CHAPTER XXIII.

LOTTERIES.

I. OFFENCES INCLUDED IN STATUTES.

§ 1490. The term lottery has a double meaning. It includes not only a scheme for the distribution of prizes by chance, but the distribution itself.[1] At common law neither of these is indictable unless they are nuisances.[2] By statute, however, not merely lottery schemes themselves, but sales of lottery tickets, are made indictable in many jurisdictions.[3] The statutes in question being too numerous and too various for analysis, we must content ourselves with noticing some of the more general considerations they involve.

Lotteries and sales of lottery tickets indictable by statute.

§ 1491. Supposing the term "lottery" as a *nomen generalissimum* is introduced in a statute, what is included in the term? In the United States there is a popular usage attaching the term to schemes for the distribution of

"Lottery" does not include private drawings by chance.

[1] See U. S. *v.* Olney, 1 Deady, 461; 1 Abb. (U. S.) 275; Dunn *v.* People, 40 Ill. 465; Wilson *v.* State, 67 Ga. 658; U. S. *v.* Duff, 19 Blatch. C. C. 9. By the U. S. Rev. St. § 3894, the mailing of letters and circulars concerning lotteries is prohibited. See U. S. *v.* Noelke, 17 Blatch. 554.

[2] See, as ruling that a public lottery is a common law nuisance, Blanchard, *ex parte*, 9 Nev. 101.

[3] That these statutes are constitutional even when prohibiting sale of lotteries organized in other States, see People *v.* Noelke, 94 N. Y. 137. *Supra*, § 288; Evans *v.* State, 68 Ga. 826.

prizes by chance among person purchasing tickets; the drawing purporting to be from a wheel, on a particular day, which day, with the amount of the intended prizes, is previously announced. But this is but a single form of lottery; the term, in its full sense, embracing all schemes for the distribution of prizes by chance, and including faro tables, and various forms of gambling. At the same time there is a wide distinction between a private and a public offering of prizes by chance. A., B., C., and D. may meet together, and in good faith agree that a certain article to which they have a common claim shall be given to the person who draws a particular number. This is a matter of contract which, if the terms are known to the parties beforehand, has nothing in it repugnant to sound morals, and nothing which can operate on the community as a fraud. When, however, the community at large is invited to come in, a new and very serious objection springs up. Independently of the opportunity for fraud by the managers of such enterprises, their publication imparts an excited spirit of gambling to the public generally. On the one side often ensue gross cases of deception as to the scheme itself; on the other, the sacrifice of savings by the ignorant and credulous, and excitement, destructive of regular industry, often inducing insanity. It is to suppress this species of lottery, we should remember, that the lottery statutes are aimed. The test, therefore, as to any scheme for the distribution of property by chance, is, is it private or public? If a private arrangement be made, by which A., B., C., and D. agree upon the lot as the mode of settling a disputed title, this is not a lottery in the penal sense. If they adopt a plan by which all who choose may buy tickets in a prearranged scheme, this is a lottery in the penal sense.[1] Hence a "gift enterprise," or a "raffle," in which the public is invited to take shares for the distribution of prizes by chance, is a lottery, no matter how artfully the object may be disguised.[2] Nor does it

[1] See 2 Holzendorff's Rechts-Lexicon, Leipzig, 1872, p. 74; Buckalew *v.* State, 62 Ala. 334; State *v.* Ochsner, 9 Mo. Ap. 216; State *v.* Yoke, Ibid. 582. See 5 Crim. Law Mag. 529, for a learned note on games of chance.

[2] U. S. *v.* Olney, 1 Deady, 461; 1 Abbott (U. S.), 275; State *v.* Clarke, 33 N. H. 329; Com. *v.* Thacher, 97 Mass. 583; Hull *v.* Ruggles, 56 N. Y. 424; State *v.* Shorts, 3 Vroom, 398; Wooden *v.* Shotwell, 3 Zab. 465; Bell

affect the question that in the scheme there are no blanks.[1] Such, for instance, it has been ruled to be the case with a gift sale of books, by which the books were offered for sale at prices above their real value, and by which each purchaser was declared to be entitled in addition to a prize, to be ascertained, after the purchase, by a correspondence, unknown to the purchaser, between certain numbers indorsed in the books offered for sale, and the different

v. State, 5 Sneed, 507; Com. *v.* Chubb, 5 Rand. (Va.) 715; State *v.* Lamsden, 89 N. C. 572; Dunn *v.* People, 40 Ill. 465; State *v.* Mumford, 73 Mo. 647; State *v.* Overton, 16 Nev. 136; Eubanks *v.* State, 3 Heisk. 488; People *v.* Noelke, 94 N. Y. 137. But see *contra*, State *v.* Pinchback, 2 Const. S. C. 128.

In Thomas *v.* People, 59 Ill. 160, it was said by Thornton, J.:—

"The ticket alone does not constitute a lottery, for we are not informed by it that there would be any distribution of prizes. When, however, we consider it in connection with the advertisement, we ascertain that there will be a distribution at the close of the concerts, and, after the sale, of the engravings. The advertisement contains this language: 'There will be distributed, as presents, to the purchasers of engravings, in a just and legal manner, $200,000 in presents.' The term 'present,' though literally it means a gift, yet, in the relation, and in the sense in which it was used, evidently meant a prize. It was offered, as the reward of contest, to the purchasers. It was something to be won. One ticket and engraving were sold for $5, 100 engravings and tickets for $425, and 1000 for $4250. Inducements were thus offered to struggle for the prizes. Here, then, was a scheme for the distribution of prizes. Was the distribution certain and fixed, or was it to be by chance? It is urged, in defence of this scheme, that no plan of distribution had been determined upon; that the purchasers were to receive certain articles in a just and legal manner; and that a plan might be devised, at the proper time, which would neither violate the law nor be in contravention of good morals.

"The distribution was to be in a just and legal manner. It should, then, be in an honest, upright, and equitable mode. There should be perfect fairness and equality. This plan would be utterly violated if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a 'just and legal manner,' unless the number of purchasers was the same as the number of prizes, and the prize received proportional, as nearly as possible, to the amount of money paid.

"It is barely possible, but most improbable, that the purchasers would be the same in number as the presents. We could not indulge in so unreasonable a presumption, even in a criminal proceeding. In ordinary affairs, we must reason upon probabilities, deduce conclusions from facts, and not indulge in mere conjecture. We have no right to harbor wild imaginings, to change a reasonable and probable result."

[1] Wooden *v.* Shotwell, 3 Zab. 465.

prizes proposed.[1] The same ruling was made as to the American Art Union;[2] and as to a sale of envelopes, some of which were alleged to contain tickets enabling the holder to purchase valuable property at a nominal price;[3] and as to the ticket being grafted on a ticket for admission to a concert.[4] But we cannot extend this principle to cases where, by private and limited contract, certain parties unite, according to a plan known to all of them before the drawing, to dispose of designated articles by chance.[5]

[1] State *v.* Clark, *ut supra*; and see S. P., Hull *v.* Ruggles, 56 N. Y. 424; Eubanks *v.* State, 3 Heisk. 488; Thomas *v.* People, 59 Ill. 160; Randle *v.* State, 42 Tex. 580. See State *v.* Bryant, 74 N. C. 207. *Supra*, § 1465.

[2] People *v.* Art Union, 7 N. Y. 240; Governors, etc. *v.* Art Union, Ibid. 228. See Morris *v.* Blackman, 2 Hurl. & Colt. 912.

[3] Dunn *v.* People, 40 Ill. 465; State *v.* Lumsden, 89 N. C. 572. Under a statute prohibiting "any lottery, gift enterprise, or scheme of chance," a scheme giving a prize to all purchasers of goods who guess the number of beans in a glass jar is prohibited. Hudelson *v.* State, 94 Ind. 426; 5 Cr. Law Mag. 524.

[4] State *v.* Yoke, 9 Mo. Ap. 582.

[5] Com. *v.* Manderfield, 8 Phila. 457.

In U. S. *v.* Olney, 1 Deady, 461; 1 Abb. U. S. 275; 1 Green C. R. 328, we have the following from Deady, J.:—

"The word 'lottery' is defined and used as follows by lexicographers and writers:—

"'A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles.' Worcester's Dict.

"'A distribution of prizes by lot or chance.' Webster's Dict.

"'A scheme for the distribution of prizes by chance.' Bouvier's Dict.

"'A kind of game of hazard wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate.' Rees's Cyclopædia.

"'A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks.' American Cyclopædia.

"'That the chance of gain is naturally overvalued, we may learn from the universal success of lotteries.' Smith's Wealth of Nations, b. i. c. 10.

"All these authorities agree that when there is a distribution of prizes —something valuable—by chance or lot—that this constitutes a lottery. But the definitions from Worcester and the American Cyclopædia are the most complete. From each of these it expressly appears that a valuable consideration must be given for *the chance* to draw the prize.

"Tried by this standard it is manifest that the scheme prepared and carried out by the defendant for the sale and distribution of these town lots was a lottery. True, the purchasers of tickets or shares were in any event to get something—at the least, a lot, for the purposes of this scheme *estimated* to be worth $50. But it is not probable that any one would have purchased a ticket, if it was certain that he would have received nothing in return but one of these so-called fifty dollar lots.

Games of chance to be distinguished from games of skill.

§ 1491 *a*. It is elsewhere observed that games of skill do not fall under the general title of "gambling."[1] Hence, under the term "games of chance," or "scheme of chance," do not fall games or schemes in which skill honestly employed is a determining factor.[2]

Tickets includes fractions.

§ 1492. A ticket, under the statute, includes a quarter of a ticket.[3]

II. INDICTMENT.

Indictment must show ticket to be prohibited.

§ 1493. Where only certain kinds of lottery are prohibited, then the indictment must set forth enough of the scheme of lottery, or of the ticket sold, as the case may be, to individuate the lottery or ticket, and show that the particular scheme or lottery is of the prohibited class.[4]

It is not, however, necessary to set out mere embellishments or vignettes on the ticket, if the operative part of the ticket be accu-

If the first three hundred lots could have been sold for fifty dollars each on account of their market value, certainly the defendant would not have been improvident enough to put the other three hundred prize parcels into market at the same price, while their actual value was from $100 to $5000 each. This is neither reasonable nor probable."

In a case in the N. Y. Ct. of Appeals, in 1876, the action was brought to recover for goods sold and delivered. Defendants claimed that the goods were intended to be used in a lottery. It appeared that the goods sold consisted of a quantity of candies and silverware. The candies were put up by plaintiff in packages, known as prize candy packages, in some of which were tickets, each with the name of a piece of silverware upon it. Defendants intended to sell the packages for more than their value, the purchaser taking the chance of getting a package containing a ticket, in which case he was entitled to the article of silverware named, in addition to the package. It was ruled that this was a lottery within the meaning of the statute, and the sale, having been for the purpose of aiding in a lottery, was void (1 R. S. 668, § 38); the contract of sale was also void and plaintiff could not recover. Hall *v.* Ruggles, 56 N. Y. 424.

That "pool-selling" is not a "lottery," see People *v.* Reilly, 50 Mich. 384.

As to meaning of "promoting a lottery," in the Kentucky statute, see Miller *v.* Com., 13 Bush, 731.

[1] See *supra*, § 1465 *a*.

[2] See Tatman *v.* Strader, 23 Ill. 439; Chavannah *v.* State, 49 Ala. 396; State *v.* Gapton, 8 Ired. 271; State *v.* Hardin, 1 Kan. 474.

[3] Freleigh *v.* State, 8 Mo. 606.

[4] People *v.* Taylor, 3 Denio, 99; Com. *v.* Manderfield, 8 Phila. 457; State *v.* Scribner, State *v.* Barker, 2 Gill & J. 246. As to construction of charter, see Boyd *v.* State, 53 Ala. 601.

rately given.[1] And it has been ruled[2] that where all lotteries are prohibited by law it is not necessary to set forth the words of the ticket, or even its purport.[3] But, in view of the fact that the term "lottery" has such a wide general signification, and that it embraces processes all of which none of the statutes have undertaken to declare penal, it is more prudent, when this can be done, to individuate the offence, and to give the name of the vendee, in case of a sale, so as to in some way notify the defendant of the wrong with which he is charged.[4] An allegation that the particulars of the "lottery" are unknown to the grand jury, and that the vendees are unknown, may supply the want of specification.[5]

It has been ruled that to aver that the lottery was prohibited by law, is not necessary in a State where all lotteries are prohibited,[6] nor in such case need the object of the lottery be specified.[7]

Under the federal statute prohibiting the mailing of lottery circulars, the circular must be given in full.[8]

Not duplicity to couple stages of offence.

§ 1494. To couple in one count the allegations "offer for sale," and "sell," is not duplicity, and so with "set up and promise."[9] And it has been held that to sell several tickets, attached to each other, forms but one offence.[10]

[1] Com. *v.* Gillespie, 7 S. & R. 469.

[2] Ibid. *Infra*, § 1496.

[3] State *v.* Follet, 6 N. H. 53; France *v.* State, 6 Bax. 478; Freleigh *v.* State, 8 Mo. 606. See People *v.* Taylor, 3 Denio, 991; Com. *v.* Gillespie, 7 S. & R. 469.

[4] Wh. Prec. 528; Com. *v.* Eaton, 15 Pick. 273; Com. *v.* Thurlow, 24 Ibid. 374; State *v.* Walker, 3 Harring. 547; see Dunn *v.* People, 27 Hun, 139; but see *infra*, § 1510; and as holding that the name of the vendee need not be given, see State *v.* Yoke, 9 Mo. Ap. 582.

[5] Pickett *v.* People, 8 Hun, 83. See State *v.* Munger, 15 Vt. 290; People *v.* Taylor, 3 Denio, 99; People *v.* Adams, 17 Wend. 475; State *v.* Stucky, 2 Blackf. 289; Butler *v.* State, 5 Ibid. 280.

[6] People *v.* Sturdevant, 23 Wend. 418.

[7] People *v.* Noelke, 94 N. Y. 137.

[8] U. S. *v.* Noelke, 17 Blatch. C. C. 554.

[9] Com. *v.* Eaton, 15 Pick. 273; Com. *v.* Harris, 13 Allen, 534; Whart. Prec. 828, n. *Infra*, § 1515; Whart. Cr. Pl. & Pr. §§ 243 *et seq*. Under the federal statute, grouping in one count a bunch of circulars sent at one time is not duplicity; though it is otherwise when they are alleged to be sent at different times. U. S. *v.* Patty, 9 Biss. 429; see Whart. Cr. Pl. & Pr. § 470.

In Miller *v.* Com., 13 Bush, 731, it

[10] Fontaine *v.* State, 6 Bax. 514.

Enough to follow statute.

§ 1495. It is sufficient, ordinarily, when the indictment is for setting up a lottery, or for having tickets in possession with intent to sell, to follow the words of the statute.[1]

was ruled that the promotion of a lottery, and the aiding in such promotion, are but different modes of committing, or participating in the commission of the same offence. The latter is but a degree of the former, and under an indictment for the major offence a conviction may be had for the minor. It was further ruled that specific acts of inducement, although each is a separate offence with a separate punishment denounced against it, are provable under the general charge of promoting a lottery.

The following rulings may be noticed in addition :—

A count in an indictment, charging the defendant with keeping a common gaming-house, and selling lottery tickets therein, was held insufficient; and also a count charging the keeping an ill-governed and disorderly room for the sale of lottery tickets. People *v.* Jackson, 3 Denio, 101.

Under the 27th section of 1 Rev. Sts. of New York, 665, a lottery which is not for the purpose of disposing of property is not illegal; and an indictment for selling lottery tickets, not describing the lottery as being for such purpose, cannot be supported. People *v.* Payne, 3 Denio, 88. The indictment should contain either a particular description of the lottery, or assign as a reason that a more particular description of the lottery was unknown to the grand jury; and an averment merely that the name of the lottery was unknown to the grand jury is insufficient; but it is not necessary that the indictment should set forth the amount of the lottery. People *v.* Taylor, 3 Denio, 99. It is not necessary to set out the tickets, sold, or the names of the purchasers, it being alleged that the names were unknown to the jurors. People *v.* Taylor, 3 Denio, 99.

The publication in New York of an advertisement of a lottery to be drawn in a place where such lottery is not unlawful is an indictable offence; and if the indictment set forth the advertisement *in hæc verba*, showing that the lottery was for the purpose of disposing of money or property, it is sufficient, although the purpose of the lottery is not otherwise alleged in the indictment. People *v.* Charles, 3 Denio, 212.

The act to prevent raffling and lotteries was intended to prevent the sale of lottery tickets in the State, whether the lottery was established here or elsewhere. And an indictment for vending lottery tickets need not allege that the lottery was established in this State. An indictment for vending a lottery ticket need not expressly aver that the ticket was of a lottery established or set on foot for the purpose of disposing of real estate, goods, money, or things in action. The character and description of the lottery need not form the subject of

[1] Com. *v.* Dana, 2 Met. 329; Com. *v.* Horton, 2 Gray, 69; Dunn *v.* People, 27 Hun, 272; People *v.* Noelke, 29 Ibid. 461. As to federal statute prohibiting transmitting lottery circulars by mail, see U. S. *v.* Noelke, 17 Blatch. C. C. 554.

Variance in ticket fatal.

§ 1496. A variance as to the ticket when it is set forth, or as to the terms it offers when only given in substance, is at common law fatal.[1]

III. EVIDENCE.

§ 1497. The sale of other tickets, or acts promotive of such sale, may be put in evidence in order to prove the intention, when part of the same system.[2]

an express averment. It is sufficient if these appear argumentatively in the indictment, especially after verdict. People *v.* Warner, 4 Barb. 314.

Under the Revised Statutes (1 R. S. 665, § 28) it is a misdemeanor to publish in this State an account of a lottery to be drawn in another State or Territory, although such lottery be authorized by the laws of the State where it is to be drawn.

It was accordingly held, that a demurrer to an indictment, which charged the defendant with publishing in the city of New York an account of a lottery to be drawn in the District of Columbia, was not well taken. It was further decided that an indictment charging the defendant with publishing an account of an illegal lottery, and setting forth *in hæc verba* the lottery scheme, which showed that the prizes consisted of sums of money, is good, although it was not otherwise averred that the lottery was set on foot for the purpose of disposing of money, lands, etc. Charles *v.* People, 1 Comst. 181.

[1] Com. *v.* Gillespie, 7 S. & R. 469; Whitney *v.* State, 10 Ind. 404.

[2] Whart. Cr. Ev. § 32; Thomas *v.* People, 59 Ill. 160; Miller *v.* Com., 13 Bush, 731; State *v.* Ochsner, 9 Mo. Ap. 216.

In Thomas *v.* People, *supra*, it was ruled admissible to put in evidence, on behalf of the prosecution, not only the ticket sold, but the bill or advertisement delivered to the purchaser, which explained the purposes and character of the scheme, and also other tickets and bills or advertisements of similar kind, sold and delivered by the accused to other parties, as tending to prove the intent with which the ticket was sold.

It has also been held (Dunn *v.* People, 40 Ill. 465), that it is proper for the prosecution to read to the jury the contents of other envelopes, beside the one sold, for the purpose of showing the true character of the transaction.

In Miller *v.* Com., *supra*, it was said by Lindsay, C. J.: "There is much plausibility in the argument that, because printing, vending, or having in possession with intent to vend, lottery tickets, or knowingly permitting, in any house, shop, or other building, the setting up, managing, or drawing of a lottery, or the sale or exchange of lottery tickets, and the advertising of lotteries or tickets, are each made separate offences by statute, and a specific punishment denounced against each, that none of these acts goes to make up, or are provable under the more general charge of promoting a lottery. But if this conclusion be correct, then it will be difficult, if not impossible, to imagine in what manner a lottery can be promoted."

Intent proved inferentially.

It is no defence that the lottery was authorized by the laws of another State.[1]

Under the federal statute it is not necessary for the prosecution to prove that the lottery company had a legal existence.[2]

[1] Com. *v.* Dana, 2 Met. (Mass.) 329. [2] U. S. *v.* Noelke, 17 Blatch. C. C. 554.

CHAPTER XXIV.

ILLICIT SALE OF INTOXICATING LIQUORS.

Tippling-house when disorderly is a nuisance.

§ 1498. A TIPPLING-HOUSE is a house from which intoxicating liquors are dispensed, and which tipplers frequent. When conducted in such a way as to disturb the community it is a nuisance at common law,[1] irrespective of the question of license.[2]

Nuisances defined by statute.

§ 1498 *a*. Supplementary to the common law rule that a tippling-house, when noisy or in other ways offensive to the community as a whole, is indictable as a nuisance, statutes have been adopted in many jurisdictions making the keeping a house for selling intoxicating liquors specifically indictable. The advantages of proceedings of this class are (1) the pleading is simplified,[3] and (2) abatement may be decreed by the court, or may be executed by private persons who are especially injured by the nuisance.[4] The term "tippling-house," when used

[1] *Supra*, § 1449. See State *v.* Stevens, 40 Me. 559; State *v.* Bailey, 21 N. H. (1 Fost.) 343. That habitual collecting noisy crowds of idlers about its doors makes a tavern a nuisance, see *supra*, § 1412; Meyer *v.* State, 41 N. J. L. (12 Vroom), 6; 42 Ibid. (13 Vroom), 145; cited *infra*, § 1498 *a*, and see other cases cited *supra*, § 1454. Compare §§ 1522, 1522 *a*.

[2] *Supra*, §§ 1410, 1424.

"Tipsy persons" are "tipplers" when drunk. "Tipplers" are persons in the habit of becoming "tipsy;" the words implying drinking and becoming drunk in public places. Thus Shakespeare (Mid-summer's Night Dream, V. 1) speaks of "tipsy bacchanals;" and in Anthony and Cleopatra, I. 4, of "tippling with a slave." The word is used in same sense by Milton, Comus, I. 104.

[3] *Supra*, § 1428.

[4] *Supra*, § 1426. As authorities bearing on these points may be consulted: State *v.* Lang, 63 Me. 215 (where it was held that the various incidents of the nuisance could be cumulatively stated); State *v.* Page, 66 Ibid. 418; State *v.* Ruby, 68 Ibid. 543 (against joint offenders); State *v.* Page, 50 Vt. 445; State *v.* Haley, 52 Ibid. 476 (nuisance to be proved inferentially; Com. *v.* Buxton, 10 Gray, 9 (holding that when the statutory incidents of a nuisance are proved, no further proof of

in the statute, may be interpreted a house or apartment in which intoxicating liquor is sold to persons gathering to drink it on the premises.[1] When a tippling or drinking-house, including in the term an apartment for the sale of liquor, is kept in such a way as to infringe any statutory prescription (*e. g.*, as to selling to minors or habitual inebriates), this may make it a nuisance at common law.[2]

Keeping intoxicating liquors for sale, as a distinct statutory offence, is considered in a future section.[3]

the nuisance is required); Com. *v.* Skelley, Ibid. 464 (holding that the description by street and city is enough); Com. *v.* Langley, 14 Ibid. 21 (that averment of time may be with *continuando*); Com. *v.* Hill, Ibid. 24; Com. *v.* Welsh, 1 Allen, 1 (proof of keeping for sale or selling essential); Com. *v.* Davenport, 2 Ibid. 299 (statutory terms sufficient); Com. *v.* Cutler, 9 Ibid. 486; Com. *v.* Carpenter, 100 Mass. 204; Com. *v.* Cogan, 107 Ibid. 212; Com. *v.* Smith, 108 Ibid. 26; Com. *v.* Bacon, Ibid. 26; Com. *v.* Dunn, 111 Ibid. 428; Com. *v.* Haher, 113 Ibid. 207; Com. *v.* McNamee, Ibid. 12; Com. *v.* Sampson, 114 Ibid. 191; Com. *v.* Hayes, Ibid. 282; Com. *v.* Shea, 115 Ibid. 102; Com. *v.* Shaw, 116 Ibid. 8; Com. *v.* McIvor, 117 Ibid. 118; Com. *v.* Cronin, Ibid. 140; Com. *v.* Costello, 118 Ibid. 454; Com. *v.* Twombly, 119 Ibid. 104; Com. *v.* Brown, 124 Ibid. 318; Com. *v.* Finnegan, Ibid. 324; Com. *v.* Sisson, 126 Ibid. 48; Com. *v.* Levy, Ibid. 240; State *v.* Hopkins, 5 R. I. 53; State *v.* Paul, Ibid. 185 (in which such statutes were held constitutional); State *v.* Keenan, Ibid. 497 (in which it was held that the nuisance in such case could not be abated by a private individual unless it were specially injurious to him); State *v.* Kingston, Ibid. 297; Clinton *v.* State, 33 Ohio St. 27; State *v.* Wickey, 54 Ind. 538; State *v.* McGrew, 11 Iowa, 112 (as to abatement); State *v.* Collins, Ibid. 141 (as to abatement); State *v.* Krieg, 13 Ibid. 462; State *v.* Waynick, 45 Ibid. 516 (as to abatement); Streeter *v.* People, 69 Ill. 595; Howard *v.* State, 6 Ind. 444; McLaughlin *v.* State, 45 Ibid. 338; Stockwell *v.* State, 85 Ibid. 522. As to statutes prohibiting "screens" or "blinds" on tavern windows, see Com. *v.* Auberton, 133 Mass. 404; Com. *v.* Costello, Ibid. 192; Com. *v.* Gibbons, 134 Ibid. 194; Shultz *v.* Cambridge, 38 Ohio St. 659.

[1] State *v.* Inness, 53 Me. 536; State *v.* McNamarra, 69 Ibid. 133 (the statute prohibiting "house for tippling purposes"). That parties concerned in the nuisance may be jointly indicted, see State *v.* Ruby, 68 Me. 543; State *v.* Cox, 52 Vt. 471. For indictment for "knowingly permitting," see State *v.* Stafford, 67 Me. 125; and for indictment for letting building as a nuisance, see Com. *v.* Bossidy, 112 Mass. 297.

In Com. *v.* Worcester, 126 Mass. 256, it was held no defence, under an indictment for maintaining a tenement for the illegal sale of intoxicating liquors, that the liquors in question were paid for as part of a meal. See, however, Burner *v.* Com., 13 Grat. 778.

[2] Meyer *v.* State, 41 N. J. L. (12 Vroom, 6); Meyer *v.* State, 42 Ibid. (13 Vroom), 145.

[3] *Infra*, § 1528 *a*.

The *indictment*, as in similar cases hereafter to be noticed, must follow the statute, though convertible terms may be occasionally substituted.[1] But the omission of any essential statutory term of description is fatal.[2] The house may be designated generally by its vicinage[3] but any material variance in description may be fatal.[4] When the statute makes keeping a "tippling house," or "tippling shop" indictable, it is enough to charge the offence in the statutory words;[5] and so when the statutory offence is keeping "a building for the selling intoxicating liquors;"[6] or for other illegal sale of such liquors.[7] It is generally sufficient, in other respects, to charge the offence in the words of the statute.[8] But when this limitation is in the statute it must be averred that the place was one in which liquors were sold or kept for sale.[9] It is not duplicity to state the incidents of the nuisance cumulatively.[10] The averment of time may be with a *continuando*.[11]

[1] *Infra* §§ 1512, 1528 *a*; Com. *v.* Stowell, 9 Metc. 248, 569–571; Com. *v.* Baird, 4 S. & R. 141; Com. *v.* Schoenhutt, 3 Phila. 20; State *v.* Dyer, Meigs, 237; Bilbro *v.* State, 7 Humph. 534.

[2] Boyle *v.* Com., 14 Grat. 674 (where the omission of the statutory term "retail" was held fatal); Hensley *v.* State, 1 English, 252 (where the indictment was held defective in not following the statutory limit as to the measure of the liquor to be sold).

[3] Com. *v.* Skelley, 10 Gray, 464; Com. *v.* Welsh, 1 Allen, 1; Com. *v.* Intox. Liquors, 116 Mass. 27. See *infra*, § 1528 *a*, as to keeping prohibited liquors for sale.

[4] State *v.* Verden, 24 Iowa, 126.

[5] Com. *v.* Ashley, 2 Gray, 356; State *v.* Casey, 45 Me. 435; Com. *v.* Baird, 4 S. & R. 141; Com. *v.* Schoenhutt, 3 Phila. 20; Morrison *v.* Com., 7 Dana, 218; Com. *v.* Riley, 14 Bush, 44; Com. *v.* Allen, 15 B. Mon. 1; Com. *v.* Harvey, 16 Ibid. 1, holding, also, contrary to the general rule, the license need not be negatived.

[6] *Infra*, § 1528 *a*; State *v.* Freeman, 27 Iowa, 334; State *v.* Allen, 32 Iowa, 348.

[7] Com. *v.* Ryan, 136 Mass. 436. *Infra*, § 1528 *a*.

[8] Com. *v.* Kelly, 12 Gray, 175; Com. *v.* Quinn, Ibid. 178; Com. *v.* Davenport, 2 Allen, 299; Com. *v.* Baird, 4 S. & R. 141; Genkinger *v.* Com., 32 Penn. St. 99; Com. *v.* Schoenhutt, 3 Phila. 20; Burner *v.* Com., 13 Grat. 778 (where the indictment charged keeping "an ordinary" without notice); Morrison *v.* Com., 7 Dana, 218 (holding that while a general charge of keeping a tippling house is sufficient, if additional facts be averred, they must be proved); State *v.* Collins 11 Iowa, 141; State *v.* Dean, 44 Ibid. 648.

[9] State *v.* Hass, 22 Iowa, 497; State *v.* Harris, 27 Ibid. 429.

[10] State *v.* Long, 68 Me. 215; State *v.* Kreig, 13 Iowa, 462.

[11] Com. *v.* Hill, 14 Gray, 24; Com. *v.* Baird, 4 S. & R. 141. See *Supra*, § 1458.

In Massachusetts it is enough to aver that the defendant kept "a certain tenement, describing it, for the illegal sale and illegal keeping of intoxicating liquors, said tenement, so used as aforesaid, being then and there a common nuisance." Com. *v.* Hill, 4 Allen, 589; see State *v.* Ruby, 68 Me. 543.

In Pennsylvania the following form was approved, as sanctioned by long use, in Com. *v.* Baird, 4 S. & R. 141. "That J. B., late of etc., on etc., and on divers other days and times, as well before as afterwards, etc., did keep a tippling house, without any license, etc., and then and there without such license, commonly and publicly did sell and utter, and caused to be sold and uttered, to sundry persons, divers quantities of rum, brandy, and whiskey, and other spirituous liquors, by less measure than a quart, contrary, etc." (Whart. Prec. 813.)

In Com. *v.* Schoenhutt (Phila. 1858), 3 Phila. 20, Thompson, P. J. said: "In 1818, Judge Duncan, in Com. *v.* Baird, 4 S. & R. 141, referred to this form of indictment as having prevailed for eighty years, and now, after nearly forty years more have elapsed without change in this respect, we will not say that all preceding prosecutions have been erroneous."

In some of the statutes, the offence is limited to drinking "on the premises;" or "drinking where sold," the averment of which is essential in the indictment. Tefft *v.* Com., 8 Leigh, 721; State *v.* Charlton, 11 W. Va. 332; Higgins *v.* People, 69 Ill. 11; Vanderwood *v.* State, 50 Ind. 295; Burke *v.* State, 52 Ibid. 461; Woods *v.* Com., 1 Ben. Mon. 344; Overshine *v.* Com., 2 Ibid. 344; Christian *v.* State, 40 Ala. 376; see Patterson *v.* State, 36 Ibid. 297; Boon *v.* State, 64 Ibid. 226. And where this limitation exists, the proof of drinking on or under the shelter or shadow of the premises must be shown. Easterling *v.* State, 30 Ala. 46. Unless, however, the limitation is in the enacting clause, it need not be included in the indictment. Com. *v.* Young, 15 Grat. 664.

[1] State *v.* Gorham, 67 Me. 247; but see Lucker *v.* Com., 4 Bush. 446.

[2] *Infra*, § 1502. That the nuisance is not dependent on the liquor being drunk on the premises, see State *v.* Roach, 74 Me. 562.

[3] Moore *v.* State, 9 Yerg. 353.

[4] Dunnaway *v.* State, 9 Yerg. 350; see *supra*, § 1456.

[5] State *v.* Gorham, 67 Me. 247; Com. *v.* Higgins, 16 Gray, 19; Com. *v.* Shaw, 116 Mass. 8.

[6] *Infra*, § 1520, 1528 *a*. State *v.* Haley, 52 Vt. 476; Com. *v.* Davenport, 2 Allen, 299; Com. *v.* Dowdican, 116 Mass. 257; Com. *v.* Hays, Ibid. 282; Com. *v.* Cronin, 117 Ibid. 140; Com. *v.* Powers, 123 Ibid. 244; Com. *v.* Wal-

Evidence.—The proof of a single sale, when accompanied by collateral indications that the house was kept for tippling purposes, will sustain the indictment.[1] *A fortiori* when the proof is of several sales.[2] But such sales must be in measures prohibited by law, and for personal drinking;[3] and mere uproar, without proof, direct or indirect, of sales, will not be sufficient.[4] Among collateral indications may be mentioned the presence of drunken people,[5] materials for sale of intoxicating drinks, such as counter, jugs, barrels, casks, glasses, spiggots, and the drinks themselves and their dregs and odors.[6] Such facts, if existing prior to the indictment,

may be received as illustrating the nuisance, irrespective of the question of time.[1]

How far a servant in charge of such a nuisance is indictable is hereafter considered.[2]

Cannot be abated by private force.

§ 1498 *b*. As is the case with other disorderly houses, a disorderly tippling house cannot be abated by private force. The abatement can only be by sentence after conviction.[3]

I. LICENSE: ITS NEGATION, PROOF, AND EFFECTS.[4]

§ 1499. As a general rule, the indictment should exhaustively negative the license,[5] and in the words of the statute.[6] If the negation of the license to sell is as to quantity coextensive with the quan-

lace, Ibid. 400; Com. *v.* McCluskey, Ibid. 401; Com. *v.* Gallagher, 124 Ibid. 29; Com. *v.* Kahlmeyer, Ibid. 322; Com. *v.* Dailey, 133 Ibid. 577; State *v.* Kingston, 5 R. I. 497; Sanderlin *v.* State, 2 Humph. 315; Casey *v.* State, 6 Mo. 646; State *v.* Norton, 41 Iowa, 430; and see *supra*, § 1452.

[1] State *v.* Haley, 52 Vt. 476.

[2] *Infra*, § 1504.

As to constitutionality of statute making reputation *prima facie* evidence, see *infra*, § 1530 *a*; Com. *v.* Wallace, 7 Gray, 15; State *v.* Morgan, 40 Conn. 44; State *v.* Thomas, 47 Ibid. 546.

That a statute making presumptions irrebuttable is unconstitutional, see *supra*, § 1452; *infra*, § 1530 *a*; State *v.* Moriarty, 50 Conn. 415; State *v.* Beswick, 13 R. I. 211; State *v.* Higgins, Ibid. 330, 667.

As to inference from character of house, see Com. *v.* Farrand, 12 Gray, 177; Com. *v.* Greenan, 11 Allen, 241; Com. *v.* Holmes, 119 Mass. 195. This question is discussed in Whart. Cr. Ev. § 715 *a*; 26 Alb. L. J. 63. That proof of the offence during part of the time alleged is sufficient, see Com. *v.* Owens, 116 Mass. 252. As to variance as to time, see Com. *v.* Conners, Ibid. 35. That proof of use of part of the house for the unlawful purpose is sufficient, see Com. *v.* Shattuck, 14 Gray, 23; Com. *v.* Burke, 114 Mass. 261; As to the limitation of selling to be drunk on the house, see *infra*, § 1528 *a*.

