 Penn. St. 29. It must be constructed in such a manner as “not to impede the passage or transportation of persons or property along the same. Act of February, 1848, Pur. Dig. 1920. A turnpike is a public highway; it is for the use of every person desiring to pass over it, on payment of the toll established by law. It differs from a common highway, in the fact that it is not constructed in the first instance at the public expense, and the cost of construction is reimbursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. The same public annoyance and injury arise from its obstruction as if it were a common highway. Hence, in Lancaster Turnpike Co. v. Rogers, 2 Bar., 114, it was said, that when the turnpike company ceased to use a building, erected, in part on the turnpike, as a toll-house, it ceased to be there for a lawful purpose, and became a public nuisance. Common understanding and public policy unite in requiring us to hold that a turnpike is a public highway in so far that an indictment will lie against one obstructing it as for a public nuisance. It was so held in Com. v. Wilkinson, 16 Pick. 175. As to toll, see supra, § 1473. As to indefiniteness of corporations generally, see supra, § 91.

2 R. v. Pease, 4 B. & Ad. 50. Supra, § 1424.
3 Supra, § 1424; R. v. Scott, 2 G. & D. 723; 3 Q. B. 543; Com. v. Church, 1 Bar., 115.
entitled to use it in this way, to obstruct the passage of a navigable river, or of a navigable lake, by bridges or otherwise, so as to diminish appreciably its capacities for navigation, or to divert a part of such stream, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burden as it would before. But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, and may be removed by the public authorities, yet the owner is not indictable for a nuisance in not removing it. And it is also to be kept in mind, that the owner of the soil between high and low water-mark may use it for his own private purposes, provided he do not interfere with the navigation of the river.

The obstruction must be proved by the prosecution.

Obstructions to navigable streams may be abated by individuals.

§ 1478. It was once thought that a collateral benefit to the community could be set up as a defence. Thus, upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage, occasioned by these staiths, was for a public purpose, and occasioned a public benefit, and if the erection were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; and it was held that this direction was right. This, however, was overruled afterwards in England, and the later position, that no countervailing benefit can be a defence, has been followed in this country.

But the obstruction must be material, and must obstruct business as a whole. Hence it has been held that a wire or rope stretched across a stream for ferry purposes is not a nuisance if necessary for the transfer of travellers, and if not materially obstructing navigation. And all level crossings must more or less obstruct free travel on the intersecting roads, yet such crossings are not, for this reason, indictable.

§ 1479. Rivers in North America (in this respect being distinguished from those in England) do not cease to be navigable from the fact that they are at certain points broken by rapids or cataracts, which have to be avoided by ports. Hence the English rule as to ebb and flow of tides does not apply to the unimpeaded parts of such rivers. But a creek which cannot even with spring freshets float timber cannot claim to be navigable. The test is, possibility of use for practical transport.

§ 1480. The provincial statute of 8 Anne, chap. 3, for preventing obstructions to fish in rivers, is still in force in Massachusetts; and as it declares all obstructions therein mentioned common nuisances, an indictment will lie; the special remedy provided by that statute being merely cumulative. A seine or net, not placed permanently, is not within the act. In other States statutes to the same effect have been enacted.

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2 McLean v. Matthews, 7 Ill. App. 700.

3 R. v. Watts, 2 Exp. 675; R. v. Ward, 4 Ad. & El. 384; R. v. Tindall, 6 Idb. 143; R. v. Trafford, 1 Idb. & Ad. 874; R. v. Bettis, 16 Q. B. 1022; State v. Freepore, 43 Mo. 189; Penna. v. Wheeling, 13 How. 518; Com. v. Church, 1 Barr. 106; State v. Dibble, 4 Jones (N. C.) 107; State v. Graham, 15 Rich. (S. C.) 210; State v. Thompson, 2 Strob. 18; People v. St. Louis, 2 Gillman, 381; Moore v. Sanborn, 2116.

4 Mich. 519. Sir J. F. Stephen inserts the qualification "wilfully" (Dig. act. 191), but I think erroneously, as a negligent obstruction is indictable.

5 1 Hawk, c. 76, s. 11; R. v. Stanton, 2 Show. 30.

6 McLean v. Matthews, 7 Ill. App. 700.

7 R. v. Watts, 2 Exp. 675; White v. Ward, 4 Ad. & El. 384; R. v. Tindall, 6 Idb. 143; R. v. Crosby, 10 Idb. 31; Brown v. Mellett, 5 C. B. 599; See R. v. Russell, 9 D. & R. 566; 6 B. & C. 666; R. v. Ward, 4 Ad. & El. 384; R. v. Tindall, 6 Idb. 143; R. v. Morris, 1 Idb. & Ad. 441.

8 22 Idb. 108; State v. Wilson, 43 Me. 11.

9 Supra, § 1425.
§ 1481. Where a wharf is extended below low-water mark, and into the channel of the tide-waters of the Commonwealth, it does not necessarily follow that it is a common nuisance, but this is the presumption, and the defendant must show that it is no impediment to navigation, or detriment to the public. If the effect of such a wharf be to fill up the channel or divert the current, it is a nuisance.

§ 1482. Public docks are protected in the same way, and it has been held a nuisance to monopolize such a dock by forcing into it a larger vessel than those for which it was constructed.

§ 1483. Planting oysters in public waters is not such a special appropriation of such waters as will justify their removal as a nuisance, unless they interfere with the rights of the public; and even then a private person has no right to take them away and convert them to his own use.

§ 1484. The supreme authority of the State may, as has been seen, authorize an obstruction of the highways of the State; but this license or charter must be strictly construed, and any negligence or excess in the exercise of such the water of any mill-pond, reservoir, canal, or trench, from flowing out of the same, shall be punished by imprisonment in the State prison, not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail, not more than two years. May 15, 1857. Supplement to Revised Statutes, 1867, chapter six, p. 410.

The conveyed powers may expose the parties, if a nuisance result, to an indictment.

§ 1485. Neglect, as well as positive commission, may become the basis of an indictment for nuisance. Thus, a person or corporation who undertakes the cleansing or repairing of a road or channel specially, is indictable for a nuisance created by neglect.

§ 1486. The indictment, when the basis of the charge is neglect, must set forth the nature of the duty specially imposed on the defendant; for this is matter of substance. But it has been said not to be necessary to aver that the defendant had the means to repair. In such indictments, two defendants, having duties distinct, both in source and limit, cannot be joined; nor can offences having distinct characters and penalties be coupled in one count. The terminus of the road must be correctly laid, and the road must be averred to be public. Whether a date is to be averred, is elsewhere discussed.

§ 1487. When the indictment is for neglect in not repairing a road, the usual practice is to impose a fine, to be remitted (if there be no contempt or wilful violation of the law) on the road being repaired.

§ 1488. The law in respect to abatement, as heretofore expressed, applies to nuisances on highways.