[3] *Supra*, § 1426; Brown *v.* Perkins, 12 Gray, 89; State *v.* Keenan, 5 R. I. 497; and cases cited *supra*, § 1498 *a*.

[4] For forms of indictment, see Whart. Prec. 782 *et seq.*

[5] Whart. Cr. Pl. & Pr. §§ 239 *et seq.*, 240; State *v.* Munger, 15 Vt. 290; Com. *v.* Thurlow, 24 Pick. 374; State *v.* Webster, 5 Halst. 293; Miller *v.* State, 3 Ohio St. 475; Kern *v.* State, 7 Ibid. 411 (where a form of negation is approved); Com. *v.* Hampton, 3 Grat. 590; State *v.* Horan, 25 Tex. (Supp.) 271; Com. *v.* Smith, 6 Bush, 303; Anderson *v.* People, 63 Ill. 53; Higgins *v.* People, 69 Ibid. 11. See Burke *v.* State, 52 Ind. 461; State *v.* Cox, 29 Mo. 475; White *v.* State, 11 Tex. Ap. 476 (interpreting the Texas "common sense" statute).

[6] Com. *v.* Young, 15 Grat. 664. When an offence by statute is for transcending license, then license must be averred. Com. *v.* Glass, 33 Grat. 827.

tity charged to be sold, it is sufficient.[1] When a license is adequately and squarely negatived, so as to exclude the hypothesis of license, it is not necessary to specify the authorities from whom the license might have been obtained.[2] When, however, a statute prescribes that a license must be obtained from "A. or B.," then the obtaining a license from "A. or B." may be negatived disjunctively.[3]

License should be negatived in indictment.

"Without being duly authorized and appointed thereto according to law" is, in some States, a sufficient negation.[4]

Exceptions.—How provisos and exceptions in statutes are to be treated is elsewhere discussed.[5] The limitations in this respect of the statute are to be followed.[6]

[1] See State *v.* Lane, 33 Me. 536; Com. *v.* Eaton, 8 Peck. 165; Com. *v.* Odlin, 23 Ibid. 275; Com. *v.* Hoyer, 125 Mass. 209; Com. *v.* McKiernan, 128 Ibid. 414.

[2] State *v.* Adams, 6 N. H. 532; State *v.* Blaisdell, 33 Ibid. 388.

[3] State *v.* Burns, 20 N. H. 550 (where "not being a licensed taverner or retailer" was sustained); Brown *v.* Com., 8 Mass. 59; People *v.* Gilkinson, 4 Park C. R. 26 (where "without being licensed" or "authorized," etc., was sustained); State *v.* Swadley, 15 Mo. 515 (sustaining without "consent from owner of said slave, *or*" "any person in authority;" Com. *v.* Haderaft, 6 Bush, 91 (in which case the court, Hardin, J., ruled that the allegation "without the consent of father and mother," was bad).

That negation of license must be exhaustive, see Whart. Cr. Pl. & Pr. §§ 238, 239, 240; State *v.* Munger, 15 Vt. 290; State *v.* Webster, 5 Halst. 293; Rawlings *v.* State, 2 Md. 201; Franklin *v.* State, 12 Ibid. 236; Davis *v.* State, 52 Ind. 488; Goodwin *v.* Smith, 72 Ibid. 113; Beasley *v.* People, 89 Ill. 571; State *v.* Pitzer, 23 Kan. 250; State *v.* McBride, 64 Mo. 364; Agee *v.* State, 25 Ala. 67 (where it was held that the negation must not be in the alternative); Davis *v.* State, 39 Ibid 521; Meier *v.* State, 57 Ind. 386; Henderson *v.* State, 60 Ibid. 296.

As to analogous case of sales to minors without permission of parents or guardian, see Newman *v.* State, 63 Ga. 533; Com. *v.* Hadcraft, 6 Bush, 91. *Infra*, § 1512 *a*; State *v.* Emerson, 35 Ark. 324.

That negation may be by assertion of contradictory opposite, see Com. *v.* Odlin, 23 Pick. 179; Com. *v.* Conant, 6 Gray, 482; see Com. *v.* Roland, 12 Ibid. 132; Com. *v.* Hatcher, 6 Grat. 667; Com. *v.* Boyle, 14 Gray, 3. The averment "not having a license" to sell liquors, as aforesaid, relates to the time of sale. State *v.* Munger, 15 Vt. 290.

[4] Com. *v.* Keefe, 7 Gray, 332; Com. *v.* Conant, 6 Ibid. 482; Com. *v.* Grady, 108 Mass. 412; Com. *v.* Hoyer, 125 Ibid. 209; Roberson *v.* Lambertville, 38 N. J. L. 69; State *v.* Fanning, 38 Mo. 359. See State *v.* Hornbreak, 15 Ibid. 478; State *v.* Andrews, 28 Ibid. 17. As to mode of negativing, see Eagan *v.* State, 53 Ind. 162.

[5] Whart. Cr. Pl. & Pr. §§ 238, 239; and see State *v.* Stamey, 71 N. C. 202. As to medical use, see *infra*, § 1516.

Where the statute makes it an offence

[6] *Infra*, § 1512 *b*.

When the offence consists in the vendee's *status* (*e. g.*, minority, habitual drunkenness), such *status* should be averred.[1]

In Massachusetts, on an indictment for keeping a tenement for the "illegal sale" of liquors, authority to sell need not be negatived.[2]

How license is to be proved.

§ 1500. It has been ruled in several courts, that it is for the defendant to prove he is licensed, the prosecution not being bound to prove a negative.[3] But whenever the negative is capable of proof, it is one as to which the prosecution at common law should at least make out a *primâ facie* case.[4] If the license be conditional or qualified, it must be shown that the condition or qualification has been satisfied;[5] as where a bond is a

to sell without medical advice, such advice must be negatived in the indictment. Thompson *v.* State, 37 Ark. 408; State *v.* Scarlett, 38 Ibid. 563; State *v.* Devers, Ibid. 517. Otherwise as to negativing authority to sell as a druggist. State *v.* Taylor, 73 Mo. 52. It is different when exception is in a distinct clause. Surratt *v.* State, 45 Miss. 601; Riley *v.* State, 43 Ibid. 397. See State *v.* Fuller, 33 N. H. 388; State *v.* Blaisdell, Ibid. 388; State *v.* Buford, 10 Mo. 703.

[1] *Infra*, § 1512 *a*.

[2] Com. *v.* Bennett, 108 Mass. 24; Com. *v.* Connelly, Ibid. 480; *infra*, § 1528 *a*.

[3] Whart. Cr. Ev. § 342; R. *v.* Turner, 5 M. & S. 205; R. *v.* Hanson, Paley on Conv. 45, n.; 1 C. & P. 538; U. S. *v.* Hayward, 2 Gall. 485; State *v.* Crowell, 25 Me. 174; State *v.* Whittier, 21 Me. 341; State *v.* Woodward, 34 Ibid. 293; State *v.* McGlynn, 34 N. H. 422; Com. *v.* Carpenter, 100 Mass. 204; Com. *v.* Kennedy, 108 Ibid. 292; State *v.* Morrison, 3 Dev. 299; Gening *v.* State, 1 McCord, 573; Wheat *v.* State, 6 Mo. 455; State *v.* Lipscomb, 52 Ibid. 32; State *v.* Edwards, 60 Ibid. 490; State *v.* Taylor, 73 Ibid. 52; State *v.* McNeary, 14 Mo. Ap. 440; Shearer *v.* State, 7 Blackf. 99; State *v.* Schmail, 25 Minn. 370; Williams *v.* State, 35 Ark. 430; Flower *v.* State, 39 Ibid. 209. But see Kidder *v.* Norris, 18 N. H. 532; State *v.* Evans, 5 Jones (N. C.), 250; Mehan *v.* State, 7 Wis. 670; Com. *v.* Thurlow, 24 Pick. 374; which case is confined to its particular point in Com. *v.* Boyer, 7 Allen, 306.

The reason for throwing the burden on the defendant is thus stated: "Since by law only one man, here or there, is licensed to sell, the presumption would be that the sale by this or that individual is unauthorized until the contrary be shown." Bakewell, J., State *v.* McNeary, 14 Mo. Ap. 412, citing Bliss *v.* Brainard, 41 N. H. 262.

[4] See Whart. Cr. Ev. §§ 332, 341; State *v.* Kuhuke, 26 Kan. 405; State *v.* Schweiter, 27 Ibid. 499; State *v.* Haney, 32 Ibid. 428.

In several States statutes have been passed throwing the burden of proving license on defendant. Com. *v.* Kelly, 10 Cush. 69; Com. *v.* Leo, 110 Mass. 414; State *v.* Beswick, 13 R. I. 411. See Whart. Cr. Ev. § 342.

As to constitutionality of such laws, see Whart. Cr. Ev. § 716 *a*; Whart. Com. Am. Law, § 425; and more fully *infra*, § 1530 *a*.

[5] State *v.* Shaw, 32 Me. 570; Com. *v.* Matthews, 129 Mass. 485; Dougherty *v.* Com., 14 B. Mon. 239; Lombard *v.* Cheever, 3 Gilm. 469; Spake *v.* People, 89 Ill. 617; State *v.* Lincoln, 6 Neb. 12; see R. *v.* Vine, L. R. 10 Q. B. 195; 13 Cox C. C. 43. A case of disqualification from conviction of felony.

[1] Lightner *v.* Com., 31 Penn. St. 341; Houser *v.* State, 18 Ind. 106; State *v.* Ferguson, 72 Mo. 297 (a druggist's case).

[2] Com. *v.* Graves, 18 B. Mon. 33.

[3] State *v.* Moore, 14 N. H. 451; aff. Pierce *v.* State, 13 Ibid. 536.

[4] Whart. Cr. Ev. § 153.

As to certificate, see Whart. Cr. Ev. § 617.

In Massachusetts a certificate is only *primâ facie* proof. Com. *v.* Spring, 19 Pick. 396; see Com. *v.* Bolkam, Ibid. 282.

[5] Whart. on Ev. §§ 77 *et seq.* See Schlicht *v.* State, 31 Ind. 246.

[6] Spake *v.* People, 89 Ill. 617.

[7] Murphy *v.* Nolen, 126 Mass. 542.

[8] Com. *v.* Rafferty, 133 Mass. 594.

[9] Com. *v.* Mueller, 81 Penn. St. 127; Hasting's Case, 39 Leg. Int. 140; Spake *v.* People, 89 Ill. 617.

[10] State *v.* Shaw, 32 Me. 570; Com. *v.* Graves, 18 B. Mon. 33.

[11] See North Bridgewater Bk. *v.* Copeland, 7 Allen, 139; Wiles *v.* State, 33 Ind. 206 (Elliott, J.); State *v.* Bradford, 36 Ga. 422; State *v.* Hughes, 24 Mo. 147; State *v.* Pate, 67 Ibid. 488 (Henry, J.); Edwards *v.* State, 22 Ark. 253. See Bost. R. R. *v.* Cilley, 44 N. H. 578.

prerequisite to a license taking effect.[1] But ordinarily defects in the license must be corrected by appeal to the tribunal granting it, and cannot be taken advantage of by the defendant in prosecutions of this class.[2]

The license, when offered by defendants, is to be proved by record;[3] parol evidence not being admissible when record proof is obtainable.[4] It is otherwise when the granting of the license is by parol, and not by a tribunal of record. But in any view the best obtainable proof must be produced.[5]

Construction of license.

§ 1500 *a*. A license is not to be strained beyond its proper and formal import;[6] but at the same time is to be construed according to its spirit.[7] It must, in order to be a defence, cover the full charge of the indictment.[8] It must, also, emanate from the proper authority.[9] Mere technical defects, however, will not render it inoperative.[10]

A license does not, unless so provided by its terms, have a retrospective effect so as to exonerate prior transactions.[11]

Licenses not assignable.

§ 1501. A license having been granted to one man to keep a tavern in a particular house, from which he afterwards removed; another being indicted for retailing spirituous liquors in that house may show that he did it as the agent or partner, and under the shelter of such licensee; and may,

on that ground, be acquitted by the jury.[1] But a license is no protection to an associate of the licensee, when the license is, not to keep a tavern, but to sell liquor.[2] And, generally, a license to one cannot be assigned to another.[3]

II. WHAT IS EVIDENCE OF A "COMMON SELLER," OR "DEALER," OR OF A TIPPLING-HOUSE.

Averment and proof of.

§ 1502. Proof of several retail sales of liquor drunk on the premises is sufficient proof of the party's keeping a tippling-house,[4] while it has been held that on a charge of being a common seller there must be proof of at least three distinct sales, with other facts indicating habitual selling,[5] which may be all to one person,[6] or on the same day.[7] Hence a license for part of the time covered by the indictment is no defence.[8] A peddler, carrying intoxicating liquors on his person and selling the same, is liable for single sales, or may be indicted as a common seller.[1] To sustain the allegation that the defendant was a common seller, records of his conviction for single sales are admissible.[2] But proof of a single sale will not sustain an indictment for keeping a place for the sale of liquor.[3]

[1] Barnes *v.* Com., 2 Dana, 388. See Gray *v.* Com., 9 Ibid. 300; Com. *v.* Hoyer, 125 Mass. 209.

[2] Long *v.* State, 27 Ala. 32.

A license to sell liquor, granted to two persons as partners, will, during the period mentioned in the license, protect one of the partners against the penalty for selling without a license, although the other has retired from the firm. State *v.* Gerhardt, 3 Jones (N. C.), 178.

The grant of a license to retail spirituous liquors from a day past is a release of the penalties for retailing without license subsequent to that day, although prior to the taking out of the license. City *v.* Corlies, 2 Bailey, 186.

A license to sell spirituous liquors has no relation back to the date of the order of the county court granting permission to obtain it, and will only protect one who sells from and after the date of its issue. State *v.* Hughes, 24 Mo. 147. Nor will a license "to keep a dram-shop, block No. 15, in the city of St. Louis," justify a sale in any other place in St. Louis. Ibid.

[3] Lewis *v.* U. S., 1 Morris, 199; Com. *v.* Bryan, 9 Dana, 310.

[4] Brock *v.* Com., 6 Leigh, 634; Cochran *v.* State, 26 Texas, 678 (and so when a wife is agent, *infra*, § 1509); State *v.* Colby, 55 N. H. 72; State *v.* Roberts, Ibid. 483; Com. *v.* Reynolds, 114 Mass. 306; Com. *v.* Kennedy, 119 Ibid. 211; *supra*, § 1498 *a*.

[5] State *v.* Day, 37 Me. 244; Com. *v.* Odlin, 23 Pick. 275; Com. *v.* Tubbs, 1 Cush. 2; Com. *v.* Wood, 4 Gray, 11; State *v.* Johnson, 3 R. I. 94; State *v.* Williams, 6 Ibid. 207. *Supra*, § 1498 *a*.

In State *v.* Hynes, 66 Me. 117, it was held that no exception could be taken to a charge "that there must be proof of a plurality of actual sales, and sufficient of them to satisfy the jury of the offence alleged" (that of a common seller), "that the jury could infer the fact of sales from circumstances, and the situation of the respondent, if they were satisfied to do so."

[6] Com. *v.* Odlin, 23 Pick. 275.

[7] Com. *v.* Perley, 2 Cush. 559; Com. *v.* Wood, 4 Gray, 11; Com. *v.* Putnam, Ibid. 16; Com. *v.* Hogan, 97 Mass. 120; State *v.* Maher, 35 Me. 225. See Com. *v.* Graves, 97 Mass. 114.

[8] Com. *v.* Putnam, *ut sup.* *Infra*, § 1527.

When the statute makes the offence to be a common seller of intoxicating (or spirituous) liquors, this must be averred in the indictment, and the two phrases may be stated conjunctively.[4]

To convict as a "dealer," under the statute, requires proof of sales as a system;[5] though it is otherwise under the Vermont statute, which makes penal "dealing in spirituous liquors."[6]

The constitutionality of laws regulating proof in liquor cases has been already considered.[7]

The mode of proving sales is discussed in another section.[8]

III. AGENCY.

Principal liable for agent's act.

§ 1503. A shop or hotel-keeper is indictable for an unlawful sale of spirituous liquors by a servant employed in his business,[9] as all concerned are principals;[10] nor

[1] State *v.* Grames, 68 Me. 418.

[2] State *v.* Gorham, 67 Me. 247.

[3] Overman *v.* State, 88 Ind. 6.

[4] State *v.* Cottle, 15 Me. 473; State *v.* Stinson, 17 Ibid. 154 (Weston, C. J.); Com. *v.* Kingman, 14 Gray, 85, citing Com. *v.* Wood, 4 Ibid. 11; State *v.* Johnson, 3 R. I. 94. See State *v.* Churchill, 25 Me. 300.

In State *v.* Cottle, *supra*, an indictment was sustained which averred that the defendant on, etc., "and on divers other days and times, as well before as afterwards, and until the finding of this indictment, without any lawful authority, etc., did presume to be a common seller of wine, brandy, and rum, and other strong liquors, etc., and did then and there sell and cause to be sold, wine, brandy, rum, etc., to divers persons to said jurors unknown."

[5] See Overall *v.* Bezeau, 37 Mich. 506 (Cooley, C. J.).

[6] State *v.* Chandler, 15 Vt. 425; State *v.* Bugbee, 22 Ibid. 32; State *v.* Paddock, 24 Ibid. 312.

[7] *Supra*, § 1498 *b*.

[8] *Infra*, § 1520.

[9] *Supra*, §§ 135, 247, 341; State *v.* Stewart, 31 Me. 515; State *v.* Wentworth, 65 Ibid. 234; State *v.* Dow, 21 Vt. 484; Com. *v.* Park, 1 Gray, 553; Com. *v.* Nichols, 10 Met. 259; Com. *v.* Eggleston, 128 Mass. 408; Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Major, 6 Dana, 293; State *v.* Matthis, 1 Hill (S. C.), 37; Britain *v.* State, 3 Humph. 203; Molihan *v.* State, 30 Ind. 266; Schmidt *v.* State, 14 Mo. 137.

[10] *Supra*, §§ 88, 223, 247, 1422; State *v.* Bugbee, 22 Vt. 32; French *v.* People, 3 Park. C. R. 114; Johnson *v.*

in such case is it any defence that the agent was directed by the principal not to make the particular sale complained of.[1] Where, however, the sale is not in the immediate line and direction of the principal's business, the fact of agency is only *primâ facie* evidence of the principal's guilt.[2] If there be no authority, express or implied, the principal must be acquitted.[3] *Primâ facie* agency may be rebutted by showing, in cases where the sale was outside of the principal's business, and one which was not within the general scope of the agent's authority, that the agent was explicitly and *bonâ fide* ordered to make no such sale.[4]

One partner is responsible, though absent at the time, for another partner's sale, when such sale was in pursuance of an agreement, express or implied, between the two that liquor should be sold.[5]

§ 1504. It is no defence that the defendant was acting as agent for another. He is criminally responsible as principal himself, not-

People, 83 Ill. 431; Forrester *v.* State, 63 Ga. 649; Schmidt *v.* State, 14 Mo. 137; Hays *v.* State, 13 Ibid. 276; State *v.* Bryant, 14 Ibid. 340; State *v.* Reiley, 75 Ibid. 521; Kirkwood *v.* Autenreith, 11 Mo. Ap. 515.

[1] George *v.* Gobey, 128 Mass. 288; Noecker *v.* People, 91 Ill. 494; People *v.* Broughton, 49 Mich. 339; People *v.* Blake, Sup. Ct. Mich. 1884, 17 Rep. 561; People *v.* Roby, Ibid. 626.

[2] Com. *v.* Nichols, 10 Met. 259; Com. *v.* Putnam, 4 Gray, 16. See Thompson *v.* State, 45 Ind. 495; Gaiocchio *v.* State, 9 Tex. Ap. 387. *Supra*, §§ 135, 247, 341, 1422.

[3] Barnes *v.* State, 19 Conn. 398; Hipp *v.* State, 5 Blackf. 149; Wreidt *v.* State, 48 Ind. 579; Lathrope *v.* State, 51 Ibid. 192; Plunkett *v.* State, 69 Ibid. 68; People *v.* Parks, 49 Mich. 333; State *v.* Dawson, 2 Bay, 360; Goods *v.* State, 3 Greene (Iowa), 565; State *v.* Baker, 71 Mo. 475. See *supra*, §§ 246, 1422. That agency may be inferred from facts, see Merchants' Bk. *v.* State Bk., 10 Wall. 604; State *v.* Tibbetts, 35 Me. 81; Barnes *v.* State, 19 Conn. 398; State *v.* Foster, 3 Fost. (N. H.) 244; Anderson *v.* State, 22 Ohio St. 305; State *v.* Williams, 3 Hill (S. C.), 91; Hayes *v.* State, 13 Mo. 270; Seibert *v.* State, 40 Ala. 60; Thompson *v.* State, 45 Ind. 495.

[4] Com. *v.* Nichols, 10 Met. 259; Barnes *v.* State, 19 Conn. 398; Anderson *v.* State, 22 Ohio St. 305; Hanson *v.* State, 43 Ind. 550; O'Leary *v.* State, 44 Ibid. 91; Wreidt *v.* State, 48 Ibid. 579; Lathrope *v.* State, 51 Ibid. 192; State *v.* Bohles, 1 Rice, 145; Gaiocchio *v.* State, 9 Tex. Ap. 387. The question of *bonâ fides* is for the jury. State *v.* Wentworth, 65 Me. 234; Robinson *v.* State, 38 Ark. 641.

[5] State *v.* Neal, 7 Foster, 131; Whitton *v.* State, 37 Miss. 379; Gathings *v.* State, 44 Ibid. 343.

Evidence that liquor charged to have been sold by the father was sold by the son in the father's presence at his bar supports an information against the father. But the mere fact that the son sold liquor at his father's bar in the father's absence is said not to be evidence that he sold it at his request or by his authority. Parker *v.* State, 4 Ohio St. 563.

withstanding such agency.[1] Voluntary independent action on his part imposes liability.[2]

Agent is personally responsible.

A clerk or servant of the real householder may be convicted on an indictment for a liquor nuisance, if such clerk or servant is at any time in control of the house, no matter for how short a period.[3] But proof of some such control is necessary to sustain the charge of nuisance.[4]

When the agency is in *bonâ fide* subordination to the principal, the principal's license protects the agent.[5]

IV. WHAT MAY BE CONSIDERED "SPIRITUOUS" OR "INTOXICATING" LIQUORS UNDER THE STATUTES.

§ 1505. Verdicts have been sustained holding the following "drinks" to be "intoxicating" without specific proof to this effect being laid before the jury:—

Intoxicating quality when notorious need not be proved.

Brandy, *whiskey*,[6] *rum*, and *gin*,[7] whether unadulterated or mixed with water to an extent which does not materially impair their stimulative and intoxicating quality.[8]

[1] *Supra*, § 94; State *v.* Dow, 21 Vt. 484; State *v.* Bugbee, 22 Ibid. 32; State *v.* Wiggin, 20 N. H. 449; Com. *v.* Hadley, 11 Met. 66; Com. *v.* Drew, 3 Cush. 279; Com. *v.* Hoyer, 125 Mass. 209; Com. *v.* Eggleston, 128 Mass. 408; Com. of Excise *v.* Dougherty, 55 Barb. 332; Com. *v.* Gillespie, 7 S. & R. 469; State *v.* Stucker, 32 Iowa, 495; Britain *v.* State, 3 Humph. 203; Com. *v.* Major, 6 Dana, 293; Hays *v.* State, 13 Mo. 246; Schmidt *v.* State, 14 Ibid. 137; State *v.* Bryant, Ibid. 340; State *v.* Canton, 43 Ibid. 19; State *v.* Matthis, 1 Hill (S. C.), 37; Winter *v.* State, 30 Ala. 22; modified by Reese *v.* State, 73 Ibid. 10.

[2] See State *v.* Wadsworth, 30 Conn. 55; Whitton *v.* State, 37 Miss. 379; State *v.* Finan, 10 Iowa, 19; *supra*, § 94.

[3] Com. *v.* Kimball, 105 Mass. 465.

[4] Com. *v.* Churchill, 136 Mass. 148, cited *supra*, § 1422.

[5] *Supra*, §§ 1499 *et seq.* See Briffitt *v.* State, 58 Ala. 39; State *v.* Thompson, 20 W. Va. 674

"The Massachusetts decisions have never pressed the liability of a servant for keeping and maintaining a nuisance, consisting of a tenement in the possession of his master, under circumstances like the present (where the employer was at the time present) beyond cases where the servant had had charge and control of the place, for a short time at least." Field, J., Com. *v.* Churchill, 136 Mass. 148, citing Com. *v.* Tryon, 99 Ibid. 442; Com. *v.* Kimball, 105 Ibid. 465; Com. *v.* Maroney, Ibid. 467 n.; Com. *v.* Roberts, 132 Ibid. 267; R. *v.* Williams, 1 Salk. 384; 10 Mod. 63.

[6] State *v.* Munger, 15 Vt. 290; Carmon *v.* State, 18 Ind. 450; Eagan *v.* State, 53 Ibid. 173; Schlicht *v.* State, 56 Ibid. 173.

[7] Com. *v.* Peckham, 2 Gray, 514.

[8] Com. *v.* Odlin, 23 Pick. 275. As to meaning of "intoxicating," see State *v.* Kelly, 47 Vt. 294 (where the court confined the term to its popular

Cordial, which, though sweetened and distinctively flavored, contains a large ingredient of alcohol, and is notoriously so composed ;[1] though unless there be such notoriety attached to a specific form of cordial no judicial notice will be taken of the fact.[2]

Spiritous liquors, which, when known to be such, imply the efficient presence of alcohol.[3]

Beer, in its ordinary acceptation, or "strong beer," as it is sometimes called.[4] As to "*lager beer*" there has been great difference of opinion. In some States the courts seem to take judicial notice that it is "malt liquor" or "fermented liquor."[5] In other States the

sense, excluding opium); Com. *v.* Peckham, 2 Gray, 514 (where it was held that the jury could "take notice" that gin is intoxicating) ; Com. *v.* Blos, 116 Mass. 56 (where the same notice was not permitted as to lager beer) ; State *v.* Laffer, 38 Iowa, 422. That a liquor derives its type from the object of its use, see *infra*, § 1506 *b*. Foster *v.* State, 36 Ark. 258. As to opium, see State *v.* Ah Chew, 16 Nev. 50; State *v.* Ching Gang, 16 Nev. 62, under statute.

[1] State *v.* Bennet, 3 Harring. 565 (a cordial not used as medicine).

[2] Williams *v.* State, 35 Ark. 430 (Home Bitters).

[3] See Walker *v.* Prescott, 44 N. H. 511 ; Com. *v.* Markoe, 17 Pick. 405 ; Com. *v.* Thayer, 5 Metc. (Mass.) 246.

In Klare *v.* State, 43 Ind. 486, the court said: "In State *v.* Moore, 5 Blackf. 118, it was held that fermented was not spirituous liquor. 'Spirit is the name of an inflammable liquor produced by distillation.'"

[4] Tompkins *v.* Taylor, 21 N. Y. 173 (affirming the ruling of Walworth, C., in Nevin *v.* Larue, 3 Denio, 437. See, however, Rau *v.* People, 63 N. Y. 277) ; Markle *v.* Akron, 14 Ohio, 586 ; Briffit *v.* State, 58 Wis. 39 ; State *v.* Tessedre, 30 Kan. 476 ; State *v.* Jenkins, 32 Kan. 477. *Contra*, as to beer generally, State *v.* Starr, 67 Me. 242; and as to "common brewer's beer," Klare *v.* State, 43 Ind. 483, and as to beer generally not proved to be "malt beer." Plunkett *v.* State, 69 Ind. 68 ; Wells *v.* State, Ibid. 286 ; see State *v.* Thompson, 20 W. Va. 674 ; People *v.* Hawley, 3 Mich. 330.

In Nevin *v.* Ladue, 3 Denio, 43, 437 (in error), it was maintained that the court would take judicial notice that beer is intoxicating ; and this view is sustained by Chancellor Walworth in the court of errors, in an opinion in which he took notice not only of this fact but of a heterogeneous collocation of other facts, ancient and modern, foreign and domestic, popular and abstruse, on which he based his conclusion. This decision, however, was disregarded as an *obiter dictum* in People *v.* Crilley, 20 Barb. 246, where it was held that ale was not strong liquor. In People *v.* Wheelock, 3 Park. C. R. 9, the court took notice that "Dutch beer" is intoxicating.

[5] State *v.* Goyette, 11 R. I. 592; State *v.* Rush, 13 Ibid. 198 ; Adler *v.* State, 55 Ala. 16 ; Watson *v.* State, Ibid. 158 ; Waller *v.* State, 38 Ark. 656 ; and see last clause in this section. See *contra*, as to intoxicating character, Rare *v.* People, 63 N. Y. 177. In this case, Earl, J., after conceding that the court would take judicial notice that "whiskey, brandy, ale,

question is said to be for the jury,[1] while in some States, by statute, it is now prohibited by name.[2]

Whether in any case there ought to be a conviction without proof as to the character of the liquor will be considered more fully at the end of this section. It is, however, agreed on all sides, that in order to sustain a conviction, there must be specific proof of the presence of intoxicating and inebriating qualities in the following cases :—

"*Bitters*."[3]

"*Cider*," which has been held not to be notoriously "spirituous" or "vinous,"[4] and the question whether it is intoxicating, has been ruled in Massachusetts to be for the jury.[5]

Wine, as a generic term, covers so many drinks that are notoriously not intoxicating that neither court nor jury can find any particular wine to be "intoxicating" without evidence as to its qualities.[6] But wine is not by itself a spirituous liquor. "Wine is the fermented juice of the grape, or a preparation of other vegetables by fermentation. We cannot so far confound the signification of these terms as to call wine a spirituous liquor."[7] "Vinous liquor," when a statutory term, is wine produced from the grape.[8]

Averments in Indictment.—When a statute prohibits the sale of "intoxicating liquors," then it is enough for the indictment to

and strong beer," are intoxicating, declined to take this notice of lager beer, and said that there are "intoxicating beverages which are not so well known, and of whose character the courts could not take notice ;" among which he included lager beer.

[1] Com. *v.* Blos, 116 Mass. 56 ; People *v.* Leiger, 6 Park. C. R. 355 ; Rau *v.* People, 63 N. Y. 277 ; People *v.* Schewe, 29 Hun, 122 ; Kurz *v.* State, 79 Ind. 488.

[2] Com. *v.* Snow, 133 Mass. 575.

[3] State *v.* Wall, 34 Me. 165 ; Williams *v.* State, 35 Ark. 430. A verdict of guilty will be sustained when the "bitters" are shown (under statute) to contain twenty *per cent.* of alcohol. Gostorf *v.* State, 39 Ark. 450. See State *v.* Lillard, 78 Mo. 30.

[4] State *v.* Moron, 5 Blackf. 110 ; Foldman *v.* Morrison, 1 Bradw. 460, citing Caswell *v.* State, 2 Humph. 402. *Aliter* under Maine statute, State *v.* Roach, 75 Me. 123.

[5] Com. *v.* Chappels, 116 Mass. See remarks of court in State *v.* Lowry, 74 N. C. 123. That cider may be by statute made "intoxicating," see *infra*.

[6] See State *v.* Packer, 80 N. C. 439 ; State *v.* Lowry, 74 Ibid. 121 ; Jackson *v.* State, 19 Ind. 312.

[7] State *v.* Moore, 5 Blackf. 118 ; S. P. Caswell *v.* State, 2 Humph. 402.

[8] Adler *v.* State, 55 Ala. 16, citing Smith *v.* State, 52 Ibid. 384. See Dant *v.* State, 83 Ind. 60.

aver a sale of "intoxicating liquor;"[1] the specific character of the liquor being exhibited on trial. When the statute prohibits the sale of a particular liquor by name, then the sale of such particular liquor by name must be averred, and in such case, when the statute does not affix the qualification of "intoxicating," "intoxicating" need not be averred.[2] It is otherwise when the qualification "intoxicating" is in the statute.[3]

Diversity of Knowledge among Judges.—Among judges there is an extraordinary diversity of information on the question as to what drinks are intoxicating. Of all judges, Chancellor Walworth speaks with the most copious and positive detail on this topic, since he is able to tell us, not only what drinks intoxicate in New York, but what intoxicate in the remotest countries and intoxicated in the remotest times.[4] This knowledge, however, appears to be declining in New York,[5] and in Massachusetts it no longer appreciably exists. In earlier cases in that State the judges seemed to have known that whiskey and brandy are intoxicating; but the fountain of judicial knowledge in this respect appears recently to have dried up, the courts disavowing any judicial knowledge on the subject. While this is the case, however, they do not hesitate to impute to juries extensive information in this line, and they have gone so far, as we have seen, as to hold that a witness (who was a temperance detective), is able to prove that ale is intoxicating by the smell.[6] The legislature has from time to time sought to remove the difficulty by enacting that particular liquors, which the court has declined to take judicial notice of, shall be "deemed intoxicating." But the relief is only temporary, since, as we will presently see, as soon as the legislature proclaims a particular drink to be "intoxicating,"

[1] *Infra*, § 1513, where cases are given at large; State *v.* Blaisdell, 33 N. H. 388; Com. *v.* Conant, 6 Gray, 482; Com. *v.* Odlin, 23 Pick. 275; State *v.* Fox, 1 Harr. (N. J.) 152; Connell *v.* State, 46 Ind. 446; Plunkett *v.* State, 69 Ibid. 68. See State *v.* Peterson, 41 Vt. 504; State *v.* Packer, 80 N. C. 439; though see State *v.* Reynolds, 47 Vt. 297; Deverny *v.* State, 47 Ind. 208; Gunter *v.* Leckey, 30 Ala. 591.

[2] State *v.* Munger, 15 Vt. 290.

[3] Ward *v.* State, 48 Ind. 293; Lathrope *v.* State, 50 Ibid. 555. *Infra*, § 1513.

[4] Nevin *v.* Ladue, 3 Denio, 437, criticised above.

[5] People *v.* Crilley, 20 Barb. 246; People *v.* Wheelock, 3 Park. C. R. 9; which case, however, is questioned in Tompkins *v.* Taylor, 21 N. Y. 173.

[6] Haines *v.* Hanrahan, 105 Mass. 480.

the drink ceases to be offered under the proscribed name, but, with some slight modifications, makes its appearance with a new name, of which no judge, no matter how experienced, could take "judicial notice."—In Maine the judges have taken the same course as in Massachusetts, and with the same results. "Whether liquors are, as matter of fact wholly or in part spirituous or intoxicating," they declare, "is to be determined by the jury, from the evidence in the case."[1] The legislature undertook to supply the want by a statute that "ale, porter, strong beer, lager beer, and all other malt liquors, shall be considered intoxicating liquors," etc. But notwithstanding this, the court refused not only to know what is "malt liquor," but what is "Stanley's Hop Beer." "The term 'malt liquor,'" so their opinion runs, "is a general term, embracing several kinds of liquor; what liquors are embraced in it as well as the mode of their manufacture, and the ingredients of which they are composed, is a question of fact for the jury, and not of law for the court."[2] In Rhode Island, on the other hand, the court take emphatic judicial notice "that lager beer was a malt liquor."[3] In Alabama the court "will take judicial notice of the compound word 'malt liquor' found in the statute;" and it is decided that lager beer falls under this head.[4] In Tennessee the court takes judicial notice that "wine" is not "spirituous."[5] In Wisconsin the judges have judicial knowledge of the intoxicating quality of beer; and this knowledge is peremptory. In a case decided in 1883, the trial judge said: "I think a man must be almost a drivelling idiot, who does not know what beer is. I do not think it necessary to prove what it is." Of this the Supreme Court said: "The rulings of the learned judge in this case as to the question were clearly correct, and if his peculiar manner gave them force and emphasis, that was not only proper, but commendable."[6] In Delaware, the majority of the court (Booth, C. J. diss.) gives, as to cordials, the following information: "Common store cordial is sweetened whiskey, sold as spirituous liquor; Godfrey's cordial is a very different thing, known

[1] State *v.* Wall, 34 Me. 165.

[2] State *v.* Starr, 67 Me. 242.

[3] State *v.* Rush, 13 R. I. 199, citing State *v.* Goyette, 11 Ibid. 592.

[4] Adler *v.* State, 55 Ala. 16–23. The judges consequently took notice that "lager beer" was "malt liquor." See Watson *v.* State, 55 Ala. 158.

[5] Caswell *v.* State, 2 Humph. 402.

[6] Briffitt *v.* State, 58 Wis. 39.

for and sold as medicine."[1] On the other hand, the Iowa judges have disclaimed any "judicial knowledge" of the difference between an "intoxicating beverage" and a medicinal tonic.[2] In North Carolina the court in 1876 declined to consider whether "blackberry wine," or indeed, any kind of wine, is a "spirituous liquor;" and when the jury left the question to the court, the court sent it back to the jury.[3] And in 1879, the court held that the question as to whether port wine is intoxicating, is one for the jury as a matter of fact.[4] In Indiana judicial notice is taken that "whiskey" is "intoxicating,"[5] and that "ale" is "malt liquor."[6] But no judicial notice will be taken that malt liquors or beer are intoxicating;[7] or wine.[8]

So have judges decided; yet, on principle, it is hard to see how a judge can take judicial notice of the character of any liquor whatsoever. If, on the one hand, a defendant, through the action of a committee appointed to prosecute all cases reported by agents not always exact in their investigations, be brought into court for selling whiskey, and deny that the drink is whiskey, the only way the court can determine the question, if judicial notice be exclusively relied on, is by smelling or tasting the drink. It is easy enough for a court or a legislature to proclaim that "champagne" is "intoxicating;" but to make a particular drink (*e. g.*, Apollonaris water) "champagne," neither court nor legislature has power. We may take the case, on the other hand, of a vendor selling whiskey under a new name, "Home Tonic," heretofore noticed, for instance. "Home Tonic," is not named in any statute, nor would any court, on the drink making its first appearance, declare that its intoxicating properties are so notorious as to be a matter of judicial notice. If, however, the legislature, to cure this defect, should pass a statute providing that "Home Tonic is to be deemed intoxicating," the difficulty would be in no way relieved. "Home Tonic" would cease to be offered, and in its place a drink with a new name would appear, which would, in like manner, defy judicial notice, until such

[1] State *v.* Bennett, 3 Harring. 565–7.
[2] State *v.* Laffer, 79 Ind. 488.
[3] State *v.* Lowry, 74 N. C. 121.
[4] State *v.* Packer, 80 N. C. 439.
[5] Schlicht *v.* State, 56 Ind. 173; Eagan *v.* State, 53 Ibid. 162.
[6] Wiles *v.* State, 33 Ibid. 206.
[7] Klare *v.* State, 43 Ind. 483; Shaw *v.* State, 56 Ibid. 188; Schlosser *v.* State, 55 Ibid. 76; Kurz *v.* State, 79 Ibid. 488; Plunkett *v.* State, 69 Ibid. 68.
[8] Jackson *v.* State, 19 Ind. 312.

period as legislative prescription should compel it to change its name. The courts could under such statute take "judicial notice" of the drink with the name that was abandoned, but not of the drink with its name newly assumed.[1]

The same course has been taken with respect to "cider."[2]

V. HOW FAR MEDICAL USE IS A DEFENCE.

§ 1506. Unless there be an express exception in the statute, the fact that the liquor was sold for medicine, unless in cases of necessity,[3] is no defence;[4] and where there is an exception in the statute in favor of sales as medicine, or under a physician's prescription, such an exception does not cover cases in which the object was to obtain an intoxicating beverage.[5] But, as a rule, under the head of "intoxicating liquor," in this sense, will not be considered liquor given to a sick man by his physician, though specially charged in the latter's bill.[6] And the preponderance of authority is, that under the exceptions in the statute, if not under the body of the statute, it is a good defence that the stimulant in question was sold *bonâ fide* and non-neg-

To be a defence drink must be sold in good faith as medicine.

[1] Thus when "lager beer," was enacted to be "intoxicating" by the Massachusetts statute, "Bavarian Hop Beer" made its appearance, whose intoxicating properties the court held were not a matter of law, but of fact. Com. *v.* Collier, 134 Mass. 203.
[2] Com. *v.* Smith, 102 Mass. 144. That in cases of doubt the question of intoxicability is one of fact for the jury; see State *v.* Wall, 34 Me. 165; State *v.* Starr, 67 Ibid. 242; Haines *v.* Hanrahan, 105 Mass. 480 (where it was held that ale could be found to be intoxicating on the testimony of a witness who smelt, but did not taste it); Com. *v.* Chappel, 116 Mass. 7 (as to cider); Josephdaffer *v.* State, 32 Ind. 402; Shaw *v.* State, 56 Ibid. 188; State *v.* Lowry, 74 N. C. 121. For cases of judicial notice see State *v.* Rush, 13 R. I. 198; Adler *v.* State, 55 Ala. 16; Watson *v.* State, Ibid. 138. That "ale" is not "spirituous," see Walker *v.* Prescott, 44 N. H. 511; citing Com. *v.* Markoe, 17 Pick. 405; Com. *v.* Thayer, 5 Metc. (Mass.) 246. Whether "Pop" is intoxicating is a question of fact for the jury. See Godfrieson *v.* People, 88 Ill. 284.
[3] *Supra*, § 95.
[4] State *v.* Whitney, 15 Vt. 298; State *v.* Brown, 31 Me. 522; Com. *v.* Kimball, 24 Pick. 366; Com. *v.* Sloan, 4 Cush. 52; Phillips *v.* State, 2 Yerg. 458; State *v.* Thornburg, 16 S. C. 482; Thomasson *v.* State, 70 Ala. 20; Wood *v.* State, 36 Ark. 36.
[5] Ibid.
[6] State *v.* Larrimore, 19 Mo. 391; Thomasson *v.* State, 15 Ind. 449. But see State *v.* Hall, 39 Me. 107; Russell *v.* Sloan, 33 Vt. 656; Jakes *v.* State, 42 Ind. 473. *Cf.* Com. *v.* McKiernan, 128 Mass. 414; article in 25 Albany Law J. 365.

ligently by an apothecary for medical purposes,[1] or that the article sold is not really an intoxicating liquor, or is not susceptible of being used as an intoxicating drink, though alcohol enters into its composition.[2] The apparent conflict in the cases may be, perhaps, reconciled by an appeal to the law as to necessity, as noticed in a prior section.[3] A sale of whiskey or other intoxicating liquor to a stranger who asks for it as medicine is not necessarily within the exception authorizing sales for medical use.[4] Yet, in cases where a stimulant is obviously required to save life or to ward off disease, the stimulant can be sold under the statutory exception, if not as a matter of independent right, even though it could, under the circumstances, be regarded as an "intoxicating" drink.[5]

To constitute an apothecary, under the exception in the statute, he must have some skill in the preparation of medicine. Merely keeping drugs will not be enough.[6]

Where there was evidence tending to show that the liquor was

[1] Ball *v.* State, 50 Ind. 595; Nixon *v.* State, 76 Ibid. 524; State *v.* Hammond, 20 W. Va. 18; State *v.* Wray, 72 N. C. 253; King *v.* State, 58 Miss. 737; Prather *v.* State, 12 Tex. Ap. 401. But see *contra*, cases in prior note, and Carson *v.* State, 69 Ala. 255.

[2] Com. *v.* Hallett, 103 Mass. 452; Com. *v.* Butterick, 6 Cush. 247; Com. *v.* Ramsdell, 130 Mass. 68; State *v.* Laffer, 38 Iowa, 422; Intoxicating liquors *in re*, 25 Kan. 751; Boone *v.* State, 10 Tex. Ap. 418.

[3] *Supra*, § 95.

[4] State *v.* Knowles, 57 Iowa, 669.

[5] That prudence and caution are necessary to establish such a defence, see Hottendorff *v.* State, 89 Ind. 282.

The defence of necessity, under such circumstances, is to be indulgently regarded. Alcohol is an ingredient in a large proportion of medicines compounded; and if, in cases where alcoholic mixtures are prohibited without exception, proof of absolute necessity be required before a sale, human suffering would be largely extended. See State *v.* Wray, 72 N. C. 253 (where the selling of half a pint of French brandy on medical prescription was sustained on this ground); Donnell *v.* State, 2 Ind. 358; Thomasson *v.* State, 15 Ibid. 449 (where it was said that the courts would make the necessary exceptions); Ball *v.* State, 50 Ibid. 595; Nixon *v.* State, 76 Ibid. 524; State *v.* Larrimore, 19 Mo. 391.

In Anderson *v.* Com., 9 Bush, 569, the court took the broad ground of the Indiana Supreme Court, that the legislature cannot be supposed to have intended to prohibit the "harmless and necessary sale of liquors for medicinal purposes by persons engaged in the occupation of apothecaries." See *contra*, State *v.* Brown, 31 Me. 522; Noecker *v.* People, 91 Ill. 494; Wright *v.* People, 101 Ibid. 126; State *v.* Gummar, 22 Wis. 442; State *v.* Blackman, 32 Kan. 615. *Cf.* State *v.* Thornburg, 16 S. C. 482; Thomasson *v.* State, 70 Ala. 20; Woods *v.* State, 36 Ark. 36. See, also, Ball *v.* State, 50 Ind. 595. *Supra*, § 1499.

[6] State *v.* Whitney, 15 Vt. 298.

purchased for medicinal purposes, but none that it was *sold* for that purpose, a conviction was held right.[1]

In Ohio, any person may lawfully, *in good faith*, give away intoxicating liquors, for medicinal or similar purposes, or may lawfully sell them in any quantity for such purposes, to be drank elsewhere than where sold; but he cannot lawfully *sell* them (except such as are specially excepted by the statute) *to be drank where sold*, for any purpose.[2]

§ 1506 *a*. The same distinctions apply to the illegal sale of opium. When prescribed by a physician, it must appear that under the statutes he was entitled to act as such.[3]

And so as to opium.

§ 1506 *b*. We have already seen[4] that cordials may be regarded as intoxicating liquors when their predominant element is alcohol, or other intoxicating ingredient, merely qualified by other ingredients, so as to disguise it as a tonic. Between tonics and intoxicating drinks the line is not easy to be drawn, since most tonics are more or less intoxicating, and most intoxicating drinks are more or less tonic. The test is, the object for which the drink is used. If merely temporarily to stimulate or excite, then it is an intoxicating drink. If used continuously as a tonic, bought and sold as such, it is a medicine.[5] But selling the alcohol singly, in order to be compounded by the purchaser with drugs purchased by him, has been held to be within the statute.[6] It is otherwise as to keeping the alcohol by the druggist for the purpose of compounding under his own charge.[7]

Liquor derives its type from the object of its use.

It is no defence that the money received from the sale was to go to charity.[8]

Whether the indictment must negative the medical use, depends on the structure of the statute.[9] When a statute makes an exception in favor of a requisition of a physician for medical purposes,

[1] Leppert *v.* State, 7 Ind. 300. See Donnell *v.* State, 2 Ibid. 658.

[2] Schaffner *v.* State, 8 Ohio St. 642.

[3] State *v.* Ching Gang, 16 Nev. 62.

[4] *Supra*, § 1505.

[5] Com. *v.* Hallett, 103 Mass. 452; Com. *v.* Ramsdell, 130 Ibid. 68; Haynie *v.* State, 32 Miss. 400; McGuire *v.* State, 37 Ibid. 369 (to the effect that the burden is on the physician to prove medicinal efficiency); State *v.* Larrimore, 19 Mo. 391.

[6] State *v.* Hall, 39 Me. 107. See Carson *v.* State, 69 Ala. 235; State *v.* Blackman, 32 Kan. 615.

[7] Com. *v.* Ramsdell, 130 Mass. 68.

[8] U. S. *v.* Dodge, 1 Deady, 186.

[9] See State *v.* McBride, 64 Mo. 364; State *v.* White, 31 Kan. 342; Whart. Cr. Pl. & Pr. § 238.

this means a written or oral application from the physician himself.[1] Where there is no exception, while physicians cannot sell intoxicating drinks as medicine, except in necessity, yet it is said, in Alabama, that this does not mean that "physicians or druggists would be prohibited, under such a statute as the one in question, from a *bonâ fide* use of spirituous liquors in the necessary compounding of medicines manufactured, mixed, or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactments, nor even within the strict letter of the statute."[2]

VI. IGNORANCE.

§ 1507. Cases may readily be conceived in which ignorance on the part of a vendor as to the character, either of the liquor or of the vendee, may be set up as a defence. The vendor may say that it is his conscientious belief that though alcohol may stimulate, it does not inebriate; or that the person to whom he sells is one entitled by law to purchase; *e. g.*, one seeking to use the liquors for medical purposes, or one of full age as distinguished from a minor, when to the latter sales are prohibited. But to such defence the answer has been already given,[3] that when a specific act is made by the law indictable, irrespective of the defendant's motive or intent, his belief that he was right in what he did, based on a mistake of fact, is no defence. Eminently is this the case with regard to intoxicating drinks. Legislatures in many States, on high grounds of public morality, have either partially or totally prohibited the sale of such drinks. To evade such laws various devices have been adopted. Intoxicating liquors have been advertised with innocent names: "Bitters," "Tonics," "Alteratives," "Cordials." Certificates are given that they contain no alcohol, and nothing to inebriate. Selling is disguised as trading, or showing sights.[4] Persons to whom sales are prohibited, *e. g.*, minors, become at once to the vendors adults.[5] Drunkards, when

Honest mistake of fact is not ordinarily a defence.

[1] Bainbridge *v.* State, 61 Ala. 75.

[2] Carson *v.* State, 69 Ala. 235.

[3] *Supra*, § 88. State *v.* Thornburg, 16 S. C. 482; Woods *v.* State, 36 Ark. 36.

[4] See *infra*, § 1519. Where, however, the character of the liquor is so changed that it cannot be used as a beverage, and it becomes solely a medicine, then the doctrine of the text ceases to apply. See State *v.* Laffer, 38 Iowa, 422; Russell *v.* Sloan, 33 Vt. 656; Holmes *v.* State, 88 Ind. 145. *Infra*, § 1512 *a*.

[5] *Infra*, § 1512 *a*.

the statute prohibits selling to them, appear sober.[1] Any diseased craving on the part of a purchaser becomes a sickness, which makes the sale one for "medical use."[2] If pretexts such as these are sustained, the worst vendors of the worst liquors would be the best protected by the law. They have only to be brutishly ignorant as to the character of the liquor, the purpose of the purchase, and (when sales to minors are prohibited) the age of the vendee, to go free.[3] But the law declares that such "ignorance" is no defence.[4]

VII. AUTREFOIS ACQUIT.[5]

§ 1508. A conviction for retailing to one person is no bar to an indictment for retailing to another, though the act of selling charged in the second indictment was anterior to the finding of the bill on which the conviction was had.[6] So, where two bills for retailing were found against the defendant at the same time, and the first charged a retailing to A. B., and to divers other persons; the second a retailing to C. D., and to divers other persons, and a conviction was had on the first indictment, and it was pleaded in bar of the second; it was held, that the words, "and to divers other persons," in both indictments, could be rejected as surplusage, and the plea in bar was overruled.[7]

Offence must be identical to bar.

An indictment for specific sales is not barred by a conviction of

[1] Cundy *v.* LeCocq, 51 L. T., N. S. 265.

[2] Holmes *v.* State, 88 Ind. 145.

[3] See *supra*, § 88; Crampton *v.* State, 37 Ark. 108. As to proof of sale to minor, see Siegle *v.* People, 106 Ill. 69.

[4] See *supra*, § 88, where the cases on this question, on both sides, are given; *infra*, § 1509. S. P., U. S. *v.* Dodge, 1 Deady, 186; Barnes *v.* State, 19 Conn. 398; Com. *v.* Goodman, 97 Mass. 117; Com. *v.* Emmons, 98 Ibid. 6; Com. *v.* Lattinville, 120 Ibid. 385; Com. *v.* Finnegan, 124 Ibid. 324; State *v.* Hause, 71 N. C. 518; McCutcheon *v.* People, 69 Ill. 601; Farmer *v.* People, 77 Ibid. 322; State *v.* Cain, 9 W. Va. 559; Ulrich *v.* Com., 6 Bush, 400; State *v.* Heck, 23 Minn. 549; State *v.* Hartfiel, 24 Wis. 60. As dissenting, see Crabtree *v.* State, 30 Ohio St. 382; Brown *v.* State, 24 Ind. 113; Fahrbach *v.* State, Ibid. 77; State *v.* Kalb, 14 Ibid. 403; Robinius *v.* State, 63 Ibid. 235; where it was held that, *due care having been shown*, honest belief is a defence. In Alabama, where the offence is selling to a "known" drunkard, *scienter* must be proved. Smith *v.* State, 55 Ala. 1. *Infra*, § 1512 *a*.

[5] See, generally, Whart. Cr. Pl. & Pr. § 472.

[6] State *v.* Ainsworth, 11 Vt. 91; State *v.* Cassety, 1 Rich. 90. See *per contra*, State *v.* McBride, 4 McCord, 332, overruled by State *v.* Cassety, as above; and see Com. *v.* Mead, 10 Allen, 396.

[7] State *v.* Cassety, 1 Rich. 90.

being at about the same period of time a common seller.[1] Clearly is a conviction or acquittal of a disorderly or tippling house, as a nuisance, no bar to an indictment for specific sales, or for being a common seller,[2] and the converse holds good.[3] The same rule also applies to keeping for sale and selling.[4]

An acquittal for a sale to a "person unknown" is no bar to a prosecution for a sale to A. B., unless the prosecution's case in both instances is the same.[5]

When there are a series of sales distinctly separated as to time, they may be separately prosecuted when the statute makes single sales indictable,[6] even though the defendant could have been prosecuted for all the sales together as a "common seller," or as keeping a "tippling house," or other nuisance;[7] though it is otherwise when the first indictment avers a continuous offence; in which case a conviction or acquittal bars a subsequent prosecution for any ingredient of such offence.[8]

Keeping liquor with intent to sell is a distinct offence from keeping a liquor nuisance.[9]

A conviction of the husband for maintaining a liquor nuisance may be no bar to a conviction, on the same evidence, of the wife.[10]

[1] Whart. Cr. Pl. & Pr. § 472; State v. Coombs, 32 Me. 527; State v. Maher, 35 Ibid. 225; State v. Innes, 53 Ibid. 536; Com. v. Hogan, 97 Mass. 122. State v. Moriarty, 50 Conn. 415; State v. Johnson, 3 R. I. 94; Com. v. Kennedy, 97 Mass. 224; Heikes v. Com., 26 Penn St. 513, though see *contra*, under statutes, State v. Nutt, 28 Vt. 598; Miller v. State, 3 Ohio St. 475.

[2] State v. Lincoln, 50 Vt. 644; State v. Inness, 53 Me. 536; Com. v. McCauley, 105 Mass. 69; State v. Williams, 30 N. J. L. (1 Vroom,) 102 Martin v. State, 59 Ala. 34.

[3] Whart. Cr. Pl. & Pr. § 472; State v. Moriarty, 50 Conn. 415.

[4] State v. Head, 3 R. I. 135.

[5] State v. Birmingham, Busbee, 120; see Whart. Cr. Pl. & Pr. § 456; McBride's Case, 4 McCord, 332.

[6] That "drinks" taken in succesion may be severed, see Weireter v. State, 69 Ind. 269; State v. Small, 31 Mo. 197.

[7] State v. Grames, 68 Me. 418; Tuttle v. Com., 2 Gray, 505; Com. v. Porter, 4 Ibid. 426. See as to sales by "retail," *infra*, § 1514 *a*; Weil v. State, 52 Ala. 19; Lawson v. State, 55 Ibid. 118.

[8] Com. v. Robinson, 126 Mass. 259; citing Com. v. Armstrong, 7 Gray, 49; Whart. Cr. Pl. & Pr. § 472.

[9] Com. v. McShane, 110 Mass. 502; see Whart. Cr. Pl. & Pr. § 472.

[10] Com. v. Welsh, 97 Mass. 593. See *supra*, §§ 79–81; *infra*, § 1509.

VIII. HUSBAND AND WIFE.

Feme covert may be responsible for sales, and husband for wife's sales

§ 1509. A *feme covert* may be jointly indicted with her husband for an illegal sale made with his approval, though he was at the time absent.[1] If made by her in his absence, and not under his command, though in the house in which they live and trade together, she may be indicted singly.[2] She may, with the same limitation, be responsible for such a sale when she is living separate and apart from her husband, and the sale is without his approval.[3] But the husband may be liable if he have a guilty prior knowledge of his wife's acts, and the business is done, without his interfering to stop it, in the common domicil,[4] though she does business on her own account, and has taken out a United States license as retail dealer.[5] He is liable, also, if he make or countenance the sales, though the house, or its apparatus for liquor selling, are owned separately by the wife.[6] And it has been ruled in Massachusetts that even under the married women's acts, if a married woman keep intoxicating liquors for sale in violation of law, in a house occupied by herself and her husband, and her husband aid her in such keeping; or if, without actually and actively aiding her, he is present, and has, or ought to have, knowledge of the fact and of her intent, he can be convicted of such illegal sale or keeping,[7]

[1] See *supra*, §§ 79–81; State v. Colby, 55 N. H. 72; State v. Roberts, Ibid. 483; Com. v. Tryon, 99 Mass. 442; Com. v. Kennedy, 119 Ibid. 211; Com. v. Hamor, 8 Grat. 698.

[2] R. v. Crofts, 2 Stza. 1120; State v. Haines, 35 N. H. 207; Com. v. Murphy, 2 Gray, 510; Com. v. Welsh, 97 Mass. 593; Com. v. Roberts, 132 Ibid. 267 (a case of statutory nuisance). *Supra*, §§ 79–81.

[3] Ibid.; Pennybaker v. State, 2 Blackf. 484; State v. Collins, 1 McCord, 355. *Supra*, §§ 79–81.

[4] Com. v. Coughlin, 14 Gray, 389; Com. v. Gannon, 97 Mass. 547; Com. v. Reynolds, 114 Ibid. 306; Geuing v. State, 1 McCord, 572. See State v. Colby, 55 N. H. 73; State v. Roberts, Ibid. 483.

[5] Com. v. Wood, 97 Mass. 225; Com. v. Barry, 115 Ibid. 146; Com. v. Kennedy, 119 Ibid. 211; Com. v. Carroll, 124 Ibid. 30. See Hensley v. State, 52 Ala. 10; see *supra*, § 81; *infra*, § 1531.

[6] Com. v. Barry, 115 Mass. 146; Com. v. Pratt, 126 Ibid. 462; Mulvey v. State, 43 Ala. 316.

[7] Com. v. Welch, 97 Mass. 593; Com. v. Barry, 115 Ibid. 146; Com. v. Carroll, 124 Ibid. 30; Com. v. Pratt, 126 Ibid. 462. That at common law the husband cannot under such circumstances defend, on the ground that he had remonstrated with his wife for such sales, see State v. McDaniel, 1 Houst. C. C. 506. And see State v. Colby, 55 N. H. 72; Com. v. Barry, 115 Mass. 146; State v. Roberts, 55 N. H. 483; Com. v. Reynolds, 114 Mass. 306.

even though he has no share in the profits.[1] But if his wife have a license, this protects her husband when acting for her.[2]

IX. AVERMENT AND PROOF OF VENDEE.

Prevalent opinion is that vendee need not be named.

§ 1510. The prevalent opinion is that in an indictment against a person for selling spirituous liquors by the small measure, without a license, it is not necessary that it should be averred to whom the sale was made, or the number of the vendees.[3] But in some States, and on principle with greater apparent reason, it is determined that in the indictment the name of the person to whom the sale was made must be specified, if known.[4] But in view of the fact that the offence is not, like assault, directed against an individual, but, like nuisance, directed against the community, we may reconcile ourselves to the more convenient practice of omitting the name of the vendee in all cases where the statutes forbid sales irrespective of persons.

When the defendant is charged with being a "common seller," then it is agreed on all sides that the vendee need not be named.[5]

[1] Com. v. Kennedy, 119 Mass. 211.

[2] State v. Hunt, 29 Kan. 762.

[3] State v. Munger, 15 Vt. 290; People v. Adams, 17 Wend. 475; Osgood v. People, 39 N. Y. 449; State v. Webster, 5 Halst. 293; Com. v. Dove, 2 Va. Cas. 26; Halstead v. Com., 5 Leigh, 724; Com. v. Smith, 1 Grat. 553; State v. Pendergast, 20 W. Va. 672; State v. Muse, 4 Dev. & B. 319; Morrison v. Com., 7 Dana, 219; State v. Staley, 3 Lea, 565; Riley v. State, 43 Miss. 397; State v. Rogers, 39 Mo. 431; State v. Jaques, 68 Ibid. 260; Cannady v. People, 17 Ibid. 158; Rice v. People, 38 Ibid. 435; Green v. People, 21 Ibid. 125; Smouse v. State, 49 Iowa, 634; State v. Gummer, 22 Wis. 441; State v. Schweitzer, 27 Kan. 499; Carter v. State, 68 Ga. 626; Powell v. State, 69 Ala. 10; State v. Kuhn, 24 La. Ann. 474; State v. Parnell, 16 Ark. 506; Johnson v. State, 40 Ibid. 453; Cochran v. State, 26 Tex. 678; State v. Heldt, 41 Ibid. 220; Whart. Cr. Pl. & Pr. §§ 111; Whart. Cr. Ev. § 97.

In Rough v. Com., 78 Penn. St. 495, the name of the vendee was left blank. It was held that it was within the discretion of the court below to amend it by inserting the vendee.

[4] Com. v. Thurlow, 24 Pick. 374; State v. Doyle, 11 R. I. 574; State v. Plainfield, 44 N. J. L. 118; State v. Steedman, 8 Rich. 312; State v. Jackson, 4 Blackf. 49; McLaughlin v. State, 45 Ind. 338; Wreidt v. State, 48 Ibid. 579; Wilson v. Com., 14 Bush, 159; Dorman v. State, 34 Ala. 216; Capritz v. State, 1 Md. 569; State v. Walker, 3 Harring. 547; Neales v. State, 10 Mo. 499; overruled by State v. Rogers, 39 Ibid. 431. See *supra*, § 1493; Whart. Cr. Ev. § 97; Whart. Cr. Pl. & Pr. § 111.

[5] *Supra*, § 1502. See State v. Cottle, 15 Me. 473, where the selling was averred to "divers persons;" Com. v. Hart, 11 Cush. 130, where it was held

Vendee may be averred as unknown.

§ 1511. Where the vendee must be named, and his name was at the finding unknown, it is enough so to aver it, and it will be no variance, though it appear that subsequently to the finding the name became known.[1] If, however, the name were known to the grand jury, or could have been, if they asked, the variance may be fatal.[2]

Vendee when named must be proved.

§ 1512. Where the vendee's name is averred, a variance may be fatal.[3] And this is the case where the allegation is a sale to A., and the proof is a sale to A. and B.[4] In such cases whether the names are *idem sonans*, is for the jury.[5] An allegation in an indictment that the defendant sold spirituous liquors to A., is proved by evidence that A. bought the liquors of the defendant for B., at B.'s request, and with his money, without disclosing that fact to the defendant.[6] Where, however, the agency is disclosed, the sale in States where the law requires the vendee to be named must be averred to have been to the principal and not to the agent.[7]

The rule in cases where the act derives its illegality from the character of the vendee is elsewhere considered.[8]

X. AVERMENT AND PROOF OF SALE.

1. *How Sale is to be averred.*[9]

§ 1512 *a*. As has been already incidentally seen, statutes are in force in several jurisdictions prohibiting sales of intoxicating liquors

that the averment of particular sales could be rejected as surplusage.

[1] Whart. Cr. Ev. § 97; Roberson v. Lambertville, 38 N. J. L. 69; State v. Bryant, 14 Mo. 340; Blodget v. State, 3 Ind. 403; Ashley v. State, 92 Ind. 559; State v. Carter, 7 Humph. 158.

[2] Blodget v. State, 3 Ind. 403; Whart. Cr. Ev. § 97.

[3] Com. v. Shearman, 11 Cush. 546; citing Com. v. Hall, 3 Pick. 388; Com. v. Brown, 2 Gray, 358; Com. v. Mehan, 11 Gray, 321; Com. v. O'Hearn, 132 Mass. 553; Com. v. Whelan, 134 Ibid. 206. See U. S. v. Howard, 3 Sumn. 12.

[4] Iseley v. State, 8 Blackf. 403; Brown v. State, 48 Ind. 38; State v. Wolf, 46 Mo. 584.

[5] Com. v. Mehan, *supra*, citing R. v. Davis, 2 Den. C. C. 231; Whart. Cr. Ev. § 96.

[6] Com. v. Perley, 2 Cush. 559; Com. v. Gormley, 133 Mass. 580.

[7] Com. v. Remby, 2 Gray, 508.

[8] *Supra*, § 1507; *infra*, § 1512 *a*; Aultfather v. State, 4 Ohio St. 467.

[9] That it is enough if indictment follow statute, see generally State v. Wentworth, 65 Me. 234; Whiting v. State, 14 Conn. 487; State v. Miller, 24 Ibid. 522; Com. v. Hickey, 126 Mass. 250; Glass v. Com., 33 Grat. 827; State v. Connor, 30 Ohio St. 405; State

to minors and to drunkards. These specific prohibitions come in most cases to our notice from the fact that in cases in which it can be done with any plausibility, the defence is set up that the defendant did not know that the purchaser was a minor or was a drunkard. All that would be necessary, were such a defence admitted, to enable the dram-seller to defy the law triumphantly in such cases, would be for him to be invincibly ignorant of the character of those coming to him to purchase; and thus the most stolid and wicked of dram-sellers would be those whom the law would most effectually protect in their nefarious work. Hence it is that most statutes prohibiting sales to minors and to drunkards do not include the qualification "knowingly," and the better opinion is that, under such statutes, even honest ignorance on the defendant's part, though ground for an appeal to executive clemency, is no defence in bar.[1] On the other hand, it is held in some jurisdictions that when the defendant can show that he took due care to inquire as to the purchaser's *status* so far as it involves the right to buy intoxicating drinks, this is a defence.[2] In any view, when the statute includes the qualification "knowingly," then no conviction can take place unless guilty knowledge be proved.[3]

Sales to minors and drunkards specially prohibited.

v. Joyner, 81 N. C. 534; State *v.* Bullard, 13 Ala. 413; State *v.* Odam, 2 Lea, 220; State *v.* Smouse, 49 Iowa, 634.

[1] See *supra*, §§ 88, 1507. As to negativing permission of parent or guardian, see *supra*, § 1499. That this is the rule with regard to sales to minors, see Com. *v.* Emmons, 98 Mass. 6 (where it was held in a prosecution for admitting a minor to gamble that evidence that the "minor" represented himself of full age was inadmissible, and that the *scienter* was irrelevant); Roberge *v.* Burnham, 124 Ibid. 277; Com. *v.* Finnegan, Ibid. 324 (where the same doctrine was applied to the sale of liquors); McCutcheon *v.* People, 69 Ill. 601 (affirming Ells *v.* People, 4 Scam. 509); Farmer *v.* People, 77 Ibid. 322; Humpeler *v.* People, 92 Ibid. 400; State *v.* Cain, 9 W. Va. 559; State *v.* Gilmer, Ibid. 641; Ulrich *v.* Com., 6 Bush, 400; State *v.* Hartfiel, 24 Wis. 60; Redmond *v.* State, 36 Ark. 58; Crampton *v.* State, 37 Ibid. 108; Edgar *v.* State, Ibid. 219.

[2] Brown *v.* State, 24 Ind. 113; Fahrbach *v.* State, Ibid. 77; Robinius *v.* State, 63 Ibid. 235; Robinius *v.* State, 67 Ibid. 94; Faulks *v.* People, 39 Mich. 200; State *v.* Boucher, 59 Wis. 477; Adler *v.* State, 55 Ala. 16. See, also, Ohio cases as to *scienter* in sales to drunkards to be hereafter noticed, and explanation of these cases given, *supra*, § 88.

[3] See Marshall *v.* State, 49 Ala. 21; Smith *v.* State, 24 Tex. 547; *Cf.* Felton *v.* U. S., 96 U. S. 699. As to the analagous case of gambling with minors, see *supra*, § 1465 *d*.

In Siegel *v.* People, 106 Ill. 89, it was held that the sale of three glasses of beer to an adult by a saloon-keeper, the adult paying therefor, and giving one of the glasses of beer to a minor,

The same distinctions are taken with regard to sales to drunkards.[1]

When the offence consists in the vendee's minority, such minority at the time of sale should be averred,[2] and so of drunkenness, using the terms of the statute.[3]

who drinks the same, does not by itself make the seller liable under the statute, although the minor may have furnished the money with which to procure the same, the seller not knowing or having reason to know that fact. It was said by the court, however, that a case might arise where the barkeeper ought to know, from the circumstances, that the person purchasing liquor is being used by a minor as a screen to conceal his own participation, and in such case the vendor would be liable under the statute. The question, however, whether such facts exist should be submitted to the jury on the evidence.

It is otherwise under a statute which prohibits all persons from "letting" minors have intoxicating drinks. State *v.* Munson, 25 Ohio St. 318.

How age is to be proved is elsewhere discussed. Whart. Cr. Ev. §§ 236, 311, 459. See Hill *v.* Eldredge, 126 Mass. 234; Vangorden *v.* State, 49 Ind. 518; Robinius *v.* State, 63 Ibid. 235; State *v.* Cain, 9 W. Va. 559; Johnson *v.* People, 83 Ill. 431; Bain *v.* State, 61 Ala. 751. That, in a doubtful case, the jury ought not to rely exclusively on inspection, see Ihringer *v.* State, 53 Ind. 251. But see State *v.* Arnold, 13 Ired. 184.

[1] Cundy *v.* Le Cocq, 51 L. T. (N. S.) 265; George *v.* Gobey, 128 Mass. 289; Barnes *v.* State, 19 Conn. 398; Humpeler *v.* People, 92 Ill. 400; State *v.* Hock, 23 Minn. 549; State *v.* M'Ginnis, 30 Ibid. 52. See, *contra*, Miller *v.* State, 5 Ohio St. 275; Crabtree *v.* State, 30 Ibid. 282; Stanley *v.* State, 23 Ala. 27; Smith *v.* State, 55 Ibid. 1. Atkins *v.* State, 60 Ibid. 45, apparently *contra*, was on a statute making the offence to sell to a person of *known* intemperate habits.

In Barnes *v.* State, *supra*, it was said by Ellsworth, J., for the court, that "knowledge of one's character, as a common drunkard, is not essential to subject the offender to the penalty of the law," and it was held that the same rule applies to unlawful sales to minors and students in colleges. In Humpeler *v.* People, *supra*, Craig, C. J., giving the opinion of the court, said, "The statute makes a sale to a person in the habit of getting intoxicated a crime, and that, too, without regard to the question whether the vendor had knowledge of the habits of the person to whom the sale was made or not." See, also, State *v.* Hubbard, 60 Iowa, 466. As to statutory notice to be given in cases of habital drunkards, see Engle *v.* State, 97 Ind. 122.

[2] Aultfather *v.* State, 4 Ohio St. 467 (aff. Miller's Case, 3 Ibid. 475); Grunkemeyer *v.* State, 25 Ibid. 548; State *v.* Shoemaker, 4 Ind. 100 (where it was held that the negation of permission must be exhaustive); Meyer *v.* State, 50 Ind. 18 (where this rule was modified); Newman *v.* State, 63 Ga. 533 (where it was held that negation of "from mother," under the statute, was not sufficient, unless the father's death was averred); State *v.* Emerick, 35 Ark. 324 (where it was held that the negation must extend to the guardian).

[3] State *v.* Connor, 30 Ohio St. 405; Berry *v.* State, 67 Ind. 222 (aff. State *v.* Snyder, 66 Ibid. 203); Tatum *v.* State, 63 Ala. 147 (where it was held that, after stating that the defendant was of known intemperate habits, it is not

§ 1512 *b*. The limitations of the statute as to the offence must be followed in the indictment.[1] Hence the allegation, drank on the premises, when part of the statutory offence, must be specific.[2] But unless part of the enacting clause, the qualification "not to be drunk where sold" need not be in the indictment.[3]

Limitation of statute to be followed.

§ 1512 *c*. In some statutes there is a specific prohibition of selling liquor within certain distances from schools or churches. In such cases the limitation must be expressed in the indictment and the proof must correspond.[4] The same rules are laid down in reference to statutes prohibiting drinking "saloons" to be opened in the neighborhood of places where elections are held.[5]

Limitation as to neighborhood of schools or churches.

§ 1513. Where a statute selects a particular kind of liquor, using the term not generically, but specifically, on account of its particular danger to the community (as extreme instances may be taken as illustrations absinthe, and preparations of opium), then the liquor in question, in a prosecution of its seller, must be described by the statutory name.[6] Where,

Statutory description of liquor sufficient.

necessary to negative physicians' prescription.

[1] See State *v.* Orton, 41 Ark. 305; State *v.* Cathey, Ibid.

[2] Teft *v.* Com., 8 Leigh, 721; State *v.* Charlton, 11 W. Va. 332 (where the place was stated disjunctively, which was held defective); Higgins *v.* People, 69 Ill. 11 (cited *supra*, § 1499); State *v.* Freeman, 6 Blackf. 248; Vanderwood *v.* State, 50 Ind. 295; Burke *v.* State, 52 Ibid. 461 (holding that all the prohibited places should be negatived); Boon *v.* State, 69 Ala. 226 (where it was held sufficient to state that the defendant "did sell vinous or spirituous liquors without a license"); Woods *v.* Com., 1 Ben. Mon. 344; Overshine *v.* Com., 2 Ibid. 344; Christian *v.* State, 40 Ala. 376. See State *v.* Smith, 35 Tex. 132. In what cases the disjunctive can be used, see *supra*, § 1499.

[3] Com. *v.* Young, 15 Grat. 664. Nor is it necessary to aver that liquor sold was not made by the defendant, though this limitation is in the statute. State *v.* Joyner, 81 N. C. 34. That exceptions as to liquor sold *in* package need not be negatived, see State *v.* Shaw, 35 N. H. 217.

[4] Com. *v.* Whelan, 134 Mass. 206; State *v.* Midgett, 85 N. C. 538; Block *v.* State, 66 Ala. 493; Brewer *v.* State, 7 Lea, 682; Tillery *v.* State, 10 Ibid. 35; State *v.* Tarver, 11 Ibid. 658; Hatcher *v.* State, 12 Ibid. 368; Wilson *v.* State, 35 Ark. 414; Blackwell *v.* State, 36 Ibid. 178; McClain, *ex parte*, 61 Cal. 436.

[5] *Infra*, § 1832.

[6] *Supra*, § 1505. See *infra*, § 1522 *a*. State *v.* Blaisdell, 33 N. H. 388; State *v.* Munger, 15 Vt. 290; Com. *v.* Conant, 6 Gray, 482; Com. *v.* Dean, 14 Ibid. 99; Com. *v.* Ryan, 9 Ibid. 137; State *v.* Fox, 1 Harris (N. J.) 152; Downey *v.* State, 20 Ind. 82; State *v.* Carpenter, Ibid. 219, and other cases cited *supra*, § 1505.

however, a generic term is used, *e. g.*, intoxicating liquor, then the liquor sold may be designated by its generic and not by its specific name;[1] and this though the statute uses "intoxicating liquor" in the alternative.[2] When, also, the liquor is not specifically named in the statute, and of its intoxicating properties the court does not take judicial notice, then it must be specifically averred to be intoxicating.[3] In cases of this class, questions of technical variance are of little moment. The indictment may describe the liquor by the statutory designation, and this will be good, if true, though it may be superseded by a popular *alias*.[4]

§ 1514. When the statute prohibits sales of less than a particular measure, the indictment must aver the quantity sold to be less than such measure, in the statutory words, which will be by themselves sufficient.[5] It will not be enough to aver simply a sale by a smaller measure.[6] Thus it is not enough to aver selling a "pint," when the statute makes illegal the selling of "a less measure than a quart." The indictment must aver the selling of "a less measure than a quart."[7] But when every mode of sale is illegal, any kind of measure known to law may be averred.[8] And when all sales are prohibited irrespective of measure, then it is enough merely to aver the sale.[9]

And so as to measure.

[1] Com. *v.* Blaisdell, 33 N. H. 388; Com. *v.* Conant, 6 Gray, 482; Com. *v.* Odlin, 23 Pick. 279; Simpson *v.* State, 17 Ind. 444; Fetterer *v.* State, 18 Ibid. 388; Downey *v.* State, 20 Ibid. 82; Leary *v.* State, 39 Ibid. 360; Connell *v.* State; 46 Ibid. 446; Hooper *v.* State, 56 Ibid. 153; Wells *v.* State, 69 Ibid. 286; Noonan *v.* State, 1 S. & M. 562; State *v.* McGinnis, 30 Minn. 52; State *v.* Packer, 80 N. C. 439; State *v.* Melton, 38 Mo. 368; State *v.* Rogers, 39 Mo. 431.

[2] State *v.* Packer, 80 N. C. 439.

[3] Com. *v.* Dean, 14 Gray, 99; State *v.* Packer, 80 N. C. 439.

[4] See illustration as to gambling devices, in Johnson *v.* State, 7 Sm. & M. 163, cited *supra*, § 1466.

[5] Com. *v.* Odlin, 23 Pick. 275; Zarresseller *v.* People, 17 Ill. 101; Noecker *v.* People, 91 Ibid. 468; Weireter *v.* State, 69 Ind. 269, citing State *v.* Zeitler, 63 Ibid. 441; State *v.* Shaw, 2 Dev. 198; State *v.* Arbogast, 24 Mo. 363.

[6] Arbintrobe *v.* State, 67 Ind. 267; Goupe *v.* State, Ibid. 37.

[7] *Supra*, § 1505; Com. *v.* Odlin, 23 Pick. 275; State *v.* Shaw, 2 Dev. 198; though see Reams *v.* State, 23 Ind. 111.

[8] State *v.* Reed, 35 Me. 489; Com. *v.* Brown, 12 Met. 522; Cool *v.* State, 16 Ind. 355. *Infra*, § 1523.

[9] Burke *v.* State, 52 Ind. 522; State *v.* Wickey, 54 Ibid. 438; Plunkett *v.* State, 69 Ibid. 68; White *v.* State, 11 Tex. Ap. 476 (under the "common sense" statute, see *supra*, § 1499); Com. *v.* Brown, 12 Met. 522; Kilburn

§ 1514 *a*. When the statute requires that the sale should be "retail" in order to be indictable, then that it was "retail" must be averred and proved.[1] Nor can this provision be evaded by lumping sales, so as to treat several as if they were one,[2] even though these sales were all on one day.[3] "Wholesale" means a sale in gross for others to retail: "retail" means a sale to the immediate consumer for personal use.[4]

And so as to retail.

§ 1515. In cases in which the statute makes it penal to "sell or offer to sell" liquor, "sell and offer to sell" in the indictment is not duplicity;[5] and so, *mutatis mutandis*, as to the statutory terms "expose or keep for sale."[6] But the statutory description of the offence in this respect must be strictly followed.[7]

"Sell and offer" not double.

§ 1516 The *price* of a sale need not be averred.[8] *Payment* may be inferred from circumstances.[9]

Price need not be averred.

§ 1517. An indictment which avers generally that the

v. State, 9 Conn. 560. That "one glass" will be sufficient under a statute making the sale of the smallest as well as of the greatest quantity indictable, see State v. Rust, 35 N. H. 438; and so Hintermaister v. State, 1 Iowa, 101, where the allegation was of selling "three glasses of whiskey by the dram." See Zarresseller v. People, 17 Ill. 101.

[1] Forwood v. State, 49 Md. 531 (a case of sale of stock in lots); Lemons v. State, 50 Ala. 130 (a revenue prosecution).

[2] Murphy v. State, 1 Ind. (Carter), 366; Thomas v. State, 37 Miss. 353 (citing 2 Kent. Com. 496).

[3] State v. Lowenhaught, 11 Lea, 13; State v. Tarver, Ibid. 658.

[4] State v. McBride, 4 McCord, 332; State v. Mooty, 3 Hill, S. C., 187; Martin v. State, 59 Ala. 34; *supra*, § 1508, where the court held that to sustain the *offence of engaging in the business of retailing, the business* must be proved, but that to prove retailing, a single sale is enough, citing Mulvey v. State, 43 Ala. 316; Weil v. State, 52 Ibid. 19.

[5] Whart. Cr. Pl. & Pr. § 251; Barnes v. State, 20 Conn. 232. See Com. v. Eaton, 15 Pick. 273; Com. v. Harris, 13 Allen, 534; State v. Schweiter, 27 Kan. 499. See State v. Teahan, 50 Conn. 92.

[6] Com. v. Atkins, 136 Mass. 130.

[7] Com. v. Byrnes, 126 Mass. 248; Com. v. Hickey, Ibid. 250; State v. Campbell, 12 R. I. 147; Blakeley v. State, 57 Miss. 680.

[8] Ibid.; Com. v. Roberts, 1 Cush. 505; Com. v. Odlin, 23 Pick. 275; State v. Miller, 24 Mo. 532; O'Conner v. State, 45 Ind. 347; Farrell v. State, Ibid. 371; State v. Clare, 5 Iowa, 509; but see Divine v. State, 4 Ind. 240; Hubbard v. State, 11 Ibid. 554, *contra*.

[9] Com. v. Reichert, 108 Mass. 482.

That price is unnecessary, see State v. Munger 15 Vt. 295; Com. v. Churchill, 2 Mete. (Mass.) 118; Com. v. Thayer, 5 Metc. 246; State v. Ladd, 15 Mo. 430; though see State v. Miller, 24 Mo. 532; State v. Melton, 38 Mo. 368; State v. Rogers, 39 Ibid. 431; State v. Downer, 21 Wis. 274. In Whart. Prec. 792 *et seq.*, a number of

defendant, at a time and place named, was a "common seller" of intoxicating liquors, is sufficient, without setting forth any particular sales, or any number of sales.[1] And so as to charging a "tippling-house;"[2] or house for illegal sale of liquors.[3]

Sufficient to charge as "common seller."

How license is to be negatived is already shown.[4]

License.

An indictment on the Massachusetts statute of 1875, c. 99, charging the defendant in one count with "keeping an open bar," and in another count with "keeping a public bar for the sale of spirituous and intoxicating liquors," but not alleging that the defendant unlawfully sold intoxicating liquors or kept or exposed them for sale, does not sufficiently set forth the offence intended to be charged.[5]

Sale must be properly averred.

Under the statute prescribing that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquors, except as authorized in this act," a complaint, which merely alleges that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this Commonwealth," is insufficient.[6]

precedents of indictments, approved in various States, is given, in one of which is the price averred. In State v. Finan, 10 Iowa, 19, it was held that when "selling" is averred no price need be named, but that it is otherwise with the statutory allegation of "giving in consideration," etc., when the consideration must be averred. State v. Downer, 21 Wis. 274; see *contra*, Divine v. State, 4 Ind. 240; Segur v. State, 6 Ibid. 451; State v. Buckner, 52 Ibid. 278; State v. Jacks, 54 Ibid. 412, where the court said that the indictment "must aver a price at which the liquor was sold, but need not aver the quantity more particularly than to show that it was less than a quart."

[1] Com. v. Edwards, 4 Gray, 1; Com. v. Wood, Ibid. 11. See State v. Collins, 48 Me. 217.

An information under the fourth section of the Ohio statute must aver that the place of sale was one of public resort. Aultfather v. State, 4 Ohio St. 467. Under the same statute it is a sufficient averment if the place of sale is described as a tavern, eating-house, bazaar, restaurant, grocery, or coffee-house, which *ex vi termini* import a place of public resort; but it is otherwise with "room," which has no such import. Ibid.

[2] *Supra*, § 1498 *a*. Com. v. Riley, 14 Bush, 44.

[3] *Infra*, § 1528 *a*. *Supra*, § 1498 *a*. Com. v. Ryan, 136 Mass. 436, citing Com. v. Kelly, 12 Gray, 175.

[4] *Supra*, § 1499.

[5] Com. v. Hickey, 126 Mass. 250. As to Kansas, see State v. Shackle, 29 Kan. 341.

[6] Com. v. Byrnes, 126 Mass. 248. But see Boon v. State, 69 Ala. 226.

2. *What are Sales.*

§ 1518. *Sales on credit are sales;*[1] but, unless there be a delivery, a mere agreement to sell is not indictable.[2] Such delivery, however, may be through an agent, or in some other way constructive.[3]

Sales on credit are within statute.

And so are drinks on "trade," or as collateral.

§ 1519. No trick, by which a sale is covered up[4] as a trade, or as a free drink when money is paid for admission, or as a prior contribution, will be a defence.[5] If the liquor be directly or indirectly given for a valuable consideration, it is a sale,[6] and so where the "drink" is thrown in as part of a meal paid for as a whole.[7] But a *bonâ fide* gift is not a sale.[8]

But by statute, however, in some jurisdictions, giving away intoxicating liquor is made specifically indictable.[1] But such statutes do not cover giving wine or other stimulant to a friend as a matter of hospitality,[2] or as a *bonâ fide* incident to business relations.[3]

Keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors is sustained by proof that the defendant furnished intoxicating liquors with meals supplied to customers, the payment for which included payment for the liquors.[4]

§ 1519 *a.* The *bonâ fide* delivery by a social and limited club, of spirituous liquors by the glass as refreshment to its members at a fixed tax is not a "selling" under a statute prohibiting the sale of liquor by retail, there being no public sale to all who should come, and no use of the club as an evasion of the statute.[5] But when the "club" is a mere trick to evade the law and to sustain a liquor seller, sales by him are within the statute;[6] and so in Alabama where the statute makes it indictable for any corporation to sell liquor.[7]

Club distribution not sales under statute.

[1] Com. *v.* Burns, 8 Gray, 482; Ihrig *v.* State, 40 Ind. 422. That it is no defence that the consideration was an antecedent debt, see Beseher *v.* State, 32 Ind. 480; State *v.* Poteet, 86 N. C. 612 (Ashe, J.); Hill *v.* State, 37 Ark. 395.

[2] Pulse *v.* State, 5 Humph. 108; Archer *v.* State, 45 Md. 33. See Stevenson *v.* State, 65 Ind. 409.

[3] See Com. *v.* Greenfield, 121 Mass. 40; Dobson *v.* State, 57 Ind. 69; Riley *v.* State, 43 Miss. 397.

[4] See Com. *v.* Smith, 102 Mass. 144; State *v.* McMinn, 83 N. C. 668; citing State *v.* Kirkham, 1 Ired. 384.

Under the Massachusetts statute an exchange, by a distiller, of intoxicating liquor for grain, was held a sale. Com. *v* Clark, 14 Gray, 367, citing Mason *v.* Lothrop, 7 Gray, 358. *Aliter* in Indiana, Stevenson *v.* State, 65 Ind. 409.

[5] Richardson *v.* Com., 76 Va. St. 1007; Stockwell *v.* State, 85 Ind. 522; Holly *v.* State, 14 Tex. Ap. 605. *Supra*, § 1507.

In Williams *v.* State, 35 Ark. 430, "bitters" were "given" to all who bought a stick of candy for ten cents. This was held to be a sale. On the other hand, in Rabe *v.* State, 39 Ark. 204, a sale of "brandy peaches," there being a "gill of liquor to six peaches," was held not to be a sale of intoxicating liquor. See, also, Seager *v.* White, 51 L. T. N. S. 261; State *v.* Kirkham, 1 Ired. 384; Dobson *v.* State, 57 Ind. 69; Young *v.* State, 58 Ala. 358. That in indictment in such a case only a sale need be averred, see Com. *v.* Thayer, 8 Metc. 525.

[6] Com. *v.* Clark, 14 Gray, 367; State *v.* Redden, 5 Harring. (Del.) 505; Kober *v.* State, 1 Ohio St. 444; Rickart *v.* People, 79 Ill. 85; Massey *v.* State, 74 Ind. 368; Klein *v.* State, 76 Ibid. 333; State *v.* Bell, 2 Jones (N. C.), 337, affirming State *v.* Kirkham, 1 Ired. 384.

[7] Com. *v.* Worcester, 126 Mass. 256. See Com. *v.* Thayer, 8 Metc. 525; Archer *v.* State, 45 Md. 33.

[8] Allen *v.* State, 14 Tex. 633; Schaffner *v.* State, 8 Ohio St. 642. That a mortgage may be a sale, see Hay *v.* Parker, 55 Me. 355, citing Chapman *v.* Emery, Cowp. 280.

[1] Parkinson *v.* State, 14 Md. 184 (where the prohibition is limited to minors); State *v.* Hopkins, 4 Jones (N. C.), 305; Williams *v.* State, 48 Ind. 306.

[2] Albrecht *v.* People, 78 Ill. 513 (Breece, J.); Parkinson *v.* State, *ut sup.*

[3] Stevenson *v.* State, 65 Ind. 409. That supplying by a physician as part of his account is not "selling" or "giving" under statute, see *supra*, § 1506.

[4] Com. *v.* Worcester, 126 Mass. 256.

[5] Graff *v.* Davis, L. R. 8 Q. B. D. 375. See Com. *v.* Smith, 102 Mass. 144; Com. *v.* Pomphret, Sup. Ct. Mass. 1884, 30 Alb. L. J. 403; 19 Rep. 115; Seim *v.* State, 55 Md. 566; Rickart *v.* People, 79 Ill. 85; Tennessee Club *v.* Dwyer, 11 Lea, 452; 47 Am. Rep. 298. See, as to gaming at "clubs," *supra*, § 1465 *b*.

[6] Marmont *v.* State, 48 Ind. 21; State *v.* Mercer, 32 Iowa, 405.

[7] Martin *v.* State, 59 Ala. 54.

"If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion . . . he might well be convicted. This, however, would be a question not of law but of fact, and would fall wholly within the province of the jury." Ames, J., giving opinion of court in Com. *v.* Smith, 102 Mass. 144, 148.

3. *Proof of sales.*

§ 1520. Sales may be inferred from extraneous facts, as well as from the testimony of the vendees.[1] And *a fortiori* is inferential evidence sufficient to establish the charge of keeping intoxicating liquors.[2] That the place in question was kept for illicit sales a few days before the day in controversy, may be shown as corroboration of proof of sales on that day.[3]

Sales to be inferred from circumstances.

Proof of signs and other marks by which the sale of intoxicating liquors in a bar-room may be indicated is admissible;[4] though the mere fact of an innkeeper's sign being kept in front of a house is irrelevant, when there is no proof of a bar or of intoxicating drinks.[5] The evidence in cases of liquor nuisances and of keeping prohibited liquors is elsewhere considered.[6]

Statutes have in some jurisdictions been enacted as to the burden

[1] U. S. *v.* Dodge, 1 Deady, 186; State *v.* Gorman, 58 N. H. 77; State *v.* Haley, 52 Vt. 77; Com. *v.* Kennedy, 97 Mass. 224; Com. *v.* Cotter, Ibid. 336; Com. *v.* Van Stone, Ibid. 548; Com. *v.* Stoehr, 109 Ibid. 365; Com. *v.* Dearborn, Ibid. 368; Com. *v.* Berry, Ibid. 366; Com. *v.* Carr, 111 Ibid. 423; Com. *v.* Shaw, 116 Ibid. 8; Com. *v.* Mason, Ibid. 66; Com. *v.* Gafley, 122 Ibid. 334; Com. *v.* Wallace, 123 Ibid. 401; Com. *v.* Kahlmeyer, 124 Ibid. 322; Com. *v.* Levy, 126 Ibid. 240; Com. *v.* Fraher, Ibid. 48; Com. *v.* Mathews, 129 Ibid. 487; Com. *v.* Dailey, 133 Ibid. 577; People *v.* Hulbut, 4 Denio, 133; State *v.* Hubbard, 60 Iowa, 466; State *v.* Ferrell, 22 W. Va. 759; State *v.* Long, 7 Jones (N. C.), 24; Huey *v.* State, 31 Ala. 349. See, also, State *v.* Munger, 15 Vt. 290.

As to inference from possession of materials for offence, see Com. *v.* Intox. Liquors, 105 Mass. 595; Com. *v.* Van Stone, 97 Ibid. 548; Com. *v.* Gallagher, 124 Ibid. 54; Com. *v.* Levy, 126 Ibid. 240; State *v.* Knott, 5 R. I. 293; People *v.* Hulbut, 4 Denio, 133 (Bronson, C. J.); Robbins *v.* People, 95 Ill. 275; State *v.* Jarrett, 35 Mo. 357; People *v.* Winters, 29 Cal. 658; Whart. Cr. Ev. § 799.

As to inference from evasions and suppression of proof, see Whart. Cr. Ev. §§ 741, 748, 749; Com. *v.* Clark, 14 Gray, 367; Com. *v.* Cotter, 97 Mass. 336; Com. *v.* Van Stone, Ibid. 548; Com. *v.* Doe, 108 Ibid. 418; Com. *v.* Daily, 133 Ibid. 577. See R. *v.* Jarvis, Dears. C. C. 552; 7 Cox C. C. 53.

[2] *Infra*, § 1528 *a*. Com. *v.* Gallagher, 124 Mass. 29; Com. *v.* Madden, 1 Gray, 486. See Com. *v.* Dunn, 111 Mass. 425; Com. *v.* Haher, 113 Ibid. 207; Com. *v.* Hayes, 114 Ibid. 282; Com. *v.* Shea, 115 Ibid. 102; Com. *v.* McIvor, 117 Ibid. 118; Com. *v.* Cronin, Ibid. 140; Com. *v.* Levy, 126 Ibid. 240; and other cases cited *supra*, § 1498 *a*.

[3] State *v.* Haley, 52 Vt. 476; Com. *v.* Matthews, 129 Mass. 487.

[4] State *v.* Wilson, 5 R. I. 291; see Com. *v.* Sisson, 126 Mass. 48.

[5] Com. *v.* Madden, 1 Gray, 486.

[6] *Supra*, § 1498 *a*; *infra*, § 1528 *a*.

of proof in cases of this class. These statutes are noticed in other sections.[1]

§ 1521. The day averred in the indictment is immaterial. Proof of any other day, prior to the finding of the bill, is enough.[2] But when the averment is laid with a *continuando*, proof of sale within the specified periods must be made.[3]

Time is immaterial.

One who is tried on several complaints, charging him with unlawful sales of intoxicating liquors to the same person on different days, and convicted upon evidence sufficient to prove only one such sale, may be sentenced on any of the complaints, and have a new trial on the others.[4] A single sale constitutes the offence.[5]

§ 1522. If the proof shows the sale of an illegal amount, it is no variance if such amount does not correspond with that laid in the indictment.[6] Where, however, statutes, as is sometimes the case, make the offence to consist in selling less than a certain measure, then the indictment must aver, and the evidence must prove, a sale under such measure.[7] But with this qualification, variance as to quantity is immaterial if within the statutory limits. This is so when a greater amount (within such limits) than that averred is proved;[8] or when the proof is of a less amount.[9] But the statute cannot be evaded by selling a gallon (or a quart, as it may be) as a whole, with the understanding that the buyer may tipple it in a series of separate drinks.[10]

Measure is immaterial unless made otherwise by statute.

§ 1522 *a*. It has been already noticed that the name given to a "drink" by the parties is immaterial.[11] It may be added that this

[1] See *infra*, §§ 1528, 1530 *a*.

[2] U. S. *v.* Riley, 5 Blatch. C. C. 204; State *v.* Havey, 58 N. H. 1; Com. *v.* Carroll, 15 Gray, 409. See Com. *v.* Wood, 4 Ibid. 11. See, generally, Whart. Cr. Pl. & Pr. § 120. But "on or about" a day is insufficient. See Whart. Cr. Pl. & Pr. § 125.

[3] Com. *v.* Briggs, 11 Metc. (Mass.) 594; Whart. Cr. Ev. § 103 *b*.

[4] Com. *v.* Remby, 2 Gray, 508. See Com. *v.* Walton, 11 Allen, 238; Koch *v.* State, 32 Ohio St. 353.

[5] Elam *v.* State, 26 Ala. 48; McPherson *v.* State, 54 Ala. 221. *Infra*, § 1529.

[6] State *v.* Moore, 14 N. H. 451 (citing Stark. on Ev. 1539); Windsor *v.* Com., 4 Leigh, 680; Brock *v.* Com., 6 Ibid. 634; Keiser *v.* State, 84 Ind. 229. See *supra*, § 1514.

[7] *Supra*, § 1514.

[8] State *v.* Connell, 38 N. H. 81 (citing R. *v.* Gibson, 6 T. R. 265); Winston's Case, 4 Leigh, 680; Brock *v.* Com., 6 Ibid. 634.

[9] State *v.* Cooper, 16 Mo. 551; State *v.* Andrews, 28 Mo. 17.

[10] Richardson *v.* Com., 76 Va. 1007.

[11] *Supra*, §§ 1505, 1513.

ments fitted for the commission of indictable offences is not in itself an indictable offence.[1] It is essential, to make such preparations indictable, that they should be put in such a state of progress that the offence will be consummated unless deterrent causes intervene.[2]

Statutes to be Strictly Construed.—Wines, beer, and other stimulants of the same class are (1) articles of legitimate commerce, protected in the same way by the constitution, as are all other articles of import; (2) in their less intoxicating shapes articles of ordinary domestic consumption, and (3) even in their highest potency necessary as medicines, or in the preparations of medicines. Hence statutes limiting the right to hold such liquors on hand for sale are to be strictly construed.[3]

Drinking in the house.—In some of the statutes the proviso occurs "to be drunk in the house."[4] Liquor handed from a window and drunk on the steps falls within this category.[5]

Intent Essential.—It follows, therefore, that unless there be an intent to throw the liquor on the market for illegal sale, the mere keeping is no indictable offence.[6] Whether there is such an intent is to be inferred from all the circumstances of the case; as the mode in which the liquors are kept, and the mode in which they are transmitted and disposed of.[7]

[1] *Supra*, § 180.

[2] *Supra*, §§ 181 *et seq.* As to illegal transportation of liquor, see Com. *v.* Commeskey, 13 Allen, 585; Com. *v.* McCluskey, 116 Mass. 64.

[3] State *v.* Miles, 32 Me. 55; State *v.* Guernsey, 33 Ibid. 527; State *v.* Leach, 38 Ibid. 432; State *v.* Moran, 40 Ibid. 129; State *v.* Connell, 63 Ibid. 121; State *v.* Plunkett, 64 Ibid. 534; State *v.* McGlynn, 34 N. H. 422; State *v.* Hoffman, 46 Vt. 176; Com. *v.* Timothy, 8 Gray, 480; Com. *v.* Intoxicating Liquors, 14 Ibid. 375; Com. *v.* Bennett, 108 Mass. 27; Com. *v.* Finnegan, 109 Ibid. 363; Com. *v.* Foran, 110 Ibid. 179; Com. *v.* Carr, 111 Ibid. 423; Com. *v.* Ramsdell, 130 Ibid. 68; Com. *v.* Ryan, 136 Ibid. 436; State *v.* Raymond, 24 Conn. 204; State *v.* Brennan, 25 Ibid. 278; State *v.* Mead, 46 Ibid. 22; State *v.* Campbell, 12 R. I. 147; Brubaker *v.* State, 89 Ind. 577; Ziegel *v.* People, 106 Ill. 89. That "keeping" is to be distinguished from "selling," see Oshe *v.* State, 37 Ohio St. 494; State *v.* Miller, 53 Iowa, 84.

[4] See *supra*, § 1512 *b*, for cases.

[5] Stockwell *v.* State, 85 Ind. 522.

As to "screens" and "blinds," see *supra*, § 1498 *a*.

[6] State *v.* Rum, 35 N. H. 222; Barth *v.* State, 18 Conn. 432; State *v.* Harris, 36 Iowa, 136.

[7] *Supra*, § 1523; State *v.* McGlynn, 34 N. H. 422; Com. *v.* Madden, 1 Gray, 486; Com. *v.* Timothy, 8 Ibid. 480; Com. *v.* Goodman, 97 Mass. 117; Com. *v.* Powers, 123 Ibid. 244; Com. *v.* Gallagher, 124 Ibid. 29; State *v.* Mead, 48 Conn. 22. To prove it sales may be shown both before and after the period selected for trial by the prosecution, if such proof goes to establish system. Whart. Cr. Ev. §§ 32, 54; State *v.* Plunkett, 64 Me. 534; State *v.* Colston, 53 N. H. 483; Com. *v.* Price, 10 Gray, 472; Com. *v.* Hayes, 114 Mass. 282; Com. *v.* Shaw, 116 Ibid. 8; Com. *v.* Matthews, 129 Ibid. 487; State *v.* Raymond, 24 Conn. 204. As to analogous cases, see Whart. Cr. Ev. §§ 45, 52.

The indictment is ordinarily sufficient if it follow the statute, even though it states cumulatively the various prohibited liquors.[1] The indictment need not, under a statute prohibiting keeping of intoxicating liquors, specify the kind of liquor.[2] The allegations "expose and keep for sale" are divisible.[3] Equivalent terms, however, may be used in describing the mode of keeping, or the liquors kept.[4] Thus "purpose of sale" may be treated as an equivalent for "intent to sell."[5] But an indictment presenting an alternative is bad.[6] The indictment need not aver by whom the intended sale was to be made,[7] and a variance in such respect is immaterial.[8] A substantial keeping a place in which it is reputed that intoxicating liquors are kept for sale. It has been held by the Supreme Court, that these two offences are so far distinct that an acquittal of the former is not a bar to a conviction of the latter, although the time at which the offences are charged to have been committed is the same. The distinction is that in a prosecution for the former offence the whole burden of proof is on the State, while in one for the latter the burden of proof, after reputation is shown, is shifted upon the accused. State *v.* Moriarty, 50 Conn. 415.

[1] State *v.* Roach, 74 Me. 562; State *v.* Reynolds, 47 Vt. 297; State *v.* McGlynn, 34 N. H. 422; Com. *v.* Odlin, 23 Pick. 275; Com. *v.* Conant, 6 Gray, 482; Com. *v.* Timothy, 8 Ibid. 480; Com. *v.* Desmond, 103 Mass. 445; Com. *v.* Dolan, 121 Ibid. 374; State *v.* Goyette, 11 R. I. 592; State *v.* Campbell, 12 Ibid. 592; see Vaughn *v.* State, 5 Iowa, 369; State *v.* Munzenmaier, 24 Ibid. 87. *Supra*, §§ 1505, 1512. Under "malt liquor" there can be a conviction of keeping "lager beer." State *v.* Campbell, 12 R. I. 147.

[2] State *v.* Reynolds, 47 Vt. 297; Com. *v.* Sprague, 128 Mass. 75; Foreman *v.* Hunter, 59 Iowa, 550.

[3] Com. *v.* Dolan, 121 Mass. 374; Com. *v.* Curran, 119 Ibid. 206; Com. *v.* Atkins, 136 Ibid. 160.

The Connecticut statute in one section forbids the keeping of intoxicating liquors for sale, and in another the

[4] Booth *v.* State, 18 Conn. 432.

Under the Connecticut statute a count charging keeping "intoxicating liquors with intent to sell contrary to law" is good. Com. *v.* Teahan, 50 Conn. 92.

In Massachusetts it is enough to say "did keep intoxicating liquors with intent to sell the same within this commonwealth," without authority, etc. Com. *v.* Sprague, 128 Mass. 75; see State *v.* Mohr, 53 Iowa, 26.

[5] State *v.* Mohr, 53 Iowa, 261, citing State *v.* Freeman, 27 Ibid. 262.

[6] State *v.* Moran, 40 Me. 129.

[7] State *v.* Kaler, 56 Me. 88.

[8] Ibid. See, also, State *v.* McCann, 61 Me. 116.

negation of an exception is sufficient.[1] Exceptions not in the enacting clause need not be negatived.[2]

The ordinary rules as to *venue* apply.[3]

Where the charge is keeping a tenement for the sale of "illegal liquors," want of authority need not be averred.[4]

Possession, not title to ownership, is the standard of responsibility for one occupying the premises on which the forbidden liquors are found.[5]

Seizure under search warrant is authorized and directed under several statutes, the object being in some cases the destruction, in other cases the impounding of the liquor. In all cases the search warrants must conform strictly to statute.[6]

The misconduct of the officer making the seizure is no defence to an indictment for keeping the articles seized.[7]

Evidence Inferential.—As is the case with the offence of *selling*, the offence of *keeping* prohibited liquors is proved mainly by putting in evidence facts from which such keeping is to be inferred.[8] It is no objection to the reception of evidence of inculpatory articles that they were got hold of by an illegal search warrant.[9] It is admissible to show that the defendant broke bottles and otherwise evaded inquiry during search.[10] The keeping of a place for the sale

[1] Com. *v.* Chisholm, 103 Mass. 213; Com. *v.* Davis, 121 Ibid. 352. *Supra*, § 1499.

[2] State *v.* McGlynn, 34 N. H. 422; Com. *v.* Edwards, 12 Cush. 187; Com. *v.* Tuttle, Ibid. 502; Com. *v.* Jennings, 121 Mass. 47.

[3] State *v.* Roach, 74 Me. 522. *Infra*, § 1532.

[4] Com. *v.* Bennett, 108 Mass. 24; Com. *v.* Conneally, Ibid. 480.

[5] Com. *v.* Reilly, 116 Mass. 15.

[6] State *v.* Leach, 38 Me. 432; State *v.* Stevens, 47 Ibid. 357; State *v.* Plunkett, 64 Ibid. 534; State *v.* Roach, 74 Ibid. 562; State *v.* Snow, 3 R. I. 64; State *v.* Brennan, 25 Conn. 278; State *v.* Harris, 36 Iowa, 136 (a case of destruction of liquors under warrant); and see State *v.* Thompson, 44 Iowa, 399, on the same point. As to proceedings *in rem*, see further State *v.* Burrow, 37 Conn. 425; State *v.* Intoxicating Liquors, 68 Me. 187; 69 Ibid. 524; Com. *v.* Intox. Liquors, 105 Mass. 181; Fenner *v.* State, 3 R. I. 107; State *v.* Maxwell, 36 Conn. 157.

[7] State *v.* McCann, 61 Me. 116; State *v.* Plunkett, 64 Ibid. 534. See State *v.* Burroughs, 72 Ibid. 479.

[8] *Supra*, §§ 15, 20; State *v.* Gorman, 58 N. H. 77; Com. *v.* Timothy, 8 Gray, 480; Com. *v.* Conneally, 108 Mass. 480; Com. *v.* Kinsley, Ibid. 24; Com. *v.* Doe, Ibid. 418; Com. *v.* Wallace, 123 Ibid. 401; Com. *v.* Gallagher, 124 Ibid. 29; Com. *v.* Fahey, 126 Ibid. 56; Com. *v.* Peto, 136 Ibid. 155; State *v.* Moriarty, 50 Conn. 415.

[9] State *v.* Burroughs, 72 Me. 479, and see cases cited *supra*.

[10] Com. *v.* Daily, 133 Mass. 577. *Supra*, §§ 1498 *a*, 1520.

of such liquors is strong proof that the liquors in store in the same building were kept for sale;[1] and this is strengthened by proof of sales.[2] But the keeping of such liquors, to be used for medical or manufacturing purposes, such liquors as kept not being capable of being used as intoxicating drinks, is not within the statute.[3]

Exposing and keeping for sale, with intent unlawfully to sell, is sustained by proof of keeping for sale with such intent.[4]

Negative averments as to matters exclusively within the defendant's knowledge may be regarded as proved, unless disproved by him.[5]

"Keeping a tenement" is not sustained by proof of leasing.[6]

Time is immaterial, if within the statute of limitations and prior to indictment found; and a single and brief period of keeping or exposing for sale will sustain the indictment.[7] And illustrative facts may be put in evidence irrespective of the question of time.[8]

Statutes as to burden of proof in liquor prosecutions are elsewhere considered.[9]

XII. PENAL RESPONSIBILITY OF VENDEE.

§ 1529. Is the vendee of spirituous liquors, illegally sold, penally responsible? Remembering that all accessaries to misdemeanors, and all persons participating in the commission of misdemeanors, are principals, our first impression would be in the affirmative. Closer study, however, greatly qualifies this conclusion. The sale of spirituous liquors, it must be remembered, is not a misdemeanor *per se*, any more than is the sale of meat. When, however, the sale of liquor is unlicensed, then it is indictable, just in the same way as the sale of meat, when unwholesome, is indictable. To make, therefore, a purchaser in either case a principal, his intention in purchasing must have been to have promoted the selling of unwholesome meat, or of illicit liquor. But an ordinary purchaser, without special proof of *scienter*

Vendee may be called as witness.

[1] Com. *v.* Intoxicating Liquors, 107 Mass. 386; Com. *v.* Hayes, 114 Ibid. 282; Com. *v.* Wallace, 123 Ibid. 401. *Supra*, § 1520.

[2] State *v.* Teahan, 50 Conn. 92.

[3] Com. *v.* Ramsdell, 130 Mass. 68.

[4] Com. *v.* Atkins, 136 Mass. 160.

[5] State *v.* McGlynn, 34 N. H. 422. *Supra*, §§ 1499, 1500.

[6] Com. *v.* Churchill, 136 Mass. 148.

[7] State *v.* Haley, 52 Vt. 476; Com. *v.* McCleary, 105 Mass. 384; Com. *v.* Atkins, 136 Mass. 160. *Supra*, § 1521.

[8] Whart. Cr. Ev. §§ 32 *et seq.*; *supra*, §§ 1498 *a*, 1520; State *v.* Moriarty, 50 Conn. 415.

[9] *Supra*, § 1498. *Infra*, § 1530 *a*.

and intent, cannot be charged with this. Consequently, an ordinary purchaser cannot be charged as a principal in the offence. Hence, an ordinary purchaser may be compelled to answer under oath as to whether he made the purchase.[1]

XIII. CONSTITUTIONALITY OF LAWS RESPECTING.

License laws to be strictly construed.

§ 1530. Legislative zeal has led to provisions in this relation which have not infrequently provoked grave constitutional issues. The issues thus involved have been more fully discussed in another volume;[2] and the limits of the present work permit only a few points to be generally noticed. It will be generally conceded that an act directing the forfeiture of intoxicating liquors without process of law is unconstitutional, on account of its summary and arbitrary disregard of the ordinary safeguards of trial.[3] In Texas it has been ruled that an act is unconstitutional which provides that the indictment need not negative license.[4] A similar decision was made in Maine, as to a statute which provided that a form of complaint for keeping with intent to sell should be good, without averring to whom the sale was to be made.[5] In Vermont constitutionality was predicated of a statute providing that it shall be sufficient to allege "that the respondent became a dealer in intoxicating liquors without having license therefor."[6] In Massachusetts, as has just been seen, a statute declaring that delivery is *primâ facie* evidence of sale has been declared constitutional,[7] though this is, as will be seen elsewhere, denied.[8]

[1] *Supra*, § 179; Hill *v.* Spear, 50 N. H. 254; State *v.* Rand, 51 Ibid. 361; Com. *v.* Downing, 4 Gray, 29; Com. *v.* Willard, 22 Pick. 476; State *v.* Teahan, 50 Conn. 92; People *v.* Smith, 1 N. Y. Cr. Rep. 72; Page *v.* State, 11 Lea, 202. *Supra*, §§ 1498 *b*, 1505. Doran's Case, 2 Parsons, 467, and State *v.* Bonner, 2 Head, 135, were under statutes making vendee specially responsible, in which case he cannot be compelled to answer criminating questions. See Whart. Cr. Ev. § 468.

[2] Whart. Com. Am. Law, § 410 *et seq.*

[3] Fisher *v.* McGirr, 1 Gray, 1. See Greene *v.* Briggs, 1 Curtis C. C. 311. Compare Life of Curtis, ii. 191.

[4] Hewitt *v.* State, 25 Tex. 722; State *v.* Horan, Ibid. (Suppl.) 271.

[5] State *v.* Learned, 47 Me. 426.

[6] State *v.* Comstock, 27 Vt. 553.

[7] Com. *v.* Wallace, 7 Gray, 222.

[8] *Supra*, § 1498 *a*; *infra*, § 1530 *a*; Whart. Cr. Ev. § 716 *a*.

On the other hand, a statute providing that the statutory term "intoxicating liquor" is to be held to include cider, has been sustained without any question as to its constitutionality. Com. *v.* Smith, 102 Mass. 144.

Whether general reputation is evidence in such cases will be considered in a future section.[1]

So far as concerns the general question, laws which "assume to regulate only, and to prohibit sales by other persons than those who should be licensed by the public authorities, ... are but the ordinary police regulations such as the State may make in respect to all classes of trade or employment."[2] It is otherwise, however, when the object is to prevent the admission of such commodities in the port.[3] But it has been held that a State law is not unconstitutional which punishes the sale within such State of gin brought into the port of another State and therefrom forwarded, notwithstanding the gin was in the cask in which it was imported.[4] That Congress

[1] *Infra*, § 1530 *a*.

[2] Cooley's Const. Limit. 581.

[3] License Cases, 5 How. 512, 574, 631.

[4] Ibid.

"It would seem, from the views expressed by the several members of the court in these cases, that the State laws known as Prohibitory Liquor Laws, the purpose of which is to prevent altogether the manufacture and sale of intoxicating drinks as a beverage, so far as legislation can accomplish that object, cannot be held void as in conflict with the power of Congress to regulate commerce, and to levy imposts and duties. And it has been held that they are not void, because tending to prevent the fulfilment of contracts previously made, and thereby violating the obligation of contracts. People *v.* Hawley, 3 Mich. 330; Reynolds *v.* Geary, 26 Conn. 179.

"The same laws have also been sustained, when the question of conflict with State constitutions, or with general fundamental principles, has been raised. They are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances. Com. *v.* Kendall, 12 Cush. 414; Com. *v.* Clapp, 5 Gray, 97; Com. *v.* Howe, 13 Ibid. 26; Santo *v.* State, 2 Iowa, 202; One House *v.* State, 4 Greene (Iowa), 172; Zumhoff *v.* State, Ibid. 526; State *v.* Donehey, 8 Iowa, 396; State *v.* Wheeler, 25 Conn. 290; Reynolds *v.* Geary, 26 Ibid. 179; Oviatt *v.* Pond, 29 Ibid. 479; People *v.* Hawley, 3 Mich. 330; People *v.* Gallagher, 4 Ibid. 244; Jones *v.* People, 14 Ill. 196; State *v.* Prescott, 27 Vt. 194; Lincoln *v.* Smith, Ibid. 328; Gill *v.* Parker, 31 Ibid. 610. Compare Beebe *v.* State, 6 Ind. 501; Meshmeier *v.* State, 11 Ibid. 484; Wynehamer *v.* People, 13 N. Y. 378." See, also, State *v.* Allmond, 2 Houst. 612; 1 Green's C. R. 304.

"In Reynolds *v.* Geary, 26 Conn. 179, it was held that the State law forbidding suits for the price of liquors sold was to be applied to contracts made out of the State, and lawful where made.

"It has also been held competent to declare the liquor kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied as a dram shop on the same ground. One House *v.* State, 4 Greene (Iowa), 172. See, also, Lincoln *v.* Smith, 27 Vt. 328; Oviatt *v.* Pond, 29 Conn. 479; State *v.* Robinson, 33 Me.

has the power to exclude intoxicating liquor from the Indian country has been already seen.[1]

§ 1530 *a*. In several jurisdictions statutes have been adopted for the purpose of facilitating the introduction of evidence in prosecutions for offences of the class now before us. These statutes may be classified as follows :—

Constitutionality of laws modifying evidence.

(1) Those prescribing that the burden of proving the license shall be on the defendant. There is no sound reason why such statutes should not be held constitutional. It is within the constitutional power of a State legislature to provide for the conviction of all who sell intoxicating liquor by retail. If so, it is within its power to provide for the conviction of all who sell intoxicating liquor by retail without a license, leaving it to the defendant to set up a license if he have one.[1]

(2) Those prescribing that when the keepers of a tippling-house or house for the unlawful sale of intoxicating liquor, are prosecuted, evidence of the bad repute of the house in this respect shall be admissible for the prosecution, and shall be *primâ facie* proof. There is nothing in this provision that is so antagonistic to the principles of the common law as to be held to conflict with the constitutional provision guaranteeing that no person shall "be deprived of life, liberty, or property without due process of law."[2] It has been held that in prosecutions for houses of ill-fame it is admissible (though this has been in some jurisdictions disputed), for the prosecution to put in evidence such fame, and there can be no dispute as to the right of the prosecution in such cases to put in evidence the bad reputation of the persons visiting the house.[3] If such evidence be admissible in one class of nuisances, it cannot be held to violate the provision as to "due process of law" that it should be held admissible in other classes of nuisances.

(3) Those providing that on trials for selling liquor, or keeping it on hand for sale, the bad repute of the defendant or of his house should be admissible for the prosecution, is *primâ facie* proof. Here there is no question of nuisance, as to which "repute" is more or less relevant, and which is in its essence a prosecution *in rem*. An indictment against an individual for selling liquor con-

568 ; License Cases, 5 How. 589. But see Wynehamer *v.* People, 13 N. Y. 378 ; Welch *v.* Stowell, 2 Doug. (Mich.) 332.

"And it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation. Hibbard *v.* People, 4 Mich. 125 ; Fisher *v.* McGirr, 1 Gray, 1. But see Meshmeier *v.* State, 11 Ind. 484 ; Wynehamer *v.* People, 13 N. Y. 378.

"Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purposes of sale, becomes a criminal offence ; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day ; and the very building in which he lives and conducts the business, which to that moment was lawful, becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit ; but, whether satisfactory or not, they address themselves exclusively to the legislative wisdom." Cooley's Const. Lim. 582 *et seq.*

See, generally, State *v.* Lovell, 47 Vt. 493 ; Com. *v.* Clapp, 5 Gray, 97 ; Com. *v.* Fredericks, 119 Mass. 199 ; State *v.* Wheeler, 25 Conn. 290 ; State *v.* Wilcox, 42 Ibid. 364 ; Metrop. Board *v.* Barrie, 34 N. Y. 657 ; People *v.* Commis., 59 Ibid. 92 ; Felt *v.* State, 42 Md. 71 ; Jones *v.* People, 14 Ill. 196 ; Streeter *v.* People, 69 Ibid. 595 ; State *v.* King, 37 Iowa, 462 ; Rohrbacker *v.* Mayor, 51 Miss. 735 ; Hurl, *ex parte*, 49 Cal. 557.

As to "local option," see Com. *v.* Weller, 14 Bush, 218 ; State *v.* Cooke, 24 Minn. 247.

[1] *Supra*, § 282 *a* ; Whart. Com. Am. Law, §§ 410 *et seq.*

[1] See Com. *v.* Tuttle, 12 Cush. 502 ; Com. *v.* Carpenter, 100 Mass. 204.

"It is entirely reasonable that a person who is prosecuted for an act which, if generally criminal, should, if licensed to commit it, be required to show his license in defence whenever there is evidence to establish his guilt if he have no license." Durfee, C. J., State *v.* Higgins, 13 R. I. 330, 332. Hence it was held that a statute declaring that evidence of the sale, or keeping of intoxicating liquors for sale, in any building, place, or tenement, shall be evidence that the sale or keeping is illegal, and that such premises are nuisances was constitutional ; but that such evidence is only *primâ facie*. Ibid., aff. in State *v.* Mellor, 13 R. I. 666.

[2] As to meaning of this guarantee, see Whart. Com. on Am. Law, §§ 566 *et seq.*

[3] *Supra*, § 1452 ; Whart. Cr. Ev. §§ 57 *et seq.*, 277.

That in statutes making punishable "notorious" adulterers and "notorious" thieves notoriety is admissible, see Whart. Cr. Ev. § 261.

trary to law stands in this respect on the same basis as an indictment against an individual for violating any other law; and a statute prescribing that on a charge for such a sale, evidence should be admissible that the defendant was "reputed" to be a liquor seller, is no more constitutional than would be a statute providing that it should be admissible in a murder case to prove that the defendant was "reputed" to be a murderer. The same reasoning applies to prosecutions against an individual for keeping spirituous liquors on hand for sale.

(4) Those providing that delivery of liquors shall be *primâ facie* proof of sale. Such statutes may be held to be constitutional as in the same line with those which provide that concealment of death of a bastard child shall be proof of complicity in killing it;[1] with those providing (in fact though not in words) that in certain police offences *scienter* shall be irrebuttably presumed;[2] with those providing that exemplifications of records and deeds may be admissible;[3] and with those providing that the charters of existing corporations can be presumed by the fact of such existence.[4]

Supra, § 600.

[2] *Supra*, § 88.

[3] Whart. Cr. Ev. § 179.

[4] Ibid., 102 *a*. As sustaining the constitutionality of statutes to this effect, see State *v*. Hurley, 54 Me. 562; Com. *v*. Williams, 6 Gray, 1, Thomas, J., diss. See, *contra*, People *v*. Toynbee, 20 Barb. 169; S. C. on app., 2 Park. C. R. 490; and particularly opinion of Selden, J., Ibid. 523 *et seq*.

The authorities bearing on the above topics may be thus noticed in detail:—

In State *v*. Beswick, 13 R. I. 211, it was held that a statute providing that "notorious character" of the premises or of parties frequenting them "shall be *primâ facie* evidence that liquor was kept on the premises for sale," was held unconstitutional, as taking away the right to have the question of guilt determined by due course of law. The case was distinguished from State *v*. Hurley, 54 Me. 562, and Com. *v*. Williams, 6 Gray, 1, in the fact that in the latter cases the statute made *delivery* a *primâ facie* evidence of a sale, delivery, to quote from Durfee, C. J. (113 R. I. 219), being "a necessary constituent of a sale, whereas the facts which are made *primâ facie* evidence by our (the Rhode Island) statute may not only exist without the offence, but the offence may exist without the facts."

In Connecticut, in State *v*. Morgan, 40 Conn. 44; State *v*. Thomas, 47 Ibid. 546, and State *v*. Moriarty, 50 Ibid. 416, a statute was held constitutional which provides a penalty on "every person who shall keep a place in which it is reputed that intoxicating liquors are kept for sale." It was held that the "reputation" in such case is not conclusive but may be rebutted. If the Connecticut statute be regarded simply as providing for the abatement of a "reputed" nuisance, the case may be reconciled with the ruling in Rhode Island where the offence was personal, that of keeping liquors unlawfully. This, however, is not the ground taken by Parke, C. J., in giving the opinion

XIV. UNITED STATES REVENUE LICENSE.

§ 1531. A license to retail liquors under the United States revenue laws, sustained by proof of payment of the revenue tax, is no defence to a prosecution under the State law for the illegal sale of intoxicating liquor.[1]

XV. JURISDICTION.

§ 1532. In accordance with the principles heretofore announced, the offence of selling prohibited drinks, when continuing over several jurisdictions, may be prosecuted in every jurisdiction in which it is made indictable by the local law. And where the offence is indictable in two jurisdictions, it is an indictable offence to make preparations in one of them for its consummation in the other.[2] But where a sale, passing the title, is consummated by delivery to an expressman, in a particular locality, the courts of such locality have jurisdiction, which has been held in Alabama to be exclusive.[3] But when the liquor is to be delivered to the vendee at the latter's risk, the place of such delivery has jurisdiction.[4]

Each place of offence has jurisdiction.

in State *v*. Moriarty, *ut sup*. "The statute," he said, "upon which the present complaint is founded was fully considered in the cases of State *v*. Morgan, 40 Conn. 44, and State *v*. Thomas, 47 Ibid. 546. The statute was there interpreted as meaning a reputation founded on fact, and as therefore equivalent to proof, the fact that liquors were kept for sale, the proof of the reputation being merely *primâ facie* proof that it was well founded, leaving the defendant the right to prove, should he be able, that liquors were not in fact kept by him for sale. . . . There are many cases where *primâ facie* proof of guilt on the part of the State is held to be sufficient for conviction if the defendant does not explain away the *primâ facie* case against him."

[1] McGuire *v*. Com., 3 Wall. 387; State *v*. Delano, 54 Me. 501; Com. *v*. McNamee, 113 Mass. 12; Com. *v*. Sanborn, 116 Ibid. 61; State *v*. Lillard, 78 Mo. 136; Boyd *v*. State, 12 Lea, 687.

[2] See *supra*, §§ 288 *et seq*.; Blackwell *v*. State, 42 Ark. 275.

[3] Pilgreen *v*. State, 71 Ala. 368.

[4] Com. *v*. Greenfield, 121 Mass. 40; Com. *v*. McKiernan, 128 Ibid. 414; Com. *v*. Burgett, 136 Ibid. 450. *Supra*, § 118.

CHAPTER XXV.

RIOT, ROUT, AND UNLAWFUL ASSEMBLY.

I. UNLAWFUL ASSEMBLY.

§ 1535.* An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons

Unlawful assembly is an assembly threatening a tumultuous disturbance of public peace.

to disturb the peace tumultuously. The mere fact, however, that an assembly will probably be attacked by parties who object to it, does not make it unlawful.[1]

Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose; and this has been held to

[1] In Beatty *v.* Gillbanks, in London, 1882, 47 L. T. (N. S.) 194, the defendants, with a considerable number of other persons, forming a body called the "Salvation Army," assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed and resisted by other persons in such a way as would in all probability tend to the committing of a breach of the peace on the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly and procession through the streets of the defendants and the Salvation Army, who themselves used no force or violence, it was held by Field and Cave, JJ. (reversing the decision of the justices), that the defendants had not been guilty of "unlawfully and tumultuously assembling," etc., and could not, therefore, be convicted of that offence, nor be bound over to keep the peace. It was further ruled, that knowledge by persons peaceably assembling for a lawful object that their assembly will be forcibly opposed by other persons, under circumstances likely to lead to a breach of the peace on the part of such other persons, does not render such assembly unlawful. See, also, Beatty *v.* Glenister, 51 L. T. (N. S.) 301.

The definition in the text is taken from the Draft Report of the English Commissioners of 1879. See article on "Riot," Am. Law Mag. for July, 1844; 2 West. L. J. 49; R. *v.* Hunt, 1 Russ. on Cr. 388; R. *v.* Hunt, 3 B. & A. 566; R. *v.* Hughes, 4 C. & P. 373; R. *v.* Birt, 5 C. & P. 154; R. *v.* Neale, 9 Ibid. 431; 4 Penn. L. J. 31; Lambkin *v.* State, 12 State, 12 Tex. Ap. 341. For an exposition of the difference between unlawful assembly and riot, see R. *v.* Kelly, 6 Up. Can. (C. P.) 372, where a conviction of riot was set aside on proof that there was no overt act of public disorder.

Sir J. F. Stephen thus illustrates the topic in the text:—

"Sixteen persons meet for the purpose of going out to commit the offence of being by night, unlawfully, upon land, armed in pursuit of game. This is an unlawful assembly. R. *v.* Brodribb, 6 C. & P. 571. The meeting in this case was in a private house.

"A., B., and C. meet for the purpose of concerting an indictable fraud. This, though a conspiracy, is not an unlawful assembly. (Submitted.) Compare 1 Hawk. P. C. 515.

"A., B., and C., having met for a lawful purpose, quarrel and fight. This, though an affray, is not an unlawful assembly. 1 Hawk. P. C. 514.

"A large number of persons hold a meeting to consider a petition to parliament, lawful in itself; but they assemble in such numbers, with such a show of force and organization, and when assembled make use of such language as to lead persons of ordinary

be the case with disorder got up suddenly though concertedly at a town meeting,[1] and at a social assembly for dancing.[2] In determining the question of terror, it has been said that the jury are to consider whether rational and firm men, in charge of families, would have, under the circumstances, cause for anxiety; and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them, and the acts done.[3] An unlawful assembly does not in itself involve any overt act. If overt acts of violence are attempted, the offence is a rout; if such acts of violence are executed, the offence is a riot.

II. ROUT.

Rout is attempt at riot.

§ 1536. A rout is an attempt at riot made by an unlawful assembly. Such preparatory steps must have been taken as would lead, if carried out, to a riot. At least three persons are essential to constitute the offence.[4]

III. RIOT.

Riot is an executed tumultuous disturbance of public peace.

§ 1537. A riot is the tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object.[5] If the object be to overthrow the government, then the offence, if there be adequate overt acts, is treason.[6] If it be to resist a statute, but not to overthrow government, then, in the United States (however it may be in England), the offence is not treason, though it may be riot or a high misdemeanor.[7] The distinction, as has been seen, between rout and riot is that the first

firmness and courage in the neighborhood to apprehend a breach of the peace. This is an unlawful assembly. Redford *v.* Birley, 3 Starkie (N. P.), 79; R. *v.* Vincent, 9 C. & P. 91." Steph. Dig. art. 71. That consent of parties whose rights are invaded is no defence, see Sanders *v.* State, 60 Ga. 126. *Supra*, § 142.

[1] Com. *v.* Hoxey, 16 Mass. 385.

[2] Trittipo *v.* State, 13 Ind. 360.

[3] R. *v.* Vincent, 9 C. & P. 91.

[4] 1 Hawk. P. C. c. 65, § 1.

[5] 1 Hawk. P. C. c. 65, s. 1; 1 Russ. on Cr. 265; Com. *v.* Armstrong, 1 Phila. 656; State *v.* Connolly, 3 Rich. 337; State *v.* Sumner, 2 Spear, 599; Bolden *v.* State, 64 Ga. 361. See Logg *v.* People, 92 Ill. 598. Under Indiana statute, see Kiphart *v.* State, 42 Ind. 273. Under Georgia statute, see Rachels *v.* State, 51 Ga, 374.

[6] See *infra*, § 1795.

[7] See *infra*, § 1796.

involves an attempt at an unlawful act, the second the commission of such act.[1]

Must be unlawful assembly.

§ 1538. An unlawful assembly is an essential prerequisite;[2] but, as we have seen, an assembly meeting lawfully can be converted into one that is unlawful, by the concerted determination, however sudden, to effect tumultuously an unlawful purpose.[3] Hence to constitute a riot it is not necessary that the original intention should have been riotous.[4]

Must be likely to inspire terror.

§ 1539. It must be also shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror,[5] such as being armed, making threatening speeches, turbulent gestures, or the like.[6] If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit.[7] But by proof of concert to do an unlawful act, followed by the doing such act so tumultuously as to strike terror into third parties, the charge of riot may be sustained.[8] And hence a "chiavari" has been held a riot;[9] and so of a combined movement to go to a theatre in force and drown the voices of the performers;[10] and of a tumultuous disturbance got up in a ball-room, in which violence was threatened and provoked.[11] As will presently be seen, a using of unlawful means is in itself an unlawful object, sufficient to constitute an unlawful assembly.[12]

§ 1540. Even a lawful act may be done in such a violent and tumultuous manner as to be a riot when three or more are engaged.[13]

[1] Ibid., and see R. *v.* Vincent, *ut sup.*

[2] State *v.* Stalcup, 1 Ired. 30.

[3] 1 Hawk. c. 65, s. 3; State *v.* Snow, 18 Me. 346; State *v.* Cole, 2 McCord, 117. *Supra*, § 1535.

[4] U. S. *v.* McFarland, 1 Cranch C. C. 140; State *v.* Snow, 18 Me. 346; Lycoming Ins. Co. *v.* Schwenks, 95 Penn. St. 89; State *v.* Brooks, 1 Hill (S. C.), 361; Darst *v.* People, 51 Ill. 286. See State *v.* York, 70 N. C. 66.

[5] R. *v.* Hughes, 4 C. & P. 373.

[6] 1 Hawk. c. 65, s. 5.

[7] Ibid.; Dalt. c. 137; State *v.* Straw, 33 Me. 554.

[8] State *v.* Brazil, Rice, R. 258; Penns. *v.* Cribs, Addis, 277; Douglass *v.* State, 6 Yerg. 525.

[9] Bankus *v.* State, 4 Ind. 114.

[10] State *v.* Brazil, Rice, 257.

[11] Trittipo *v.* State, 13 Ind. 360.

[12] *Infra*, § 1540.

[13] Kiphart *v.* State, 42 Ind. 273. Darst *v.* People, 51 Ill. 286; State *v.* York, 70 N. C. 66.

No body of men is justified in asserting legal rights by violence; and a lawful assembly becomes unlawful whenever the members agree to resort to violent and tumultuous measures to achieve even a lawful end.[1] If the object, however, of the assembly be lawful, it in general requires stronger evidence of the terror of the means to induce a jury to return a verdict of guilty than if the object were unlawful; and it has even been held that if, for the purpose of abating a public nuisance, a number of persons assemble with spades, iron crows, and the proper tools for that purpose, and abate it accordingly, without doing more, it is no riot,[2] unless there be threatening language or other misbehavior, in apparent disturbance of the peace.[3] The unlawful purpose in this case is not the object, but the means used.

Riotous to tumultuously assert legal rights.

§ 1541. It is not necessary, under the English statute, that the Riot Act should be read to constitute a riot. Before the proclamation can be read, a riot must exist; and the effect of the proclamation will not change the character of the meeting, but makes those guilty of a felony who do not disperse within one hour after the proclamation is read.[4]

Riot Act need not be read.

§ 1542. In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional, and where it tends to the encouragement of the rioters, be *primâ facie* inferred to be participants;[5] and the obligation is cast upon a person so circumstanced, in his defence, to prove his actual non-interference.[6] Eminently is this the case when the sheriff of a county, the mayor of a city, or any other known public conservator of the peace, has repaired, in the discharge of his duty, to

All present and not suppressing are participants.

[1] 1 Hawk. c. 65, s. 7; State *v.* Snow, 18 Me. 346; State *v.* Brook, 1 Hill (S. C.), 362; Douglass *v.* State, 6 Yerg. 525. See, also, the charge of Judge King, in 4 Penn. L. J. 33. For distinctive Missouri law on this point, see Smith *v.* State, 14 Mo. 147.

[2] Dalt. c. 137. *Supra*, §§ 97 *a*, 1410.

[3] Ibid. See State *v.* Hughes, 72 N. C. 25; State *v.* Blair, 13 Rich. 93. *Supra*, §§ 97 *a*, 1426.

[4] R. *v.* Fursey, 6 C. & P. 81; State *v.* Russell, 45 N. H. 83.

[5] R. *v.* Howell, 9 C. & P. 437; Roberts *v.* O'Connor, 33 Me. 496; State *v.* Bugbee, 22 Vt. 32; Com. *v.* Hadley, 11 Met. 66; Williams *v.* State, 9 Mo. 268. See *supra*, §§ 205 *et seq.*; Whart. Cr. Pl. & Pr. §§ 16, 17. See provision in §§ 454–5 of N. Y. Penal Code of 1882.

[6] R. *v.* Howell, 9 C. & P. 437. See *contra*, State *v.* McBride, 19 Mo. 239. The limitations of this principle are stated *supra*, § 223. See fully Whart. Cr. Pl. & Pr. § 16.

the scene of tumult, and there commands the dispersion of the unlawful riotous assembly, and demands the assistance of those present to aid in its suppression. After such proclamation there can be, so far as concerns persons voluntarily and deliberately remaining, no neutrals.[1] And this applies even to those who leave the scene before the riot is consummated, if they countenance any preliminary movements inciting to the subsequent riotous acts.[2] But there must be something to imply sanction and encouragement.[3]

§ 1543. While, however, it would be unwise for the court, in laying down the law to the jury, to relax the principle that presence, when operating to sanction and encourage, implies participancy, it is not improper, should a conviction take place upon evidence of presence alone, for the court, in grading its sentence, to recollect—to use the pertinent language of Judge Daly, on the trial of the Astor Place riots—that "so strong is human curiosity, that even well-disposed citizens are attracted by the excitement. To courageous minds there is a fascination in the very presence of danger, and a distinction must be carefully drawn between those who were mere lookers-on and those who were stimulating and encouraging the riot."[4] And the inference of consent to be drawn from presence,[5] and apparent encouragement, may be rebutted by showing that the defendant was in the assembly with no purpose common to the rioters.[6]

Defendant's purpose may be material.

§ 1544. To constitute a riot it is not necessary that there should be actual fright in the public generally. It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened.[7] It is not necessary that any one of the defendants should be guilty singly of an indictable offence.[8]

Enough if individuals only are terrified.

[1] Per King, J., 4 Penn. L. J. 33; Penn. *v.* Cribs, Addis. 277; Williams *v.* State, 9 Mo. 268; Whart. Cr. Pl. & Pr. §§ 16, 17.

[2] R. *v.* Sharpe, 3 Cox C. C. 288; State *v.* Blair, 13 Rich. 93.

[3] See R. *v.* Atkinson, 11 Cox C. C. 268. *Supra*, § 211.

[4] 2 West. L. J. (N. S.) 75.

[5] Ibid. U. S. *v.* Scott, 1 Morris, 143.

[6] Ibid.

[7] State *v.* Boils, 34 Me. 235; Darst *v.* People, 51 Ill. 286; State *v.* Alexander, 7 Rich. 5; State *v.* Jackson, 1 Speers, 13; State *v.* York, 70 N. C. 66; State *v.* Hughes, 72 Ibid. 25.

[8] Ibid. State *v.* Blair, 13 Rich. 93; Kiphart *v.* State, 42 Ind. 273; Davenport *v.* State, 38 Ga. 184.

§ 1545. Three or more persons must be concerned to constitute the offence of riot;[1] but it is not necessary to prove any previous concert; it is sufficient if they are together, and appear to act with the same view of disturbing the public peace.[2] It is no defence, also, that one of three persons charged as a rioter was not an active participant if he gave to the others intentional support as an aid.[3] But if several be indicted for a riot, and there be proof only against one or two, and the offence be not laid and proved to have been committed with persons unknown, all must be acquitted.[4] But if after conviction of four for riot two die, judgment will not be arrested as to the two.[5] And there may be a conviction of a single person of the offence if the indictment aver and the proof show two other persons engaged.[6] The mere fact that other persons, not co-defendants, were engaged in a riotous party opposing the defendants, is no defence.[7]

Three or more persons necessary to offence.

§ 1546. The indictment must aver an unlawful assembly as the preliminary to the riot;[8] and unlawful acts (*e. g.*, breach of the peace, terror, etc.), as its consequent.[9]

Indictment must contain proper technical terms.

It is not necessary to allege any other unlawful purpose than that of disturbing the peace;[1] nor, if a breach of the peace accompanied with violence, and terror produced thereby, be alleged, are any particular technical words necessary.[2] And where there is no specification of the particular breaches of the peace committed, it is enough to aver that the defendants unlawfully, riotously, and routously assembled together, to disturb the peace of the State; and being so assembled did make great noise, riot, tumult, and disturbance, etc., to the great terror and disturbance of the people, etc.[3]

"*Terror*," however, *in terrorem populi*, is essential to an indictment for riot, unless facts making up a riot are averred; though without such averment there may be a conviction of an unlawful assembly.[4]

"Force and arms" need not be used in immediate relation to the acts of violence committed, especially when the term is applied to the rioters assembling.[5]

A bald allegation of only two defendants is fatal.[6] But three persons need not be mentioned by name as rioters. It is enough if, in addition to the defendant, there be two or more persons, known or unknown, alleged to have acted as co-rioters.[7]

Each defendant may be severally tried.[8]

[1] R. *v.* Ellis, Holt, 636; Com. *v.* Edwards, 1 Ashm. 46, and cases cited; State *v.* Thackam, 1 Bay, 358; State *v.* Calder, 2 McCord, 462, and cases hereafter cited to this section.

In some States by statute two are enough to constitute the offence. See Rachels *v.* State, 51 Ga. 374.

[2] State *v.* Straw, 33 Me. 554; State *v.* Calder, 2 McCord, 462. See Whart. Cr. Pl. & Pr. §§ 305, 755; and see *supra*, § 1388.

[3] See *supra*, § 211 *et seq.*, 1542; State *v.* Straw, 33 Me. 54; though it is otherwise when no such encouragement is given. State *v.* Scott, 1 Morris, 143.

[4] 2 Hawk. c. 47, s. 8; R. *v.* Scott, 3 Burr. 1262; 1 W. Bl. 291, 350; R. *v.* Sudbury, 1 Ld. Raym. 484; 2 Salk. 593; Penn. *v.* Huston, Addis. 334; State *v.* Alison, 3 Yerg. 428; Turpin *v.* State, 4 Blackf. 72; State *v.* Bailey, 3 Ibid. 209; Brazil *v.* State, Rice R. 257; State *v.* Pugh, 2 Hayw. 55; State *v.* O'Donald, 1 McCord, 532; Maxwell *v.* Carlile, Ibid. 534; Whart. Cr. Pl. & Pr. § 305. See State *v.* Kuhlmann, 5 Mo. Ap. 587.

By statute in some States riotous conduct by two persons may constitute a riot. Dougherty *v.* People, 4 Scam. 179; Rachels *v.* State, 51 Ga. 374.

[5] R. *v.* Scott, 3 Burr. 1262; 1 W. Bl. 350.

[6] Com. *v.* Berry, 5 Gray, 93.

[7] Philadelphia riot cases, cited *supra*, § 1543; Whitley *v.* State, 66 Ga. 656.

[8] State *v.* Stalcup, 1 Ired. 30.

[9] R. *v.* Gulston, 2 Ld. Raym. 1210.

Twelve persons were indicted for a riot and assaulting J. W. The indictment did not conclude *in terrorem populi*. Several of the defendants had been convicted, and, at the ensuing assize, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault, except in the words "*po. se*," and "guilty," written on the indictment, over the names of the convicted defendants. It was held that this was no proof of an assault as against the present defendants, and that they could not be convicted at common law of the riot only, as the indictment did not conclude *in terrorem populi*. R. *v.* Hughes, 4 C. & P. 373.

And it is held that if persons are charged with a riot, and cutting down fences, and the indictment does not conclude *in terrorem populi*, they cannot on that indictment be convicted at common law of a riot, but may be convicted of an unlawful assembly. R. *v.* Cox, 4 C. & P. 538.

[1] State *v.* Renton, 15 N. H. 169.

[2] State *v.* Russell, 45 N. H. 83; State *v.* Langford, 3 Hawks, 381; State *v.* Voshall, 4 Ind. 589; McWaters *v.* State, 10 Mo. 167; though see Whiteside *v.* People, Breese, 3; State *v.* York, 70 N. C. 66; State *v.* Sims, 16 S. C. 486.

[3] State *v.* Brazil, Rice R. 257.

[4] R. *v.* Hughes, 4 C. & P. 373; R. *v.* Woolcock, 5 Ibid. 516; R. *v.* Cox 4 Ibid. 538; *contra*, to effect that terror may be dispensed with, when riotous facts are alleged. R. *v.* Cox, *ut sup.*; Com. *v.* Runnels, 10 Mass. 518; State *v.* Whitesides, 1 Swan, 88; State *v.* Sims, 16 S. C. 486.

[5] Com. *v.* Runnels, 10 Mass. 518. See Whart. Cr. Pl. & Pr. § 271.

[6] Whart. Cr. Pl. & Pr. §§ 305–6.

[7] Thayer *v.* State, 11 Ind. 287; State *v.* Egan, 10 La. An. 698; State *v.* Brazil, Rice R. 257. *Supra*, § 1545; Whart. Cr. Pl. & Pr. §§ 104, 111. See State *v.* O'Donald, 1 McCord, 532.

[8] Whart. Cr. Pl. & Pr. § 309; Com. *v.* Berry, 5 Gray, 93.

§ 1547. Riotous assemblages at independent periods, though connected with the defendants, cannot be put in evidence for the purpose of proving disorderly and illegal purposes on the part of the defendants, unless there be proof laid of system.[1]

System must be proved in order to introduce other riots.

Order of evidence is at discretion of court.

§ 1548. To connect a riot with a particular defendant the defendant's presence must be first put in evidence;[2] though this rule may be departed from when from its size, and the number engaged, it is more convenient that the general character of the riot should be first proved.[3]

§ 1549. "An assembly of three or more persons, for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house, in order to commit any indictable offence therein, is not unlawful."[4] A man is justified in collecting his friends to protect his house when attacked, and they may even for this purpose use necessary force;[5] but it is said he cannot in this way defend his "close," or property other than his house.[6]

Force excusable in defence of home.

§ 1550. On the ordinary indictment for riot the defendant may be convicted of an unlawful assembly;[7] and, when the indictment contains the proper averments, of an assault and battery,[8] or of any unlawful malicious disturbance of another's rights.[9]

On indictment for riot may be conviction of lesser offence.

[1] State v. Renton, 15 N. H. 169. See Whart. Cr. Ev. § 32.

[2] Nicholson's Case, 1 Lew. C. C. 300.

[3] See R. v. Cooper, 1 Russ. on Cr. 405.

[4] Draft Report Eng. Commis. 1879.

[5] See *supra*, § 502; *infra*, § 1556. State v. Huntley, 3 Ired. 418.

[6] R. v. Bangor (Bishop), 1 Russ. on Cr. 388. See *supra*, §§ 95, 502.

[7] R. v. Hughes, 4 C. & P. 373; R. v. Cox, Ibid. 538; State v. Brazil, Rice R. 258; Com. v. Kinney, 2 Va. Cas. 139. See Whart. Cr. Pl. & Pr. §§ 736 *et seq.*

[8] R. v. Higgins, 2 East R. 5; Shouse v. Com., 5 Barr, 83; but see Ferguson v. People, 90 Ill. 510. See Whart. Cr. Pl. & Pr. § 384.

[9] Campbell v. Com., 59 Penn. St. 266; and see U. S. v. Hart, 1 Peters C. C. 390; Com. v. Hoxey, 16 Mass. 385; Penn. v. Morrison, Addis. 274; Com. v. Taylor, 5 Binney, 281; State v. Townsend, 2 Harring. 543; State v. Jasper, 4 Dev. 323, and cases cited *supra*, § 17.

IV. AFFRAY.

§ 1551. Any affray is the fighting of two or more persons in some public place,[1] to the terror of the neighborhood.[2] Fighting together, as well as fighting one another, will constitute the offence.[3] There is a difference between a sudden affray and a sudden attack. The former implies reciprocity; the latter does not. To the former a public place is essential, but not to the latter.[4] The distinction between affray and riot is that there may be an affray in which only two persons take part, while to riot three persons are essential. An affray, also, implies suddenness and transientness; a riot is more deliberate and permanent.[5]

Affray is a sudden "free fight."

§ 1552. It is said that no quarrelsome or threatening words whatsoever amount to an affray:[6] and, with the exception to be noticed, that no one can justify laying his hands on those who shall quarrel merely with angry words without coming to blows.[7] To an affray more or less publicity is essential; and it has been held that a quarrel, however animated, out of the hearing or seeing of any except the parties concerned, cannot be said to be to the terror of the people, and hence is not an affray.[8] So a casual quarrel by three strangers in a private field will not amount to an affray, as the place of the fight must be in public view;[9] though it is otherwise as to an inclosure visible from a

Quarrelsome words no affray.

[1] That this must be averred and proved, see *infra*, § 1552, 1554.

[2] 4 Black. Com., 144; 3 Inst. 158; R. v. Hunt, 1 Cox C. C. 177; Com. v. Runnells, 10 Mass. 518; Duncan v. Com., 6 Dana, 295; Simmons v. Com., 6 J. J. Mar. 615; State v. Simpson, 5 Yerg. 356; Wilson v. State, 3 Heist. 378; State v. Sumner, 5 Strob. 53; but see Childs v. State, 15 Ark. 204.

[3] Thompson v. State, 70 Ala. 26.

[4] State v. Toohey, 3 Rice's Dig. 104; 1 Hawk. P. C. Curw. ed. p. 514; Taylor v. State, 22 Ala. 15; Carwile v. State, 35 Ibid. 392.

As to affrays under statutes, see Com. v. Welsh, 7 Gray, 324; Noe v. People, 39 Ill. 96.

[5] Ibid.

[6] O'Neill v. State, 16 Ala. 65.

[7] 1 Hawk. c. 63, s. 2. *Supra*, § 619.

[8] Ibid. s. 2.

[9] Skains v. State, 21 Ala. 218; Taylor v. State, 22 Ibid. 15; Hawkins v. State, 13 Ga. 322; Wilson v. State, 3 Heisk. 278. See State v. Perry, 5 Jones (N. C.), 9, where it was held that if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty of an affray, though he may be unable to return the blow; and see State v. Sumner, 5 Strobh. 53.

thronged thoroughfare.[1] But the fact that a quarrel began in a private house does not exclude proof of such beginning when the fight was continued in a public street.[2]

But wearing dangerous weapons may, with violent language, suffice.

§ 1553. But although no bare words, in the judgment of law, carry therein so much terror as to amount to an affray,[3] yet it seems certain that in some cases there may be an affray where there is no actual violence, as where words naturally provoking violence are used as part of the mêlée, or as a provocative and invitation to a fight; and where there is terror to the neighborhood.[4] An indictment for affray may also be sustained where two or more men arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law,[5] and is in some jurisdictions prohibited by statute. For by statute 2 Edw. III. c. 3, in force in several of the United States, it is enacted, "that no man, of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring any force in an affair of peace, nor go nor ride armed by night or day in fairs or markets, or in the presence of the king's justices or ministers, or elsewhere, upon pain to forfeit their armor to the king, and their bodies to prison, at the king's pleasure."[6] A man cannot excuse wearing such armor in public by alleging that a particular person threatened him, and that he wears it for safety against such assault; but it is clear that no one incurs the penalty of the statute for assembling his neighbors and friends in his own house, to resist

[1] Carwile *v.* State, 35 Ala. 392.

[2] State *v.* Billings, 72 Mo. 662.

[3] O'Neill *v.* State, 16 Ala. 65; State *v.* Simpson, 5 Yerg. 356.

[4] State *v.* Perry, 5 Jones (N. C.), 9; State *v.* Davis, 65 N. C. 298; State *v.* Lanier, 71 Ibid. 288; and as to differing from text, see State *v.* Simpson, 5 Yerg. 356.

[5] In this sense an exhibition of violence without blows, but calculated to produce terror, is an affray. Ibid. Hawkins *v.* State, 13 Ga. 322, and cases next cited.

[6] "Every one commits a misdemeanor who goes armed in public, without lawful occasion, in such a manner as to alarm the public." Steph. Dig. C. L. art. 68, citing 2 Edw. III. c. 3.

those who threaten to do him any violence therein, because a man's house is his castle.[1]

As will presently be seen, the wearing concealed weapons is in many States indictable by statute.[2]

Indictment must contain technical averments.

§ 1554. In the indictment, "to the terror of the people" must be averred.[3] In such an indictment an assault and battery may be averred and proved, and on it the defendant convicted.[4] But it is not necessary to aver the place in which the "fighting" occurred,[5] though the place must be averred and proved to be public, or must appear to be public by implication.[6]

V. POWER OF MAGISTRATES IN DISPERSING.[7]

Magistrate may disperse unlawful assembly.

§ 1555. An unlawful assembly may be dispersed by a magistrate whenever he finds such an interference necessary to preserve the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results, by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. The magistrate has not only the power to arrest the offenders, and bind them to their good behavior, or imprison them if they do not offer adequate bail, but he may authorize others to arrest them by a bare verbal command without any other warrant; and all citizens present whom he may invoke to his aid are bound to respond promptly to his requisition, and support him in maintaining the peace.[8] A jus-

[1] *Supra*, §§ 502, 1549; 1 Hawk. c. 63, s. 8; State *v.* Huntley, 3 Ired. 418; and see a note on this topic in 1 Green's C. R. 481.

[2] *Infra*, § 1557.

[3] An indictment charging that two persons with force and arms, etc., "did make an affray, by fighting," has been held to be sufficiently certain and definite. State *v.* Benthal, 5 Humph. 519.

[4] Thompson *v.* State, 70 Ala. 26; Childs *v.* State, 15 Ark. 204.

[5] State *v.* Baker, 83 N. C. 649.

[6] Archbold's C. P. 708; R. *v.* Hunt, 1 Cox C. C. 177; State *v.* Sumner, 5 Strobh. 53; State *v.* Priddy, 4 Humph. 429; Wilson *v.* State, 3 Heist. 278.

[7] See Whart. Cr. Pl. & Pr. §§ 1–17.

[8] 1 Hawk. P. C. c. 63, s. 16; Lamb. 272; Dalt. Co.; 4 Penn. Law J. 31; R. *v.* Pinney, 3 B. & Ad. 947; 5 C. & P. 254; R. *v.* Neale, 9 C. & P. 431. *Infra*, § 1584; Whart. Cr. Pl. & Pr. §§ 10 *et seq.*

In R. *v.* Pinney, *supra*, it was held

tice of the peace either present or called on such an occasion, who neglects or refuses to do his utmost for the suppression of such unlawful assembly, subjects himself to indictment and conviction for a criminal misdemeanor.[1] Where, however, as was laid down in the Lord George Gordon riots by Lord Loughborough, and as has been held in this country in riots of similar type,[2] an unlawful assembly assumes a more dangerous form, and becomes an actual riot, particularly when life or property is threatened by the rioters, measures more decisive should be adopted. Citizens may, of their own authority, lawfully endeavor to suppress the riot, and for that purpose may even arm themselves; and whatever is honestly done by them in the execution of that object will be supported and justified by the common law. It is the duty of every citizen to make such endeavor;

that a magistrate, in such cases, is bound to do all he knows to be in his power that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence if he fail in his duty. It was further held in the same case that it is not a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law. It is true that the magistrate is not bound to head the special constables, or to arrange and marshal them, as this is the duty of the chief constables. But magistrates were held not to be criminally answerable for not having called out special constables, and compelled them to act pursuant to 1 & 2 Will. IV. c. 41, unless it is proved that information was laid before them, on oath, of a riot having occurred or being expected. Nor is a magistrate chargeable with neglect of duty for not having called out the *posse comitatus* in case of a riot, if he has given the people generally reasonable and timely warning to come to his assistance. It was held that when he calls upon soldiers to attack a mob and suppress a riot he is not bound to go with them; it is enough if he gives them his authority. He may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. R. *v.* Kennet, 5 C. & P. 282, n. He may, at the time of a riot, repel force by force, before the reading of the proclamation from the Riot Act. R. *v.* Pinney, *ut supra*.

To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove—first, that the constable saw a breach of the peace committed; secondly, that there was a reasonable necessity for calling on the defendant for his assistance; and, thirdly, that when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and in such a case it is no ground of defence that from the number of rioters the single aid of the defendant would not have been of any use. R. *v.* Brown, C. & M. 314.

[1] State *v.* Littlejohn, 1 Bay, 316. *Infra*, § 1584.

[2] Annual Register, 1780, 277; 3 Penn. Law Jour. 345; 4 Ibid. 31.

and when the rioters are engaged in the commission of high crimes, the law protects other persons in repelling them by force.[1]

[1] Resp. *v.* Montgomery, 1 Yeates, 419. Wh. Cr. Pl. & Pr. §§ 10 *et seq.*

For forms of indictment, see Whart. Precedents, tit. RIOT.

In the Edinburgh Review for October, 1879 (p. 535), in an article on the Draft Code of 1879, we have the following:—

"The supposed uncertainty of the present law has worked great injustice upon those whose duty required them to use force in order to maintain the queen's peace. A soldier, it has been thought, had the disagreeable alternative of being punished for disobedience of orders if he refused to fire when ordered by his commanding officer, or of being tried before a judge and jury for murder if he did fire and killed somebody. The unwillingness of the guardians of peace to take upon themselves responsibility in such circumstances, however natural, has often been injurious to the State. In the Lord George Gordon riots, the military were at first supposed to be useless, as they dared not fire till an hour after the Riot Act had been read; and George III. and the Attorney-General Wedderburn have been praised, the latter for boldly refuting this erroneous doctrine, and the former for his determination, as chief magistrate of the kingdom, to see that other magistrates acted in accordance with Wedderburn's exposition of the law. In the Bristol riots of 1832, the country was more excited by the trials of the mayor and of Colonel Brereton for neglect of duty than by the riots themselves. Yet the law as expounded was clear enough. The Chief Justice, Tindal, in charging the grand jury in the Bristol case, declared that—

"'By the common law, every private individual may lawfully endeavor, of his own authority and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power; he may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent those whom he may see coming up from joining the rest; and not only has he authority, but it *is his bounden duty*, as a good subject of the king, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the judges in the reign of Queen Elizabeth in a case called the "Case of Arms," although the judges add that it would be more discreet for every one in such a case to attend and be assistant to the justices and sheriffs or other ministers of the king in doing this.'

"Chief Justice Tindal, approving this, adds:—

"'But if the occasion demand immediate action, and no opportunity is given for obtaining the advice or sanction of the magistrate, *it is the duty of every subject* to act for himself and on his own responsibility in suppressing a riotous and tumultuous assembly, and he may be assured whatever is honestly done by him in the execution of that object will be supported and justified by the common law.'"

VI. DISTURBANCE OF MEETINGS.

Such disturbance indictable.

§ 1556. For three or more persons to attempt to break up a meeting, religious or secular, is indictable either as a riot, or as an attempt at riot.[1] There may be cases, however, in which the number joining in the disturbance is not large enough to constitute a riot, or there may be cases in which it is desirable, for statutory or other reasons, to prosecute for the distinctive offence of improperly interfering with the right belonging to all citizens to meet together for religious or secular conference. There can be no question that the violent interference with this right is indictable at common law, and that any conduct which wantonly disturbs persons so meeting is in like manner indictable.[2] In some jurisdictions it is made indictable by statute to disturb any meeting lawfully assembled, under which head fall not only political and religious, but social and reform (*e. g.*, temperance) meetings.[3] Statutes protecting meetings for disturbing "schools" cover private schools;[4] but not assemblies for study in which there is no teacher.[5] But the statute does not shelter meetings in the streets from the interruptions incident to street travel.[6]

[1] See as to indictment, Howard *v.* State, 87 Ind. 68.

[2] *Supra*, § 17, 1535. State *v.* Yeaton, 53 Me. 125; Com. *v.* Jeandell, 2 Grant (Pa.), 506; Lindenmuller *v.* People, 33 Barb. 548; People *v.* Crowley, 23 Hun, 412; Com. *v.* Dupuy, Brightly, 44; Kidder *v.* State, 58 Ind. 68; State *v.* Cole, 2 M'Cord, 117; Hunt *v.* State, 3 Tex. Ap. 116. As to disturbing theatres, see 2 West Law J. (N. S.) 75; R. *v.* Forbes, 1 Cr. & D. 157; Clifford *v.* Brandon, 2 Camp. 358. As to schools, see State *v.* Gager, 28 Conn. 232.

[3] See Com. *v.* Porter, 4 Gray, 476.

[4] State *v.* Leighton, 35 Me. 195.

[5] State *v.* Gager, 28 Conn. 232.

[6] State *v.* Shieneman, 64 Mo. 386.

As disturbances are to be regarded as wanton and unseemly noises whose effect is to create 'uproar or excite laughter. Hicks *v.* State, 60 Ga. 464; Hunt *v.* State, 3 Tex. Ap. 116; Friedlander *v.* State, 7 Ibid. 204. It is enough if only one person is proved to have been disturbed. Cockrehan *v.* State, 7 Humph. 11; State *v.* Wright, 41 Ark. 410. Indictability has been predicated of speaking without permission in an assembly in which only designated persons have the right to speak; State *v.* Ramsey, 78 N. C. 448; of violence or use of words inciting to violence by one who has the right to speak; Lancaster *v.* State, 53 Ala. 398; of breaking forcibly into a meeting by one not entitled to attend its deliberations. State *v.* Yeaton, 53 Me. 125. And see generally, Com. *v.* Porter, 1 Gray, 476, as to definition of disturbance. And it is no defence that the meeting was without legal authorization. Dorn *v.* State, 4 Tex Ap. 67. See Ross *v.* State, 2 Dutch. 224. But title cannot in this way be tried. Ibid.

Statutes as to religious services.

§ 1556 *a*. The rule that the disturbance by intruders of public or social meetings is indictable at common law applies, *a fortiori*, to meetings for religious worship.[1] The common law offence, however, has been superseded in most jurisdictions by statutes on which the following points may be stated:—[2]

(1) There is no distinction in this respect as to creeds. No matter how heterodox, in the eyes of the body of the community, a creed may be, those who adhere to it have a right to meet without disturbance.[3]

(2) The protection is not limited to meetings in buildings. Camp and field meetings have the same rights.[4] Nor is the protection limited to the time the meeting is in actual session. Those attending it are to be protected, under the statute, in the immediate vicinity of the place of meeting, whether abiding for church duties, going or returning, so long as any ascertainable portion of the congregation as such keeps together.[5] It is otherwise, however, after the congregation is dispersed, though the disturbance is in the vicinity of the place of the meeting.[6]

(3) The congregation, to be under the statutes, must have met for religious worship. A purely business meeting opened with prayer does not fall under this head;[7] nor does a "Christmas festival"

[1] See People *v.* Degey, 2 Wheel. C. C. 135; State *v.* Jasper, 4 Dev. 323; 1 Russ. Cr. 415. See, also, as showing that this protection extends to all persuasions, the striking remarks of Lord Mansfield in R. *v.* Wroughton, 3 Bur. 1683.

[2] See 20 Alb. L. J. 124.

[3] That such statutes are constitutional, see State *v.* Leighton, 35 Me. 195; Com. *v.* Porter, 1 Gray, 476; State *v.* Gager, 28 Conn. 232; Wright *v.* Com., 77 Penn. St. 470; State *v.* Ringer, 6 Blackf. 109; Com. *v.* Daniels, 2 Va. Ca. 402; Com. *v.* Jennings, 3 Grat. 624; Bell *v.* Graham, 1 N. & M'C. 278; Williams *v.* State, 3 Sneed. 3; State *v.* Stubblefield, 32 Mo. 563; State *v.* Edwards, Ibid. 548; State *v.* Jones, 53 Ibid. 486; State *v.* Hinson, 31 Ark. 638. As to disturbance of "salvation army," see *supra*, § 1535.

[4] Jennings's Case, 3 Grat. 624; State *v.* Swink, 4 Dev. & B. 358; State *v.* Edwards, 32 Mo. 548.

Whether a "temperance camp meeting" is a "religious assembly" is a question of fact. State *v.* Norris, 59 N. H. 536.

[5] Ibid. State *v.* Yeaton, 53 Me. 125; State *v.* Lusk, 68 Ind. 264; State *v.* Jones, 53 Mo. 486; State *v.* Bryson, 82 N. C. 576; Lancaster *v.* State, 53 Ala. 398; Dawson *v.* State, 7 Tex. Ap. 59.

[6] State *v.* Lusk, 62 Ind. 264; State *v.* Edwards, 32 Mo. 548. In Com. *v.* Jennings, 3 Grat. 624, it was held that the statute covered disturbance of camp meetings in recesses while the attendants had retired for the night. But see State *v.* Edwards, *supra*.

[7] Wood *v.* State, 11 Tex. Ap. 38.

for purely social enjoyment.[1] But the fact that a religious society meets in part to transact the business of the society does not take the case out of the statute.[2] And a Sunday-school in session is a religious meeting, though the instruction be at the time in sacred music.[3]

(4) *Bonâ fide* natural peculiarities of worship cannot be regarded as disturbances of religious services even though consisting of a style of singing which provokes irrepressible laughter.[4] It is otherwise with the indulgence in whimsical or insolent action got up for the purpose of exciting laughter or creating uproar.[5]

(5) Interference with religious services, or with the ecclesiastical business of the meeting, even by one who is or has been a member of the society, is a disturbance, when in violation of the discipline of the society.[6]

(6) A disturbance, by way of noise, outside of the congregation, is as much prohibited by the statute as a disturbance inside.[7]

(7) The indictment should, on principle, specify the mode of disturbance, as there are various modes of disturbing a congregation which would not be indictable, and "disturbance" is a conclusion of law.[8]

[1] Layne *v.* State, 4 Lea, 199.

[2] Hollingsworth *v.* State, 5 Sneed, 518.

[3] State *v.* Gager, 26 Conn. 607; State *v.* Oskins, 28 Ind. 364; Martin *v.* State, 6 Baxt. 234. As to "Salvation Army," see *supra*, § 1535.

[4] State *v.* Linkhaw, 69 N. C. 214; see 21 Alb. L. J. 42.

[5] State *v.* Jasper, 4 Dev. 323; State *v.* Ramsay, 78 N. C. 448; Hunt *v.* State, 3 Tex. Ap. 116; Copping *v.* State, 7 Ibid. 61.

[6] McLain *v.* Matlack, 7 Ind. 525; State *v.* Ramsey, 78 N. C. 448; Lancaster *v.* State, 53 Ala. 398; see Cooper *v.* State, 75 Ind. 72.

Where the statute contains the term "wilful," it does not cover mere reckless disorder. Brown *v.* State, 46 Ala. 175. See Richardson *v.* State, 5 Tex. Ap. 470.

[7] Holt *v.* State, 57 Tenn. 192. See Wollingsworth *v.* State, 3 Sneed, 313; Brown *v.* State, 46 Ala. 475.

[8] See *infra*, § 1880 as to analogy in case of "revolt," and see Warren *v.* State, 3 Heist. 269. But see, under Indiana Statute, Howard *v.* State, 87 Ind. 68. That a variance between the disturbance alleged and that proved may be fatal, see State *v.* Sherrill, 1 Jones N. C. 508.

CHAPTER XXVI.

WEARING CONCEALED WEAPONS.

Wearing concealed weapons indictable by statute, § 1557.

§ 1557. Under the statutes prohibiting the wearing concealed dangerous weapons in public places the following points have been adjudicated:—

Wearing concealed weapons indictable by statute.

(1) The statutes are constitutional.[1]

(2) Wearing weapons openly is not within the purview of several of the statutes, though otherwise under statute of Edw. III. c. 3.[2] There must have been concealment,[3] and this must be proved by the prosecution.[4] In some States possession is made *primâ facie* proof of concealment.[5] It is no defence that the weapons, when there is no such exception in the statutes, were only carried about in the defendant's own house;[6] nor that they were to be shown as curiosities.[7] Where weapons of any class are forbidden,

[1] Wright *v.* Com., 77 Penn. St. 470; Andrews *v.* State, 3 Heisk. 165; overruling Aymette *v.* State, 3 Humph. 154; State *v.* Buzzard, 4 Pike (Ark.), 18; Fife *v.* State, 31 Ark. 455; Hails *v.* State, 38 Ibid. 564; Cockburn *v.* State, 24 Tex. 394; State *v.* Clayton, 41 Ibid. 410; Nunn *v.* State, 1 Kelly, 243; State *v.* Mitchell, 3 Blackf. 229; Walls *v.* State, 7 Ibid. 572; Owen *v.* State, 31 Ala. 387. See Hill *v.* State, 53 Ga. 472. See *contra*, Bliss *v.* Com., 2 Litt. 90. For common law, see *supra*, § 1553.

[2] *Supra*, § 1553.

[3] See State *v.* Swope, 20 Ind. 206.

[4] Ridenour *v.* State, 65 Ind. 411; Smith *v.* State, 69 Ibid. 140; Burst *v.* State, 89 Ibid. 133; Stockdale *v.* State, 32 Ga. 225; Jones *v.* State, 51 Ala. 16; Barton *v.* State, 7 Baxt. 105. See State *v.* Johnson, 16 S. C. 187; Waddell *v.* State, 37 Tex. 355. Carrying in a vest pocket, in a room where there are several persons, is a violation of the statute. Owen *v.* State, 31 Ala. 387.

[5] State *v.* McManus, 89 N. C. 535. See State *v.* Gilbert, 87 Ibid. 527; Zallner *v.* State, 15 Tex. Ap. 23.

In Tennessee the carrying of weapons, irrespective of concealment, is indictable. Dycus *v.* State, 6 Lea, 581. Partial concealment; Stockdale *v.* State, *ut sup.*; and occasional concealment are sufficient to make out the offence. Washington *v.* State, 36 Ga. 242.

[6] Dycus *v.* State, *ut sup.*

[7] Walls *v.* State, 7 Blackf. 572.

it is no defence that they were not in a condition to be efficient, as where a pistol is not in such a state as to be discharged.[1]

(3) The place must be public, and as such has been considered a ball-room;[2] a room of common resort where several persons are collected;[3] and, *a fortiori*, a court of justice.[4]

(4) The weapons must be carried as *arms* capable of being offensively used.[5] Whether loaded or not at the time of arrest is immaterial.[6] That the weapon was out of order is no defence;[7] though it is otherwise when it was utterly incapable of use.[8]

(5) When "travellers" are excepted from the operation of the statute, the travel must be of a kind that requires absence from home on an occasional business trip.[9] But mere casual transportation of arms, not for aggressive use, is not in any view within the statute.[10] Nor can a daily passage between home and place of business be considered "travelling" under the statute;[11] though it is otherwise with periodical journeys to a market.[12] The statute covers the whole period of the journey, including temporary stops.[13]

(6) Personal danger, when a defence, must be shown to have been reasonably anticipated.[14] But the fact that the defendant has been informed that he is threatened with violence has been held to be no defence.[15] This view, however, cannot be accepted in cases in which the information proved to have been communicated to the

[1] *Supra*, § 182; Williams *v.* State, 61 Ga. 417; Atwood *v.* State, 53 Ala. 508; and see Gamblin *v.* State, 45 Miss. 658.

[2] Owens *v.* State, 3 Tex. Ap. 444.

[3] Owen *v.* State, 31 Ala. 387. See Harman *v.* State, 69 Ibid. 248.

[4] Summerlin *v.* State, 3 Tex. Ap. 444. As to "public place," see *infra*, §§ 1465, 1470.

[5] Paige *v.* State, 3 Heisk. 198; State *v.* Roten, 86 N. C. 701; Polk *v.* State, 62 Ala. 637; Carr *v.* State, 34 Ark. 448; State *v.* Martin, 31 La. An. 849; Smith *v.* State, 10 Tex. Ap. 420; Cook *v.* State, 11 Ibid. 19.

[6] Ridenour *v.* State, 65 Ind. 411.

[7] Sears *v.* State, 33 Ala. 347; Atwood *v.* State, 53 Ibid. 508.

[8] Evins *v.* State, 46 Ala. 88.

[9] Gholson *v.* State, 53 Ala. 519 (modifying Lockett *v.* State, 47 Ibid. 42); Coker *v.* State, 63 Ibid. 95; Rice *v.* State, 10 Tex. Ap. 288. See Burst *v.* State, 89 Ind. 133; Chaplin *v.* State, 7 Tex. Ap. 87.

[10] Moorfield *v.* State, 5 Lea, 348; Waddell *v.* State, 37 Tex. 255; Maxwell *v.* State, 38 Ibid. 112. That use for hunting is no defence, see State *v.* Woodfin, 87 N. C. 526.

[11] Eslava *v.* State, 49 Ala. 355.

[12] Rice *v.* State, 10 Tex. Ap. 288.

[13] Ibid.; Car *v.* State, 34 Ark. 448.

[14] Bailey *v.* Com., 11 Bush, 688; State *v.* Wilburn, 7 Baxt. 57; State *v.* Speller, 86 N. C. 697; Chatteaux *v.* State, 52 Ala. 388; Hardin *v.* State, 63 Ibid. 38; Carroll *v.* State, 28 Ark. 99.

[15] State *v.* Speller, 86 N. C. 697. See Coffee *v.* State, 4 Lea, 245.

defendant was such as would be likely to cause him to believe himself in danger.[1] But the existence of a sufficient excuse one day does not imply the existence of such an excuse the next day.[2] Nor does danger in one place justify the carrying of such weapons to another place not dangerous;[3] nor is habit any excuse.[4] A danger that is provoked by the defendant is not a danger under the statute.[5]

(7) In some statutes there is an exception in favor of police or peace officers, under which head are included all officers whose duty it is to maintain public peace or to enforce obedience to process.[6] The burden is on the defendant to prove that he was an officer of the class excepted;[7] in which class private detectives are not included.[8]

(8) The indictment must conform to the statute, though it is not necessary to negative exceptions unless they are part of the definition of the offence, and are in the enacting clause.[9]

(9) The burden of establishing an exception is on the defence unless, as is just stated, its negation is part of the case of the prosecution.[10]

(10) It is not necessary to aver the names of the persons terrified by the defendant even when the statute avers "terror."[11] Where the exceptions are not within the enacting clause of the statute so as to qualify and limit the offence, they must be negatived in the indictment; but this need not be done in respect to mere matters of defence or excuse, though enumerated in other parts of

[1] *Supra*, § 488.

[2] Baker *v.* State, 49 Ala. 350; Shorter *v.* State, 63 Ibid. 129. See Bernay *v.* State, 69 Ibid. 233.

[3] Chatteaux *v.* State, 52 Ala. 388.

[4] Lewis *v.* State, 2 Tex. Ap. 26.

[5] Stroud *v.* State, 55 Ala. 77. As to officers, see, further, Gayle *v.* State, 4 Lea, 460; Miller *v.* State, 6 Baxt. 449; O'Connor *v.* State, 40 Tex. 27.

[6] State *v.* Hayne, 88 N. C. 625; Rainey *v.* State, 8 Tex. Ap. 62; Carmichael *v.* State, 11 Ibid. 27. A magistrate whose duty it is to arrest a prisoner is an officer in this sense. Miller *v.* State, 6 Baxt. 449.

[7] Beaseley *v.* State, 5 Lea, 705.

[8] Horn *v.* State, 6 Lea, 335.

[9] State *v.* Swope, 20 Ind. 106; State *v.* Judy, 60 Ibid. 138; Hill *v.* State, 53 Ga. 472; State *v.* Carter, 36 Tex. 89; State *v.* Clayton, 41 Ibid. 410; Pickett *v.* State, 10 Tex. Ap. 290. See State *v.* Maddox, 74 Ind. 105; Whart. Cr. Pl. & Pr. § 238.

[10] Leatherwood *v.* State, 6 Tex. Ap. 266; Wiley *v.* State, 52 Ind. 516; Beaseley *v.* State, 5 Lea, 705. See Whart. Cr. Ev. § 128. "About his person" (the statutory words) includes arms carried in a basket. State *v.* McManus, 89 N. C. 533.

[11] State *v.* Bentley, 6 Lea, 205; see Pickett *v.* State, 10 Tex. Ap. 290; Leatherwood *v.* State, 6 Ibid. 244.

the statute.[1] Aggravations in the indictment may be discharged as surplusage.[2]

(11) The burden of establishing an exception is on the defence unless such exception is one of the statutory limitations of the offence.[3]

(12) "About the person," in the indictment (following the statute) includes carrying arms in a basket[4] or in the hand.[5]

[1] Whart. Cr. Pl. & Pr. §§ 240 *et seq.*; Wiley *v.* State, 52 Ind. 516; State *v.* Duke, 42 Tex. 455; Summerlin *v.* State, 3 Tex. Ap. 444.

[2] Com. *v.* Howard, 3 Metc. (Ky.) 407.

[3] Wiley *v.* State, 52 Ind. 516; Beasley *v.* State, 5 Lea, 705; Leatherwood *v.* State, 6 Tex. Ap. 244. See Whart. Cr. Ev. § 128.

[4] State *v.* McManus, 89 N. C. 555.

[5] Woodward *v.* State, 5 Tex. Ap. 296.

CHAPTER XXVII.

COMPOUNDING CRIMES.

§ 1559. COMPOUNDING a crime is committed by agreeing not to prosecute it, when the party so agreeing knows it to have been committed.[1] The offence is complete where a party receives money or goods as a consideration for non-prosecution.[2] The bare taking of one's goods back again, however, or receiving reparation, is no offence, unless some favor is shown, or agreed to be shown, to the thief.[3] It is not necessary, to constitute the offence, that the consideration should be received by the person compounding.[4] The offence has been sometimes, though erroneously, limited to compounding felonies. But to agree, for a valuable consideration, not to prosecute any misdemeanor, is indictable at common law, or under 18 Eliz. c. 5,[5] which, in the United States, may be viewed as part of the common law.[6] But the rule does not, under 18 Eliz. c. 5, apply to offences cognizable solely

Compounding crime is agreeing not to prosecute it.

[1] 1 Hawk. P. C. c. 59, s. 5; 4 Blac. Com. 133. See, for form, Whart. Prec. 895, 896; and see State *v.* Duhammel, 2 Harring. 532.

The question of the invalidity of contracts compounding felonies is discussed in Whart. on Cont. §§ 483 *et seq.*

[2] 1 Camp. 45; 2 M. & S. 201; Com. *v.* Cony, 2 Mass. 523; Com. *v.* Pease, 16 Ibid. 91; Walls *v.* State, 54 Ind. 561. See Butt, *ex parte*, 13 Cox C. C. 374; 46 L. J. B. 14.

In State *v.* Henning, 33 Ind. 189, it was held indictable for an officer to accept money to influence him in prosecuting a crime.

[3] R. *v.* Stone, 4 C. & P. 379; 1 Hawk. P. C. c. 59, s. 7; Plumer *v.* Smith, 5 N. H. 553.

[4] State *v.* Ruthven, 58 Iowa, 121.

[5] Johnson *v.* Ogilby, 3 P. Wms. 277; Com. *v.* Pease, 16 Mass. 91. See R. *v.* Stone, 4 C. & P. 379; R. *v.* Daly, 9 Ibid. 342; Brery *v.* Levy, 1 W. Bl. 443; R. *v.* Gotley, R. & R. 84; R. *v.* Best, 9 C. & P. 368; 2 Mood. C. C. 125; Dwight *v.* Ellsworth, 9 Up. Can. (Q. B.) 540. This, however, does not include suits for penalties. R. *v.* Crisp, 1 B. & Ald. 282.

[6] See U. S. *v.* Deaver, 4 Crim. Law Rep. 209.

before magistrates,[1] nor, even supposing that statute be absorbed in the common law, does it preclude the private settlement of misdemeanors which involve no offence against the public.[2] To facilitate such settlements, statutes have been passed in some jurisdictions;[3] while in other jurisdictions the practice is for the court, in cases of assaults and cheats, to make settlement between the parties a basis on which the sentence is to be adjusted, after advising that such a settlement be made.[4] The principle that underlies the cases is this: The prerogative of prosecuting, in all matters affecting the peace and order of the State, belongs to the State exclusively; and for an individual to usurp this prerogative, and to use a prosecution for private gain, is in itself a criminal offence. To induce a witness to suppress his testimony is indictable;[5] *a fortiori* is this the case when the object is to stifle a prosecution by keeping the offence from the knowledge of the prosecuting officers, or by withholding from them the materials of proof; but in prosecutions for offences and cheats not involving any great offence against the public, the courts will encourage settlements between the parties as less injurious to the public than litigation.

Not necessary that principal should have been convicted.

§ 1560. On an indictment for compounding a felony, the record of the conviction is *primâ facie* evidence of the felony, but not conclusive as against the compounder.[6] But it is not necessary that the principal offender should have been convicted to sustain an indictment for compounding the offence.[7]

[1] R. *v.* Crisp, 1 B. & Ald. 282. For precedents, see Whart. Prec. 895–6.

[2] See R. *v.* Hardey, 14 Q. B. 529; Keir *v.* Leeman, 6 Ibid. 308; Staneel *v.* State, 50 Ga. 155.

[3] See, in New York, People *v.* Bishop, 5 Wend. 111; in Pennsylvania, Whart. Cr. Pl. & Pr. §§ 384 *et seq.*; in Louisiana, State *v.* Hunter, 14 La. An. 71.

[4] See 4 Bl. Com. 363; R. *v.* Roxburgh, 12 Cox C. C. 8.

[5] *Supra*, § 1333.

[6] State *v.* Williams, 2 Harring. 532; see State *v.* Duhammel, Ibid.

[7] People *v.* Buckland, 13 Wend. 592. To indictments for compounding, the ordinary rules as to repugnancy apply. State *v.* Dandy, 1 Brev. 395. Under the Ohio statute, it is not necessary for the prosecution to aver or prove that a crime had been actually committed. Fribley *v.* State, 42 Ohio St.

CHAPTER XXVIII.

MISCONDUCT IN OFFICE.

I. OFFICES BASED EXCLUSIVELY ON NATURAL LAW.

§ 1563. The first relationships, that engage us, when we take up the question of penal responsibility for neglect, are those of parent and

child and of husband and wife.[1] In many cases, as will presently be seen, such responsibility is imposed on those having special charge

[1] In February, 1880, a case was tried in England, which brings into conspicuous prominence the distinctions taken in the text. The defendant, James Lewis Paine, was convicted of the murder of a young lady named Maclean, with whom he was living in illicit intercourse. Miss Maclean, the daughter of an English officer of high rank, had been seduced by Paine, and was placed by him in lodgings as his wife, a marriage ceremony being pretended, he, however, having a wife still alive. Miss Maclean acquired habits of intemperance, which he encouraged, so that from time to time she took large quantities of spirits, to which her death was by the medical witnesses attributed. It was alleged, on the part of the defence, however, that the drink was administered to her at her own wish; and the question arose, therefore, whether his relation to her was such as bound him to protect her from the danger to which this habit exposed her. On these points Hawkins, J., in a charge, marked throughout by great ability, thus spoke:—

"Mere ordinary negligence or want of care and precaution will not be sufficient. The negligence which will make the man amenable for the crime of manslaughter must be culpable, wicked negligence, and that must be established before a jury can find him guilty of manslaughter. If that is not made out, the law does not punish the man. He may have been guilty of want of care, but unless that is criminal want of care, he cannot be convicted. . . . There must be some active steps taken. I do not mean in the shape of action, but an active step must be taken. If I were sitting at a table, for instance, where was a man not under my care, and I saw him take up a tumbler of poison, I should not be guilty of a crime if I did not stop him, because I am under no obligation to protect a stranger who chooses of his own free will to take his own life. And again, now, to illustrate the distinction between administering and merely sitting by. Supposing I were to go to a person and take a tumbler up to him, knowing that it contained poison, and were to say to him, 'Now, drink this, it will do you good,' and that man fell dead in consequence, I should be guilty of his murder, because my active encouragement induced him to do that which possibly otherwise he would not have done. When you are considering whether or not a man has induced another to take that which is deleterious to him, you must consider the state and condition of health and mind of the person upon whom the crime is said to have been perpetrated. Take, for instance, the case of a lunatic or an idiot being induced to take something which killed him. Then I will take another case—that in which a person is so enfeebled that the slightest suggestion will operate in influencing him to take that which will kill. In those cases the person so influencing would be guilty of a crime in the eye of the law. . . . . If such a person is in care of another, and obligation and duty such as that is cast upon him, it seems to me that if by gross, culpable, and wicked negligence he omits to protect the person against what she could have protected herself when strong, if that is done, and done with the intention to take life, the attorney-general, and rightly too, says it is murder; but if there is a mere reckless inattention to wants of the individual, that would be manslaughter, and not murder, in the eye of the law."—London Times, Feb. 27, 1880.

The defendant was convicted of manslaughter, and was sentenced to penal servitude for life.

Responsibility of parent for child, and husband for wife.

of others. But the duty of a parent to provide for a helpless child, and that of a husband to provide for a helpless wife,[1] lie at the foundation of society, and are wrought up with the law's chief sanctions.[2]

The progress of juridical reasoning in this respect is not without practical interest. According to the old Roman law, the father was privileged, under certain circumstances, to kill or abandon his new-born child. One of the first results of the establishment of Christianity was the enactment, under Constantine, of a law making the exposure of infants a Parricidium. In A.D. 374, under Valentinian and Valens, the offence was made capital. "Si quis necandi infantis piaculum aggressus sit, sciat se capitali supplicio esse puniendum."[3] The canon law went still further, placing the rule in its present shape, by making it penal for those having special charge of any helpless persons (Languidi) to expose them to bodily suffering.[4] This view has been accepted in the modern German codes,[5] which make penal the exposure (Aussetzung) of helpless persons, whether the helplessness result from infancy, sickness, or old age. Other motives may concur in the act—the getting rid of a child—the absorption of its patrimony—the alteration of a line of descent; but such motives are not necessary to constitute the offence and do not give it its peculiar type. The offence is complete when the offender (who has at the time the special charge of the dependent person) exposes the latter in a helpless state. The offender must actually abandon the person so left, and this without the intention

[1] Stat. 5, Geo. IV. c. 83, imposes a penalty on a husband for neglecting to maintain his wife. Adultery on her part is a defence to proceedings against him under this act. R. v. Flintan, 1 B. & Ad. 227. See Govier v. Hancock, 6 T. R. 603; People v. Piper, 50 Mich. 390.

[2] R. v. Renshaw, 2 Cox C. C. 285; R. v. Shepherd, 9 Ibid. 123; L. & C. 147; R. v. Ryland, L. R. 1 C. C. 99; 11 Cox C. C. 569; R. v. Cooper, 1 Den. C. C. 459; R. v. Hogan, 2 Ibid. 277; 5 Cox C. C. 255; and see cases cited *supra*, §§ 132, 374, 631 *et seq.* For statutory prosecutions see Com. v. Burlington, 136 Mass. 438; Shannon v. People, 5 Mich. 36.

[3] See L. 2 Cod. de infant. expos.; and see Nov. 153.

[4] C. ix. de infantibus et *languidis* expos.

[5] See Berner, Lehrbuch, § 178.

of returning. To sustain an indictment, however, for misconduct of this class, the following conditions must exist:—

Misconduct must result in exposure of the person neglected to physical danger.

§ 1564. No matter how gross may be the mismanagement, for instance, by a parent of a child, the law does not interpose by way of punishment, unless physical injuries ensue. Erroneous moral and religious teaching, no matter how pernicious may be the consequences, it is not within the province of penal justice to correct. Jurisdiction such as this over parental teaching could not be assumed by the courts without arrogating to themselves the control of every household in the land, and destroying both home freedom and home responsibility. It is different, however, when the neglect exhibits itself in physical injury to the person thus neglected. Then (*e. g.*, in case of a child's suffering from want of food or clothes through a parent's neglect) there is a *primâ facie* case for an indictment,[1] although, as has been seen,[2] conscientious error in this respect may be at common law a defence.

Party charged must have had means to discharge the office.

§ 1565. If the parent, however, have no means to support his children he is not indictable for his omission to do so.[3] though where a poor law agency exists, he is indictable if he neglect to apply for aid to such agency. The indictment must aver either means in the parent, or neglect to apply for poor law aid.[4]

Person neglected must have been incapable of self-help.

§ 1566. It may be that an indictment would lie against a father for turning out his children as mendicants on the community. But in such case he would be indicted as principal in a nuisance or cognate misdemeanor, and not for neglect in supplying food and clothes. Whenever the child is capable of obtaining these for himself, then the father's special duty, on which alone an indictment can be based, ceases.[5] The person neglected must be helpless, to sustain an indictment for such neglect.[6] And a husband is not indictable

[1] See *supra*, §§ 331, 359.

[2] *Supra*, § 336.

[3] R. *v.* Pelham, 8 Q. B. 959; R. *v.* Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569; R. *v.* Ridley, 2 Camp. 650; R. *v.* Troy, 1 Cr. & Dix, 556; R. *v.* Morris, 2 Ibid. 91; R. *v.* Saunders, 7 C. & P. 277.

[4] R. *v.* Mabbett, 5 Cox C. C. 339; R. *v.* Chandler, Dears. C. C. 453; R. *v.* Rugg, 12 Cox C. C. 16.

[5] See Anon, 5 Cox C. C. 279. *Supra*, §§ 331, 339.

[6] R. *v.* Shepherd, 9 Cox C. C. 123; L. & C. 147.

for neglect to provide necessaries for his wife if he offer a home with his father, which the wife refuses on ground of the father's intemperance.[1]

Neglect is a substantive offence.

§ 1567. If a parent neglect a child, leaving him without food, and the child in consequence die, the parent is indictable for killing the child.[2] But if the child be rescued, or relieved by other parties, after injury sustained, the parent's criminal amenability is not thereby cancelled.[3] Exposing to physical danger a helpless person, by those having such person in charge, is indictable if health be in any way injured.[4] But to maintain such an indictment some overt act of exposure and consequent injury must be proved.[5]

[1] People *v.* Pettit, 74 N. Y. 320.

[2] R. *v.* Bubb, 4 Cox C. C. 455. *Supra*, § 335. See R. *v.* Renshaw, 2 Cox C. C. 285; R. *v.* Hogan, 2 Den. C. C. 277; R. *v.* Mulroy, 3 Cr. & D. 318. That a parent may be in such cases indicted for assault, see R. *v.* Mulroy, 3 Cr. & Dix, 318. *Supra*, § 631.

[3] See, however, R. *v.* Philpott, 6 Cox C. C. 140; Dears. 179.

[4] R. *v.* Friend, R. & R. 20; R. *v.* Squire, 1 Russ. on Cr. 80, 678; R. *v.* Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569. See fully *supra*, §§ 152–7, 331–359.

For statutory offence, see R. *v.* White, L. R. 1 C. C. 311; 12 Cox C. C. 83. As to an maltreatment by guardians and overseers, see *infra*, § 1585.

[5] Sir J. F. Stephen (Dig. C. L. art. 265) states the law as follows:—

"Every one commits a misdemeanor who, being the parent, or master, or mistress of any child of tender years, and unable to provide for itself, refuses or neglects (being able to do so) to provide sufficient food, clothes, bedding, and other necessaries for such child, so as thereby to injure the health of such child.

"Friend's Case, R. & R. 20; R. *v.* Ryland, L. R. 1 C. C. 99. It is necessary to prove actual injury to the child's health; R. *v.* Philpot, Dears. 179, and R. *v.* Hogan, 2 Den. 277; and that the defendant actually has, not merely that he might get from the relieving officer, the means of providing for the child. R. *v.* Chandler, Dears. 453."

Under the statute 31 & 32 Vict., making penal the exposing of children, we have the following:—

"B., A.'s wife, living apart from A., leaves C., their child, nine months old, lying in the road outside A.'s door. A., knowing its position, lets it lie there from 7 P. M. till 1 A. M. A.'s mother, D., knowing the child is there, and being in her house, acts in the same way as A. A. has abandoned and exposed C., but D. has not, as she was under no legal obligation to take charge of C. R. *v.* White, L. R. 1 C. C. 311.

"A. sends B., her child, five weeks of age, packed up in a hamper as a parcel, by railway to C., B.'s putative father, giving directions to the clerk to be very careful of the hamper, and send it by the next train. The child reaches C. safely. A. has abandoned and exposed B. R. *v.* Falkingham, L. R. 1 C. C. 222."

II. STATUTORY OFFICES.

1. *Disobedience.*

Officer disobeying law, indictable.

§ 1568. Excluding from consideration those higher offices of which impeachment is the exclusive mode of penal prosecution, and those cases of which military or naval courts have exclusive control, it is clear that when the law imposes on an individual a ministerial office, then not only is disobedience to the requirements of that law in respect to such office indictable, but an indictment lies for such wilful or negligent misconduct in such office as works injury to the public, or to an individual.[1] For mere error of judgment, however, no indictment lies,[2] unless for an act made specifically indictable by statute irrespective of intent.[3]

[1] R. *v.* James, T. & M. 300; 2 Den. C. C. 1; 3 C. & K. 167; R. *v.* Tracy, 6 Mod. 30; R. *v.* Neale, 9 C. & P. 431; People *v.* Norton, 7 Barb. 477; People *v.* Coon, 15 Wend. 277; Resp. *v.* Montgomery, 1 Yeates, 419; Cross *v.* State, 1 Yerg. 261; State *v.* Buxton, 2 Swan, 57; State *v.* McEntyre, 3 Ired. 171; State *v.* Leigh, 3 Dev. & B. 127; State *v.* Maberry, 3 Strobh. 144; Harrold, *ex parte*, 47 Cal. 129; R. *v.* Bennett, 21 Up. Can. (C. P.) 238.

In R. *v.* James, *supra*, which was an indictment against a minister of the Church of England for refusing to solemnize marriage between parties having a lawful right to be married by him, the conviction, according to Sir J. F. Stephen (Dig. art. 122), "was quashed on the narrow ground that the parties did not sufficiently tender themselves for marriage. The objection that the offence was only an ecclesiastical one was taken, but no judgment was delivered on it. A refusal to bury would probably stand on the same footing. By 1 Edw. VI. c. 1, it is enacted that a minister 'shall not, without lawful cause, deny' (the sacrament) 'to any person that will devoutly and humbly desire it.' An indictment for such a denial would be incongruous and indecent, but it is difficult to find any definite legal ground for saying that it would not lie." See Jenkins *v.* Cook, L. R. 1 P. D. 80. And as to neglect or omission of duties, see further Housh *v.* People, 75 Ill. 487; State *v.* Ferguson, 76 N. C. 197; State *v.* Hawkins, 77 Ibid. 494.

A sheriff who refuses to execute a criminal condemned to death commits a misdemeanor. R. *v.* Antrobus, 2 Ad. & El. 788.

A coroner who refuses to take an inquest on a body, after notice that it is lying dead in his jurisdiction, commits a misdemeanor. 2 Hale P. C. 58.

[2] Ibid. Sir J. F. Stephen, in his Digest of the Criminal Law, which is a summary of the common law, lays down the following rules (Art. 119): "Every public officer commits a misdemeanor who, in the exercise, or under color of exercising the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred either from the nature of the act or from the circumstances of the case. But an illegal exercise of authority caused by a mistake as to the law, made in good faith, is not a misdemeanor within this article." Art. 122. "Every public officer commits a misdemeanor who wilfully neglects to perform any duty which he is bound either by common law or by statute to perform, provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness may be expected to encounter."

As to claim agents, under federal statute, see U. S. *v.* Miskell, 15 Fed. Rep. 138; U. S. *v.* Moyers, Ibid. 411.

[3] Halstead *v.* State, 12 Vroom, 552.

Indictment must be special.

§ 1569. In the indictment, the disobedience must be specially set forth. This must be done by averment of the facts from which the conclusion of law may be drawn. It is not enough to set forth merely the conclusion of law.[1]

Appointment need not be averred or proved.

§ 1570. As is elsewhere fully shown,[2] it is not necessary when an officer is charged with misconduct for the prosecution to prove that he was duly commissioned. It is enough to show that he claimed to fill the particular office, he being estopped from setting up a want of authority to act. Nor is it necessary in the indictment to do more than aver that he acted as officer of the particular class, or that he took the office upon himself,[3] one of which averments is essential.[4] An indictment averring a due election or appointment, and the taking of the office, has been held enough.[5] On an indictment for omission to undertake an office, however, he may set up that he had no legal authority to do the act omitted,[6] though it is otherwise when the omission is a failure to perform a duty undertaken by him.[7]

Impeachable officers not subject to indictment.

§ 1571. To subject the superior officers of government, upon whose uninterrupted presence at the helm the safety of the State depends, to indictments for misconduct in office, would be injurious to the body politic; and consequently in such cases impeachment is the sole instrument of penal

[1] State *v.* Shields, 8 Blackf. 151; State *v.* Longley, 10 Ind. 482; Dixon *v.* State, 4 Blackf. 312; State *v.* Jones, 19 Humph. 41.

[2] *Infra*, § 1589; Whart. Cr. Ev. §§ 164, 833. *Infra*, § 1572 *d*.

[3] See, generally, R. *v.* Verelst, 3 Camp. 432; R. *v.* Borrett, 6 C. & P. 124; R. *v.* Gordon, 2 Leach C. C. 581; State *v.* Roberts, 52 N. H. 492; Com. *v.* Fowler, 10 Mass. 290; Com. *v.* McCue, 16 Gray, 226; Nelson *v.* People, 23 N. Y. 293; People *v.* Cook, 8 Ibid. 67; State *v.* Sellers, 7 Rich. 368; and cases cited *infra*, § 1589.

[4] Com. *v.* Grove, 7 Phila. 660.

[5] Edge *v.* Com., 7 Barr, 275.

[6] Olmsted *v.* Dennis, 77 N. Y. 378; Com. *v.* Rupp, 9 Watts, 114, explained in Com. *v.* Grove, 7 Phila. 660; People *v.* Weber, 89 Ill. 347.

[7] *Supra*, § 131; State *v.* McEntyre, 3 Ired. 171; *infra*, § 1572 *d*.

revision.[1] This principle applies to the superior executive officers of government so far as such officers are clothed with discretion, and are the subjects of impeachment;[2] to the legislature,[3] and clearly to the judges of all courts of record, so far as concerns their judicial as distinguished from their ministerial acts.[4] Justices of the peace, however, are subject to indictment for misconduct in matters as to which they are not invested with judicial discretion,[5] when such misconduct is not imputable to a mere error of judgment.[6] Such is also the case with regard to merely ministerial officers,[7] and with regard to jurors,[8] and in cases of contempt or corruption. But a ministerial officer is not indictable for the malfeasance in office of a deputy.[9]

[1] See Barnard's Trial, opinion of Grover and Andrew, JJ., pp. 2043–59, 2076; and summary in Am. Law Reg. for Nov. 1882, pp. 814–5.

[2] 4 Bl. Com. 12.

As to independence of executive department, see Whart. Com. Am. Law, §§ 512, 513.

[3] See Lord Denman's Life for a discussion of the prerogative of the legislature in Hansard's Case; and see Hiss *v.* Bartlett, 3 Gray, 468; Story Const. § 794; Ferguson *v.* Kinnoul, 9 Cl. & F. 289. But it is said to be doubtful whether impeachment lies against a legislator. See Cooley's Story, § 795; Whart. Com. Am. Law, § 399.

As to impeachment, see Whart. Com. Am. Law, § 399.

[4] R. *v.* Webb, 1 W. Bl. 19; Houlden *v.* Smith, 14 Q. B. 841; R. *v.* Badger, 6 Jur. 994; Downing *v.* Herrick, 47 Me. 462; Pratt *v.* Gardner, 2 Cush. 63; Yates *v.* Lansing, 9 Johns. 395; People *v.* Coon, 15 Wend. 277; Cunningham *v.* Bucklin, 8 Cow. 178; People *v.* Norton, 7 Barb. 477; Lange *v.* Benedict, 73 N. Y. 12; State *v.* Odell, 8 Blackf. 396; Com. *v.* Rodes, 6 B. Mon. 171; State *v.* Gardiner, 2 Mo. 28. See, also, Bacon's Misc. 17; Story Const. §§ 793–5; 4 Bl. Com. 121. Even private arbitrators are protected. Pappa *v.* Rose, L. R. 7 C. P. 32, 525; Tharsis Co. *v.* Loftus, L. R. 8 C. P. 1.

[5] R. *v.* Borron, 3 B. & Ald. 432; R. *v.* Smith, 7 T. R. 80; R. *v.* Cozens, 2 Doug. 426; R. *v.* Jones, 9 C. & P. 401; Fentiman, *in re*, 4 N. & Man. 126; 2 A. & E. 127; R. *v.* Jones, 9 C. & P. 401; People *v.* Coon, 15 Wend. 277; People *v.* Norton, 7 Barb. 477; Wilson *v.* Com., 10 S. & R. 373; Resp. *v.* Montgomery, 1 Yeates, 419; Wallace *v.* Com., 2 Va. Cas. 130; Com. *v.* Callaghan, Ibid. 460; Com. *v.* Alexander, 4 Hen. & Mun. 522; Jacobs *v.* Com., 2 Leigh, 709; State *v.* Sneed, 84 N. C. 816; State *v.* Gardner, 2 Mo. 28.

[6] Ibid. R. *v.* Bishop, 5 B. & Ald. 612; Wallace *v.* Com., 2 Va. Cas. 130; Jacobs *v.* Com., 2 Leigh, 709.

[7] *Supra*, § 1568. Com. *v.* Shed, 1 Mass. 228; Com. *v.* Mitchell, 3 Bush, 39; McBride *v.* Com., 4 Ibid. 331; Wickersham *v.* People, 1 Scam. 129.

This was held to be the case with the defendants in the Star Route Cases, Washington, 1882–3.

[8] Penn. *v.* Keffer, Addis. 290; see R. *v.* Bynen, 2 Show. 304.

[9] Com. *v.* Lewis, 4 Leigh, 664.

2. *Oppression, Fraud, and Corruption.*

Oppression by officer is indictable.

§ 1572. It is a misdemeanor at common law for a public officer, in the exercise or under color of exercising the duties of his office, to abuse any discretionary power with which he is invested by law, from an improper motive. In such cases the existence of the motive may be inferred either from the nature of the act or from the circumstances of the whole case.[1] Whether it is otherwise of an illegal exercise of authority caused by a mistake as to the law, made in good faith, is hereafter discussed.

So is fraud.

§ 1572 *a*. It is also indictable for a public officer, in the discharge of the duties of his office, to commit any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.[2]

[1] Stephen's Dig. C. L. art. 119, citing R. *v.* Wyatt, 1 Salk. 380; R. *v.* Bembridge, 3 Doug. 327, and 22 St. Tr. 1–159; Bacon, Abridgment, tit. "Office and Officer," N. State *v.* Wedge, 24 Minn. 158. See Wallace *v.* Com., 2 Va. Ca. 130, where it was held indictable for a justice to issue a warrant without complaint.

The following illustrations are given by Sir J. F. Stephen:—

"A. and B., justices of the peace, refuse licenses to the keepers of public-houses because they refuse to vote as the justices wish. A. and B. commit oppression. R. *v.* Williams, 2 Burr. 1317.

"A., a justice of the peace, sends his servant to the house of correction for being saucy, and giving too much corn to his horses. A. commits oppression. R. *v.* Okey, 8 Mod. 46.

"A., a justice, acting as such, orders B. to be whipped, without such proof or information as the law requires. A. commits oppression. 2 Ch. Cr. L. 236." See for further cases, R. *v.* Borron, 3 B. & Ald. 432; State *v.* Porter, 2 Tread. 694; People *v.* Coon, 15 Wend. 291 (not requiring proper bail); Jones *v.* People, 2 Scam. 477; State *v.* Gardner, 2 Mo. 23. As to neglect in suppressing riots, see *infra*, § 1584.

That an honest mistake in the exercise of jurisdiction, or of other functions, by a justice of the peace may be a defence, see R. *v.* Jackson, 1 T. R. 653; R. *v.* Badger, 4 Q. B. 468. *Supra*, § 87.

[2] Steph. Dig. Cr. L., art. 121. Of this the following illustrations are given:—

"A., an accountant in the office of the paymaster general, fraudulently omits to make certain entries in his accounts, whereby he enables the cashier to retain large sums of money in his own possession, and to appropriate the interest on such sums to himself after the time when they ought to have been paid to the Crown. A. commits a misdemeanor. R. *v.* Bembridge, 3 Dougl. 327.

"A., a commissary general of stores in the West Indies, makes contracts with B. to supply stores, on the condition that B. should divide the profits

[*For Bribery, see infra*, § 1858.]

§ 1572 *b*. Public officers, including justices of the peace, are indictable for corruption if they accept or offer to accept, under color of office, any money or other benefit calculated in any way to influence their official course, or any money or valuable thing which is not due at the time when it is taken.[1] Nor is it necessary that any improper act on the part of the officer should follow. It is enough if he corruptly agree to open himself to improper influence.[2] Corrupt motive is essential to the offence,[3] though passion or party prejudice may constitute corruption, to which expectation of money is not essential.[4]

And so is corruption.

The sale of offices is an indictable offence under 5 & 6 Edw. VI. c. 16; if not at common law.[5] And for an officer to assign the fees of his office to another for a salary is such a sale.[6]

§ 1572 *c*. It is also an indictable offence to usurp an office for the purpose of fraud or imposition.[7]

So of usurpation.

§ 1572 *d*. It has been already seen that on an indictment for resisting an officer his title is not at issue when it appears that, at the time in question, he was a *de facto* officer, *i. e.*, the recognized official representative of the government actually in power.[8] This is what is called color of title;

De facto officers responsible.

with A. A. commits a misdemeanor. R. *v.* Jones, 31 St. Tr. 251." See for offences by federal officers U. S. *v.* Houghton, 4 Cr. Law, Mag. 243; 14 Fed. Rep. 544. *Supra*, § 1164 *a*.

[1] R. *v.* Beale, cited in R. *v.* Gibbons, 1 East, 183; 4 Bl. Com. 139; Com. *v.* Callaghan, 2 Va. Cas. 460; People *v.* Walsh, 65 Ill. 58; Ballard *v.* Pope, 3 Up. Can. (Q. B.) 320. *Infra*, § 1858. As to indictment, see People *v.* Kalloch, 60 Cal. 113.

[2] Com. *v.* Chapman, 1 Va. Cas. 138; Barefield *v.* State, 14 Ala. 503; State *v.* Glasgow, Conf. R. 38. See *infra*, § 1858. To corruption a money consideration is not requisite. Any wrongful influence is in this sense corrupt. R. *v.* Brooks, 2 T. R. 190.

[3] See cases cited to §§ 1573, 1582. R. *v.* Jackson, 1 T. R. 653; R. *v.* Cozens, 2 Doug. 426; People *v.* Coon, 15 Wend. 277; Jacobs *v.* Com., 2 Leigh, 709; Boyd *v.* Com, 77 Va. 52; Com. *v.* Rodes, 6 B. Mon. 171.

[4] R. *v.* Brooke, 2 T. R. 190.

[5] R. *v.* Vaughan, 4 Burr. 2494; R. *v.* Pollman, 2 Camp. 229; Hopkins *v.* Prescott, 4 C. B. 578; R. *v.* Charretie, 13 Q. B. 447; Com. *v.* Callaghan, 2 Va. Cas. 460; R. *v.* Mercer, 17 Up. Can. (Q. B.) 625; which is a case of a resignation corruptly procured.

[6] R. *v.* Moodie, 20 Up. Can. (Q. B.) 389. See, generally, *supra*, § 1375.

[7] *Supra*, § 1838 *b*.

[8] *Supra*, § 652.

and when it exists, not only is resistance to such officer indictable, but submission to him will be regarded, even after the government he represented is overthrown, as excusable, and as protecting him from prosecution for his conduct in such submission.[1] Even by such subsequent government his official action, except so far as concerns questions in dispute between the two governments, will be regarded as valid;[2] and, when there is no conflict of government, his action will be regarded as valid in all matters within his range.[3] It follows from this that an officer *de facto* cannot set up want of title to an indictment for misconduct.[4]

§ 1573. In an indictment against an officer of justice for corrupt misbehavior in office, it is necessary that the act imputed as misbehavior be distinctly and substantively charged to have been done with knowingly corrupt, partial, malicious, or improper motives, though there are no technical words indispensably required in which the charge of corruption, partiality, and knowledge shall be made.[5] It is otherwise, however, as has been seen, in neglects, and in cases where bare acts are made indictable irrespective of intent.[6]

Indictment must be special.

[1] *Supra*, § 94; Cooke *v.* Cooke, Phillips, 583; Lockhart *v.* Troy, 48 Ala. 579.

[2] See Ford *v.* Surget, 97 U. S. 971. *Supra*, § 94.

[3] Browne *v.* Lunt, 37 Me. 423; Com. *v.* Fowler, 10 Mass. 290; State *v.* Carroll, 38 Conn. 449; People *v.* Cook, 8 N. Y. 67; Com. *v.* McCombs, 56 Penn. St. 436; Pool *v.* Perdue, 44 Ga. 454; Darrah *v.* State, 44 Miss. 789. That title need not be proved, see *supra*, §§ 652, 1570; Whart. Cr. Ev. §§ 164, 833.

[4] *Infra*, § 1589; R. *v.* Barrett, 6 C. & P. 124; State *v.* Goss, 69 Me. 22; State *v.* McEntyre, 3 Ired. 171; State *v.* Cansler, 75 N. C. 442; State *v.* Maberry, 3 Strobh. 144; Fortenberry *v.* State, 56 Miss. 286. See Burke *v.* State, 34 Ohio St. 79, and cases cited *supra*, § 1063 *d*; *infra*, §§ 1589, 1617.

[5] State *v.* Small, 1 Fairfield, 109; People *v.* Coon, 15 Wend. 277; Jacobs *v.* Com., 2 Leigh, 709; Boyd *v.* Com., 77 Va. 52; State *v.* Gardner, 2 Mo. 22; State *v.* Johnson, 2 Bay, 385; State *v.* Buxton, 2 Swan, 57. See R. *v.* Halford, 7 Mod. 193; R. *v.* Baylis, 3 Burr. 1318.

[6] *Supra*, § 88; *infra*, § 1582.

Where it was alleged that the party suffered to escape had been charged with falsely and fraudulently obtaining the signature of a certain person to a promissory note, by means of certain false pretences, without particularly describing the note, or averring the signature to have been obtained with the intent to cheat or defraud, etc.; it was held, that this being matter of inducement, the indictment was not objectionable in this respect. People *v.* Coon, 15 Wend. 277. In such a case it must be directly and positively charged that the offender was discharged without giving sufficient sureties, or sureties in a sufficient sum, for

3. *Extortion.*

§ 1574. Extortion, in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office,[1] either where none is due,[2] or where none is yet due.[3] The offence of compounding crimes has been already considered.[4]

Extortion is taking money unjustly by an official.

§ 1575. The summary penalties attached in each State to extortion have not generally taken away the common law remedy.[5]

Statutes do not ordinarily absorb common law.

his appearance; it is not enough to allege that the magistrate discharged the offender upon his finding sureties in a small and trifling sum, to wit, fifty dollars. The offence cannot be charged argumentatively or inferentially. Ibid.

Indictments against supervisors, etc., for neglects as to roads, are considered, *supra*, § 1473; *infra*, § 1584 *a*.

[1] That this is essential, see R. *v.* Baines, 6 Mod. 192.

In U. S. *v.* Deaver, 4 Crim. Law Mag. 209, the qualification, "for his own use," is added. But it would be no defence to a charge of extortion that the object was to give the money to another.

[2] See People *v.* Whaley, 6 Cow. 661; Com. *v.* Mitchell, 3 Bush, 39.

[3] 1 Hawk. c. 68, s. 1; Co. Lit. 363 *b*; Stevens *v.* Rothmel, 3 B. & B. 145; Com. *v.* Bagley, 7 Pick. 279; People *v.* Whaley, 6 Cow. 661; State *v.* Maires, 33 N. J. L. 142; Williams *v.* State, 2 Sneed, 160; Cross *v.* State, 1 Yerg. 261.

In Pennsylvania there is an early case intimating that custom may sustain the demanding of fees in advance of services. Resp. *v.* Hannum, 1 Yeates, 71. But see *contra*, R. *v.* Baines, 6 Mod. 192; Lincoln *v.* Shaw, 17 Mass. 410; Com. *v.* Bagley, *ut sup.*; State *v.* Maires, *ut sup.*, and cases last cited. In State *v.* Vasel, 47 Mo. 416, aff. Ibid. 444, it was held that a constable cannot lawfully force payment of untaxed costs. That a *de facto* officer is so indictable, see State *v.* McEntyre, 3 Ired. 171. That person acting as officer cannot deny he was such, see *supra*, § 1570; Whart. Crim. Ev. § 833.

That a railroad company that exacts an illegal fare may be, under the New York statute, proceeded against for extortion, see Lewis *v.* R. R. 49 Barb. 330.

[4] *Supra*, § 1559.

[5] Com. *v.* Bagley, 7 Pick. 279.

In Pennsylvania, by an act of assembly already noticed (act of 21st March, 1806; 4 Smith, 332; Purd. 66; see *supra*, §§ 25 *et seq.*), it is provided that "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly, the directions of the said act shall be pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect." Under this act it was held, that as a *qui tam* action was given to an informer by the fee bill, in cases where a justice was guilty of extortion, the remedy at common law was absorbed. Com. *v.* Evans, 13 S. & R.

The multitudinous statutes on this topic it is impracticable here to examine. We must content ourselves with noticing one or two points of principle.

§ 1576. The taking illegal fees on the part of a public officer may often result from mistake. When the statute makes the bare act of taking an illegal fee indictable, then the defendant may be convicted, no matter what may have been his motive.[1] But to extortion at common law, and under most of the statutes, corrupt motive is essential.[2] And if there be no such motive, and the money be voluntarily given for extra work, the indictment is not sustainable at common law.[3] This distinction, however, is one of great delicacy, and should be carefully guarded, lest corruption be sheltered under the disguise of usage or extra work.[4]

Motive must be corrupt.

Corruption is to be inferred from the facts.[5]

§ 1577. A mere agreement, it is said, to pay, will not sustain a charge of extortion.[6] But if such an agreement might be made the

426. To remedy this defect, an act was passed (25th March, 1831; Pamph. 211; Purdon, 448) restoring the common law provision.

[1] State *v.* Cutter, 36 N. J. L. 125, citing Bowman *v.* Blyth, 7 E. & B. 26; R. *v.* Hall, 3 C. & P. 409; R. *v.* Read, C. & M. 306; Com. *v.* Shed, 1 Mass. 228; Com. *v.* Bradford, 9 Metc. 268. See *supra*, §§ 84, 85, 85 *a*, 87, where the question is discussed on principle.

That to insist on being paid the fee in advance is extortion, see R. *v.* Harrison, 1 East P. C. 382; Com. *v.* Bagley, 7 Pick. 279; State *v.* Maires, 4 Vroom, 142; State *v.* Vasel, 47 Mo. 416, 444; Jacobs *v.* Com., 2 Leigh, 709.

[2] *Supra*, § 85. Com. *v.* Shed, 1 Mass. 228; Runnells *v.* Fletcher, 15 Ibid. 525; Lincoln *v.* Shaw, 17 Ibid. 410; Shattuck *v.* Woods, 1 Pick. 171; Com. *v.* Bagley, 7 Ibid. 279; People *v.* Coon, 15 Wend. 277; Resp. *v.* Hannum, 1 Yeates, 71; Jacobs *v.* Com., 2 Leigh, 709; State *v.* Gardner, 2 Mo. 22; State *v.* Porter, 3 Brev. 175; though see *contra*, State *v.* Dickens, 1 Hayw. 406; State *v.* Stotts, 5 Blackf. 460. Hence ignorant and honest belief that the fee is right, as based on usage, is a defence at common law, unless such belief be negligent. Bowman *v.* Blyth, 7 El. & B. 26; Resp. *v.* Hannum, 1 Yeates, 71; State *v.* Cutter, 36 N. J. L. 125.

In Massachusetts, however, it has been held that usage is no defence. Com. *v.* Bagley, 7 Pick. 279; Lincoln *v.* Shaw, 17 Mass. 410. Otherwise under statute, *supra*, § 1576.

[3] R. *v.* Baines, 6 Mod. 192; Evans *v.* Trenton, 4 Zab. 764; Dutton *v.* City, 9 Phila. 597; Williams *v.* State, 2 Sneed, 160; Leeman *v.* State, 35 Ark. 438. See *infra*, § 1582, for other cases.

[4] The defence of custom, as set up in Lord Bacon's case, is discussed with much acuteness by Macaulay in his essay on Bacon.

[5] *Infra*, § 1580.

[6] Com. *v.* Pease, 16 Mass. 91; Com. *v.* Cony, 2 Ibid. 523.

basis of a suit, the law is otherwise.[1] And it is enough if any valuable thing is received.[2] No doubt, however, an incomplete act of extortion could be indicted as an attempt, if there be any overt act provable.[3]

Act must be complete.

§ 1578. The offence being a misdemeanor, all concerned, if guilty at all, are guilty as principals. This rule results from the familiar doctrine so often announced, that in misdemeanors there are no accessaries.[4] As to the joinder of defendants, it has been held that, if there be concurrence in the extortion, the parties may be joined, though the parts assigned to each be distinct.[5]

All concerned are principals.

§ 1579. The weight of authority in England is that the sum stated in the indictment is not material; proof of a less sum will sustain the indictment.[6] In several of the United States it has been held that the indictment must aver particularly the sum received, and how much of it, if any, was the legal charge.[7] But such precision does not seem to be necessary in North Carolina.[8] The term "extorsively" sufficiently implies corruption.[9]

How far indictment must be special.

"Corruptly" need not be averred if it can be supplied from other averments.[10]

4. *Negligence.*

§ 1580. Negligence in those charged with specific duties has been already considered.[11] It is important, however, to distinguish

[1] R. v. Burdett, 1 Ld. Raym. 148.

[2] R. v. Burdett, *supra*; State v. Stotts, 5 Blackf. 460.

[3] *Supra*, § 173.

[4] *Supra*, § 223.

[5] See R. v. Tisdale, 20 Up. Can. (Q. B.) 272. See, however, Whart. Cr. Pl. & Pr. § 303.

[6] R. v. Burdett, 1 Ld. Raym. 148; and see R. v. Gillham, 6 T. R. 265; R. v. Higgins, 4 C. & P. 247.

[7] People v. Rust, 1 Caines, 131; State v. Halsey, 1 South. 324; State v. Maires, 33 N. J. L. 142; State v. Coggswell, 3 Blackf. 55. That a variance in description of the money received may be fatal, see Garner v. State, 5 Yerg. 160; Johnson v. State, Mart. & Yerg. 129.

[8] State v. Dickens, 1 Hayw. 406.

Where an officer is charged with extortion, on the ground "that he oppressively sued out an execution," it is necessary that the facts which constituted the oppression should be set forth in the indictment and found by the jury. State v. Fields, Mart. & Yerg. 137.

[9] Leeman v. State, 35 Ark. 438.

[10] *Supra*, § 1573; R. v. Wadsworth, 5 Mod. 13; R. v. Tisdale, 20 Up. Can. (Q. B.) 272.

[11] *Supra*, §§ 125, 1563.

between an indictment for a crime produced by negligence, and an indictment for negligence itself. To sustain a conviction for a crime produced by negligence, a causal connection, under conditions which have been already set forth, must be established between the negligence and the crime.[1] It is otherwise when the indictment is for the negligence as a substantive offence. Here the indictment is sustainable, if the offence be so constituted by statute, though no mischief occurred from the negligence.[2]

Need be no injury caused in cases of negligence.

§ 1581. Absence of malice is essential to the idea of negligence. Whenever there is malice, negligence ceases, and the offence becomes a malicious misdemeanor.[3]

Need not be malice.

§ 1582. A man who undertakes a public office is bound to know the law, and to possess himself diligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he do not, and through mistake of law or of fact be guilty of negligence, he commits a penal offence. This seems hard law, but it is essential to the safety of the State. If an officer, enjoying the emoluments of office and wielding its occasionally vast powers, should be able to plead in defence of negligence that he mistook either law or fact, not only is there no negligence that could be punished, but ignorance and incompetency would be the masks under which all sorts of official misconduct could be sheltered. In municipal trusts, for instance, to plunder triumphantly, it would be only necessary to secure officers conveniently ignorant and inert. But this the policy of the law does not permit. It says: "You are bound to know the law and the facts: and if you lean on advisers or subalterns who mislead you, this is the very thing for which you are to be punished." It is necessary for the State that it should have at its command knowledge and vigilance in the guardians of its liberties and its treasures. In those holding public office, want of either knowledge or of vigilance, resulting in negligence, is a penal offence.[4] And, independently of these views, it is a general principle that wherever the law makes a

Mistake of law or fact no defence.

[1] *Supra*, §§ 152 *et seq.*

[2] Resp. v. Montgomery, 1 Yeates, 419; State v. Littlejohn, 1 Bay, 316; State v. Glascow, Conf. R. 38; Com. v. Mitchell, 3 Bush, 39; McBride v. Com. 4 Ibid. 331. Compare cases cited *supra*, §§ 84–88.

[3] *Supra*, §§ 125 *et seq.*

[4] *Supra*, § 84.

naked act indictable, irrespective of intent, ignorance as to either law or fact is no defence.[1] At the same time, if the indictment charge a *negligent* ignorance of the law, the defendant is entitled to an acquittal if he can show that he showed the diligence common to specialists of his class.[2] And where corrupt motive is essential to the offence, then, if it can be shown that the defendant acted honestly and non-negligently under a claim of right, he is not criminally responsible.[3]

Drunkenness in public officer indictable.

§ 1583. It is an indictable offence for a public officer voluntarily to be drunk when in discharge of his duties. No harm may come to the public from his misconduct, but he has put himself in a position from which much harm might result, and for so doing he is amenable to penal justice.[4]

And so of neglect by officer in attempting to suppress riot.

§ 1584. From what has been said we reach the reasoning by which peace officers are required to attempt to suppress riots. The law requires them to be duly active and courageous in maintaining the public peace, and if they fail in this they are guilty of an offence to which mistaken views of their own powers, or mistaken views of the facts are no defence.[5] And they are entitled to call on all citizens to aid them when resisted in the discharge of the duties imposed on them as guardians of the peace.[1]

[1] See *supra*, § 88.

[2] *Supra*, § 85.

[3] See cases cited *supra*, § 1576; State *v.* McDougald, 4 Harring. 555; Com. *v.* Jacobs, 2 Leigh, 709; State *v.* McDonald, 3 Dev. 468; State *v.* Johnson, 2 Bay, 385; 1 Brev. 155.

[4] Penn. *v.* Keffer, Addison, 290; Com. *v.* Alexander, 4 Hen. & Mun. 522.

[5] R. *v.* Pinney, 5 C. & P. 254; 3 B. & Ad. 947; R. *v.* Neale, 9 C. & P. 431; Resp. *v.* Montgomery, 1 Yeates, 419; State *v.* Littlejohn, 1 Bay, 316. See *supra*, §§ 652 *a*, 1555; Whart. Cr. Pl. & Pr. §§ 5 *et seq.*

According to Sir J. F. Stephen, an officer is indictable who neglects to perform any duty which he is bound either by common law or by statute to perform, provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter. Steph. Dig. Cr. L. art. 122.

Of this he gives the following illustrations:—

"(1) A., the mayor of B., neglects to perform various acts which it was in his power to do, and which a man of ordinary prudence, firmness, and activity might have been expected to do, in order to suppress riots in B. A. is guilty of a misdemeanor. R. *v.* Pinney, 5 C. & P. 254. *Supra*, § 1555.

"(2) A., the lord mayor of London, refrains from making the proclamation in the Riot Act, and from ordering soldiers to disperse a mob, because he is afraid to do so—in circumstances in which a man of ordinary courage would not have been afraid. A. commits a misdemeanor. R. *v.* Kennett, 5 C & P. 282.

And so of municipal neglect in repair of roads.

§ 1584 *a* Obstruction of highways by individuals has been already discussed.[1] In England, municipal authorities, whether county or parish, have been held indictable at common law for neglect in repairing thoroughfares, and in some cases a similar responsibility has been imposed in this country on counties and towns.[2] Whoever, in fact, undertakes or accepts the duty, may be indictable for its non-discharge.[3] But this liability is in all our States limited and defined by statutes too numerous and intricate to be here analyzed. Criminal courts in such cases, also, are rarely appealed to, the civil remedy being usually preferred by private litigants in cases of injury through municipal neglect.[4] On conviction, the repair of the road may be compelled as an abatement of the nuisance.[5]

III. VOLUNTARY OFFICES.

§ 1585. A guardian, master, or keeper of an asylum, who has a helpless person under his special charge, and neglects to rightly care

[1] *Supra*, §§ 652 *a*, 1555.

In R. *v.* Kennett, *supra*, it was ruled that if, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *primâ facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect.

It is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred; but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty.

The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case; and an unlawful assembly may be so far verging towards a riot, that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly. R. *v.* Neal, 9 C. & P. 431. *Supra*, § 1555.

[2] *Supra*, § 1473.

[3] See *supra*, § 93.

[4] *Supra*, § 1485. As to indictments for neglect, see *supra*, § 125.

[5] See the cases in this relation classified in Whart. on Neg. §§ 956 *et seq.*; and see State *v.* Harsh, 6 Blackf. 346.

[6] *Supra*, § 1426. As to indictments against corporations, see *supra*, § 91.

Guardian, master, or keeper, indictable for neglect.

for such helpless person, whereby the latter is exposed to physical harm, is indictable for the neglect where injury results.[1]

So of officers of ships and railroads.

§ 1586. The same reasoning establishes the indictability for negligence of sea officers, engineers, conductors, and brakesmen of railroads, when such negligence is in discharge of duties specially undertaken by them, and when by it passengers or others are injured.[2]

So of innkeepers.

§ 1587. An innkeeper who, when he has room in his house, refuses to receive and duly entertain a traveller who tenders a reasonable price for entertainment, is indictable at common law.[3] It should, however, be remembered that this duty is restricted to the entertainment of travellers in inns holding out to be such.[1] But an inn-keeper is not bound to receive a person who might communicate disease or cause serious inconvenience to occupants of the inn.[2]

[1] R. *v.* Smith, 42 L. T. (N. S.) 160; 14 Cox C. C. 398 *Supra*, § 333; R. *v.* Friend, R. & R C. C. 20; R. *v* Warren, R. & R 48, n.; R. *v.* Squire, 1 Russ C. & M. 80, 678; R. *v.* Bubb, 4 Cox C. C. 455; R *v.* Marriott, 8 C. & P. 425; R. *v.* Pelham, 8 Q. B. 959; R. *v.* Porter, L. & C. 394; 9 Cox C. C. 449; R. *v.* Smith, L. & C. 607; 10 Cox C C. 82; People *v.* Cowley, 83 N. Y. 464; S C., 21 Hun, 415; State *v.* Hawkins, 77 N. C. 494. As to omissions, see *supra*, §§ 152, 169. Assaults in such cases are discussed *supra*, §§ 633, 635. That a master is bound to supply an apprentice with medical attendance, see R. *v.* Smith, 8 C. & P. 153. Whether he is bound to take such care of other servants depends upon the exclusiveness of his control. He is liable if by his own engagement the servant has no other means of relief. Smith, Mast. & Ser. 118; Wennell *v.* Adney, 3 B. & P 247; Clark *v.* Waterman, 7 Vt. 76. *Supra*, § 360. Under Stat. 14 & 15 Vict. c. 11, neglect to provide sufficient maintenance to a dependent infant, so as to injure health, is made indictable.

[2] See *supra*, §§ 337, 343, 349, 613.

[3] Hawk. P. C. 714, s. 2; R. *v.* Luellin, 12 Mod. 445; R *v.* Ivens, 7 C & P. 213; Fell *v.* Knight, 8 M. & W 269; Hall *v.* State, 4 Harring. 132; State *v.* Matthews, 2 Dev. & Bat. 424; Whart. Prec 911, 912. It is otherwise as to intruders. *Supra*, § 625.

On this position, common to the English and the Roman common law, an interesting question arises which is discussed by Bar, in his *Lehre vom Causalzusammenhange*, to which reference has been several times made. An innkeeper refuses to receive a guest, who in consequence is obliged to wander in the woods during an inclement night, and finally dies from freezing. Is there such a causal connection between the innkeeper's act and the death as to make the innkeeper responsible for the homicide? The answer is yes, supposing that the inn is the sole house in the vicinity in which shelter could have been obtained; but not otherwise. And this coincides with the view heretofore expressed, that A. is only responsible for the death of B. resulting from A.'s negligent discharge of duty, when on A. the duty in question was specially thrown.

Ignorance and want of malice as a defence.

§ 1588. Officers holding responsible posts in great business or social institutions, in which vast interests depend on fidelity to official trust, are like statutory officers in this respect, that negligence on their part is justified neither by ignorance of law nor by mistake of fact.[3] The duties of their office, as well as the necessities of society, require them to be both well informed and vigilant; and if they make mistakes, however honest, they must bear the consequences. If ignorance were a defence to an indictment against railroad or similar officers, for negligence, the greater their ignorance, the more complete their impunity. The law would, in such case, give a premium to ignorance and sloth. Whatever good specialists, in their line, are accustomed to know, this they are bound to know.[4] And when charged with a violation of the law (as distinguished from negligence in the application of the law), then ignorance of the law is no defence.[5]

It is otherwise, however, with voluntary officers, who are legally clothed with no specific trust, and invested with no fiduciary care over others. And non-specialists, when charged with negligence,

[1] In an English case, decided in 1877, the evidence was that the defendant was the proprietor of a hotel, and that attached to the hotel and under the same roof and license, but with a separate front door, was a bar in which persons casually passing by obtained refreshments. The prosecutor, who was a near neighbor, had been in the habit of coming to the bar with several large dogs, which had been found an annoyance to other guests; and letters had passed in which the defendant had objected to the dogs been brought into the bar, and the prosecutor had asserted his right to bring them. The prosecutor subsequently, while taking a walk for pleasure, went with one large dog to the bar and claimed to be served with refreshments, which the defendant refused him. On an indictment charging the defendant, as an innkeeper, with refusing refreshment to the prosecutor, it was ruled that he could not be convicted: first, because the refreshment bar was not an inn; secondly, because the prosecutor was not a traveller; thirdly, because, had it been otherwise, the defendant had reasonable ground for his refusal. R. *v.* Rymer, L. R. 2 Q. B. D. (C. C. R.) 136; 13 Cox C. C. 378.

[2] *Supra*, § 1436.

[3] *Supra*, §§ 84 *et seq.*

[4] *Supra*, § 87.

[5] *Supra*, § 84.

are only liable for the lack of such knowledge and diligence as is common to non-specialists of their class.[1]

It need scarcely be added that in no prosecutions for neglect is want of malice a defence. As has been shown, one of the conditions of negligence is want of malice.[2]

IV. EVIDENCE.

Not necessary to prove officer's commission.

§ 1589. It is enough, as already shown, to prove that the person charged with misconduct in office held himself out to be an officer of the character described in the indictment. The reason is twofold: first, his pretension to hold the office is an admission that he is such an officer; and, secondly, he is liable, even though an usurper, for misconduct in the office thus wrongfully assumed.[3]

Malice and corruption to be inferentially proved.

§ 1590. Malice, corruption, or evil intent, when essential to the case, may be inferred, as presumptions of fact, from the evidence.[4]

V. RESISTANCE TO ILLEGAL ACTS OF OFFICERS.

§ 1591. To what extent illegal acts of officers can be resisted by individuals has been already incidentally discussed.[5]

[1] *Supra*, §§ 87, 125.

[2] *Supra*, § 125.

[3] *Supra*, § 1570, 1572*d*; *infra*, § 1617; Whart. Crim. Ev. §§ 164, 833. See, as sustaining this point, R. *v.* Borrett, 6 C. & P. 124; Com. *v.* Fowler, 10 Mass. 290; People *v.* Cook, 4 Selden, 67; State *v.* Perkins, 4 Zab. 409; Com. *v.* Rupp, 9 Watts, 114; State *v.* Hill, 2 Spear, 150; State *v.* Maberry, 3 Strobh. 144; State *v.* Cansler, 75 N. C. 442; State *v.* Long, 76 Ibid. 254; though see, in some respects qualifying above, State *v.* McEntyre, 3 Ired. 171.

[4] People *v.* Bogart, 3 Parker C. R. 143. *Supra*, § 1570; Whart. Crim. Ev. §§ 6–16, 23, 734.

[5] *Supra*, § 646.

CHAPTER XXIX.

LIBEL.

I. DEFAMATORY LIBELS.

§ 1594. A DEFAMATORY libel is matter published without legal justification or excuse, the effect of which is to insult the person of whom it is published, or which is calculated to injure the reputation of any person by exposing

Defamatory libel is a publication calculated to insult or injure the reputation of any person.

him to hatred, contempt, or ridicule. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.[1]

Libel is a crime at common law.[2] A prosecution for libel is not to be regarded as a private action subject to compromise by the parties, but is under the control of the State.[3]

§ 1595. The meaning of "defamatory," when applied to individuals, is the point next to be considered; and it may be generally said that defamation, in this sense, is confined to that which (1) is provocative of wrath; or, (2) exposes to public hatred, contempt, or ridicule.[4] Hence it is defamatory to publish that of another which will put him, supposing him to obey the impulses common to men under such circumstances, in a condition of mind which is likely to result in a breach of the peace. And even supposing there be no danger of any such action on his part, it is defamatory to expose him to public hatred, contempt,[5] or ridicule.[6] The

Test of injury is provocation to wrath or exposure to public hatred or ridicule.

[1] This is substantially the definition given in the English Draft Commission of 1879. See, also, Steph. Dig. Cr. L. art. 267.

[2] State *v.* Burnham, 9 N. H. 34; Com. *v.* Holmes, 17 Mass. 336, 338; Com. *v.* Kneeland, 20 Pick. 206, 232; State *v.* Avery, 7 Conn. 268; 3 Swift's Dig. 340.

[3] R. *v.* The World, 13 Cox C. C. 305.

[4] See 2 Stark on Slan. 210.

[5] Churchill *v.* Hunt, 2 B. & Ald. 685; 4 Taunt. 355; Macgregor *v.* Thwaites, 4 D. & R. 695; 3 B. & C. 24; State *v.* Atkins, 42 Vt. 252; State *v.* Spear, 13 R. I. 324; Steel *v.* Southwick, 9 Johns. 214; Barthelemy *v.* People, 2 Hill (N. Y.), 248; State *v.* De Long, 88 Ind. 312.

In R. *v.* Hollon, 12 Lea, 482, the court sustained an indictment against H. for libelling B., the indictment alleging that H. wrote and sent in B.'s name a libellous letter to R.

[6] 2 Wils. 403; R. *v.* Kinnersley, 1 W. Bl. 294; Crowe *v.* People, 92 Ill. 231; State *v.* De Long, 88 Ind. 312; State *v.* Farley, 4 McC. 317; State *v.* Henderson, 1 Rich. 180; but see People *v.* Jerome, 1 Mich. 142.

An indictment will lie for all words spoken of another, which may have the effect of excluding him from society; as, for instance, to charge him with having an infectious disease, such as leprosy, the venereal disease, the itch, or the like. Com. Dig. Action on the Case for Defamation D. 28, 29, F. 11, 19; 2 Burr. 930. But charging him with having had a contagious disease is not actionable; for, as this relates to a time past, it is no reason why his society should be avoided at present. 2 T. R. 473; Stevens *v.* Hayden, 2 Mass. 406; Bloss *v.* Tobey, 2 Pick. 320; Allen *v.* Hillman, 12 Ibid. 101.

On the same principle, to charge a

remedy, of information, however, should only be applied in cases where the wrong is of so flagrant a character as to make a criminal prosecution necessary on public grounds. "The court," says Hawkins, in a passage adopted in 1884, by Lord Coleridge,[1] "will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such signal

woman with libidinous habits, and with tempting another to commit adultery, is libellous. State *v.* Avery, 7 Conn. 268.

It has even been held libellous to charge a man with insanity; R. *v.* Harvey, 2 B. & C. 257; and to call a woman a hermaphrodite. Malone *v.* Stewart, 15 Ohio, 319. So it is libellous to publish of one, in his capacity of a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause, then under their consideration, upon a game of draughts. Com. *v.* Wright, 1 Cush. 46; R. *v.* Spiller, 2 Show, 205.

To charge a citizen with acting, in a nominating convention, under the influence of a bribe, is libellous; Hand *v.* Winton, 38 N. J. L. 122; and so with charging jurors with doing "injustice to their oaths;" Byers *v.* Martin, 2 Col. T. 605; and so with charging a party with engrafting silver ore in a rock, in order to cheat in a mining adventure. Williams *v.* Godkin, 5 Daly, 499.

It is no defence that the defendant states that he did not believe the story. Com. *v.* Chambers, 15 Phila. 415.

Sir J. F. Stephen (Dig. C. L. art. 268) gives the following instances of defamatory matter:—

"A question suggesting that illegitimate children were born and murdered in a nunnery. R. *v.* Gathercole, 2 Lew. C. C. 237.

"A. adds to his other vices ingratitude. Cox *v.* Lee, L. R. 4 Ex. 284.

"A. will not play the fool or the hypocrite (meaning that he would). 1 Hawk. P. C. 543.

"A. has the itch, and smells of brimstone. Villars *v.* Morristen, Holt, 216.

"I think," says Sir J. F. Stephen, "it might, under special circumstances, be a libel to say of a person a thing apparently quite inoffensive. Suppose, for instance, a man wrote of another, his name is A., meaning that his real name is A., and that the name of B., by which he passed, was falsely assumed, would not this be a libel?"

In Gregory *v.* R., 15 Q. B. 957, the Court of Exchequer Chamber held the following words sufficient to maintain an indictment for libel: "Why should T. be surprised at anything Mrs. W. does? If she chooses to entertain B. (the prosecutor), she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all infatuated foreigners who crowd our streets to her table, if she thinks fit." Where a placard was posted up to the following effect: "B. Oakley, game and rabbit destroyer, and his wife, the seller of the same in country and town." Quain, J., ruled that this was not *primâ facie* libellous; and as there was no innuendo showing that it charged an indictable offence, or that it related to the calling of the prosecutor, the learned judge quashed the indictment. R. *v.* Yates, 12 Cox C. C. 233, cited Roscoe's Cr. Ev. 659.

[1] R. *v.* Labouchere, 50 L. T. (N. S.) 161; 15 Cox C. C. 415.

enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself (this was written when truth could not be pleaded to an indictment) cannot, in true policy, be suffered to interrupt the tranquillity of any well-ordered society."

Hence imputation of crime is a libel.

§ 1596. An indictment, *a fortiori*, will lie for all words spoken of another which impute to him the commission of some crime punishable by law, such as high treason, murder, or other felony (whether by statute or at common law); forgery, perjury, subornation of perjury, or other misdemeanor.[1]

And so of reflecting on a man in his trade or livelihood.

§ 1597. It is indictable, also, to assist in a publication which may impute incapacity or dishonor to a man in his trade or livelihood; as, for instance, to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like;[2] or to charge a public officer with indictable misconduct.[3]

And so of whatever is the subject of civil action without special damage.

§ 1598. Whatever, if made the subject of civil action, would be considered libellous without laying special damage, is indictable in a criminal court, and by this test, therefore, the law of libel, as expressed on actions for damages, is brought to bear on criminal prosecutions.[4] There are cases, however, in which an action would not lie without laying special damage, in which, nevertheless, an indictment is good. Thus, for instance, if a man write or print, and publish of another, that he is a scoundrel,[5] or villain,[6] it is a libel,

[1] Com. Dig. Action on the Case for Defamation, D. 1-10, F. 1-7, 12-18; Wonson *v.* Sayword, 13 Pick. 402; Walker *v.* Winn, 8 Mass. 248; Chaddock *v.* Briggs, 13 Ibid. 248; Miller *v.* Parrish, 8 Pick, 384; Gay *v.* Homer, 13 Ibid. 535; Hotchkiss *v.* Oliphant, 2 Hill (N. Y.), 510; Stillwell *v.* Barter, 19 Wend. 487; Nash. *v.* Benedict, 25 Ibid. 645; Cramer *v.* Riggs, 17 Ibid. 209; Smith *v.* State, 32 Tex. 594. And as to charging a public officer with corruption, Com. *v.* Damon, 136 Mass. 442.

[2] Finch L. 186; Com. Dig. D. 22-27, F. 9, 10; 2 Stark. (N. P.) 245, 297.

[3] State *v.* De Long, 88 Ind. 312; State *v.* Lyon, 89 N. C. 569.

[4] 2 Stark. on Slander, 120.

[5] J'Anson *v.* Stuart, 1 T. R. 748.

[6] Bell *v.* Stone, 1 B. & P. 331; R. *v.* Pownell, W. Kel. 58; but see R. *v.*

and punishable as such; although in such cases a civil suit might not lie without special damage.[1]

§ 1599. Writings vilifying the character of persons deceased are libels, and may be made the subject of an indictment;[2] but the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the people against them, or to excite them to a breach of the peace,[3] otherwise it cannot be sustained.[4]

And so of vilifying deceased persons.

§ 1600. The Roman law here offers some salutary restrictions for our guidance. Libels on a deceased person can be prosecuted only by the heir, who, on the principle of universal succession, represents the deceased. The prosecution in such case must be limited to libels published after the ancestor's death; for, libels which the latter did not prosecute when he had capacity so to do, he is presumed to have condoned. Yet if a prosecution is instituted during the life of the libelled person, it is not barred by his death." "Iniuriarum actio" (and the term includes criminal as well as civil procedure) "neque heredi neque in heredem datur; semel autem lite contestata ad successores pertinere."[5] Yet even in this case a time arises when the interests of just historical criticism demand that the liberty of speech should be unrestrained; and when, even of the most illustrious of the dead, censures the most injurious must be permitted without penal amenability. The modern Roman law declares that this time arrives when the generation living at the death of the person libelled has passed away; and this limitation has been adopted by the codes of Austria and Saxony. By the North German code,

But there should be limit as to time.

Granfield, 12 Mod. 98; where it was held not indictable to charge the mayor and aldermen of a particular town with being "a pack of as great villains as any that rob on a highway," the ground being that this was general political abuse. S. P. Tappan *v.* Wilson, 7 Ohio, 190.

[1] See Tillson *v.* Robbins, 68 Me. 295.

[2] 5 Co. 125 *a*; Com. *v.* Clap, 4 Mass. 163.

[3] R. *v.* Topham, 4 T. R. 127. See R. *v.* Labouchere, 15 Cox C. C. 415; 50 L. T. (N. S.) 177, where a criminal information for a libel on a deceased foreign nobleman was refused, mainly on the authority of R. *v.* Topham. See comments in London Spectator of Feb. 16, 1884, p. 211.

[4] Com. *v.* Taylor, 5 Binn. 281.

Sir J. F. Stephen says (art. 267):—

"The publication of a libel on the character of a dead person is not a misdemeanor unless it is calculated to throw discredit on living persons."

[5] L. 13. D. 47. 10.

a code prepared by several eminent German jurists, the same effect is worked by the provision that such prosecutions shall be instituted only by the parents, children, or spouse of the deceased.[1]

§ 1601. Can a person who, from insanity, or infancy, or helplessness, is incapable of resenting an injury, and who, consequently cannot be supposed to be provocable to a breach of the peace, be protected by this mode of prosecution? Here, again, in default of English and American adjudications, we may look to the Roman law; and the solution is found in one of those maxims of terse beauty with which that law abounds: "Pati quis iniuriam, etiamsi non sentiat potest." In other words, the unconscious as well as the conscious sufferer the law intervenes to protect.

Unconscious or helpless persons are thus protected.

§ 1602. Whether a business corporation can be the subject of an indictable libel has been much doubted; but it is not questioned that libels on municipal corporations are indictable as seditious, and, following a parallel line of reasoning, when public credit is imperilled, and private interests assailed, by libels on a bank or other trading corporation, then the remedy by indictment is reserved. The Roman law gives for this the additional reason, that by such attacks the honor of the individual coporators is as much imperilled as would be the case were they personally picked out for calumny; and hence, on the ground that such libels are provocative of breaches of the peace, penal redress is permitted. In our own law, as stated by Sir J. F. Stephen, a libel is indictable when defaming a "body of persons definite and small enough for individual members to be recognized as such, in or by means of anything capable of being a libel."[2] Yet for libels on a person or institution to whom the law assigns no definite body or limit, a prosecution cannot be had.[3]

Corporations may prosecute for libel.

[1] Berner, Lehrbuch, § 150.

[2] Dig. C. L., art. 267. To this he adds this note:—

A religious society called the S. Nunnery, consisting of certain nuns and other persons, may be libelled, though no individual is specially referred to. R. *v.* Gathercole, 2 Lew. 237.

[3] Hence the Prussian appellate court, in October, 1868, held, and with good reason, that trades unions and joint-stock companies, which have not availed themselves of the statutes authorizing incorporation, cannot prosecute for libellous attacks in which the names of the members of such societies are not specified. The society is, in the eye of the law, a phantom, which, as it cannot sue civilly, cannot appear as prosecutor in a criminal court. Berner, Lehrbuch, § 150.

§ 1603. No indictment will lie for words, not reduced to writing, unless (1) they are seditious, blasphemous, or indecent,[1] so as to create a public scandal or likely to incite a tumult;[2] or, (2) they are spoken contemptuously to or of a magistrate when in the discharge of his official duties;[3] or, (3) they constitute a challenge to fight.[4]

Unwritten words not usually libels.

§ 1604. Words are not essential to the constitution of a libel. If the author of an infamous charge could evade prosecution by putting it in pictures or hieroglyphic signs, then the law in this respect could be made nugatory. When we recall the pictures which still remain on the walls of Pompeii, and when we remember that before the age of printing, pictures and signs were not unfrequently used to convey vividly and concisely specific thoughts, we can understand why the Roman law coupled with verbal libels, libels which were symbolical or real. "Iniuriam fieri Labeo ait aut re aut verbis."[5] Symbolical or "real"

But otherwise as to pictures and signs.

[1] See Barker *v.* Com., 19 Penn. St. 412; State *v.* Barham, 79 N. C. 646; State *v.* Brewington, 84 Ibid. 783; State *v.* Appling, 25 Mo. 315; see *supra*, §§ 1431, 1432.

[2] *Supra*, §§ 1431, 1432.

[3] R. *v.* Darby, 3 Mod. 139; R. *v.* Pocock, 2 Stra. 1157; Chapman, *ex parte*, 4 A. & E. 773. That such words must be spoken in the presence of the magistrate, or in such a way, during the pendency of a case before him, as to bring him in connection with such case under popular censure, see R. *v.* Weltje, 2 Camp. 142; Marlborough, *ex parte*, 5 Q. B. 955.

[4] 2 Salk. 417; R. *v.* Langly, 6 Mod. 125; Bailey *v.* Dean, 5 Barb. 297; State *v.* Wakefield, 8 Mo. Ap. 11; Townshend on Slander, 3d ed. 66. *Infra*, §§ 1607, 1615; Whart. Cr. Pl. & Pr. § 203. As to statutory indictable slander, see State *v.* McDaniel, 84 N. C. 803; Haley *v.* State, 63 Ala. 89; McMahon *v.* State, 13 Tex. Ap. 220.

A supposed exception is R. *v.* Benfield, 2 Burr. 980; Whart. Cr. Pl. & Pr. § 302, where sentence was passed on an indictment charging two defendants with publicly singing in the street libellous and obscene songs, reflecting on the prosecutor's son and daughter, with intention to discredit him and his children, and destroy his domestic peace. The reasons pressed in arrest of judgment were, 1. That an indictment will not lie for publishing two distinct libels on two distinct persons. 2. That several distinct defendants charged with several offences, cannot be joined in the indictment. 3. That there was a general verdict on the count, whereas the latter song contained in it was not libellous—which were severally overruled by the court. No exception was taken on the ground that the songs, not having been written, could not have been libellous. But as the songs were obscene, this, by itself, would sustain the indictment. *Infra*, § 1606.

[5] L. i. § 1. 47. 10. See as to nude pictures, Com. *v.* Dejarden, 126 Mass. 46; as to nude statues, Com. *v.* Hazleton, *supra*, § 1432.

libels have in later days taken the names of Pasquils, and comprehend, according to the curious classification of the North German Code, libellous pictures, wood-cuts, engravings, and plaster and other figures (Gusswerk). We have no such particularity in any of our statutes; but no doubt libels of this class are as indictable at common law as libels in writing.[1]

II. BLASPHEMOUS LIBELS.

§ 1605. Aside from the question already discussed,[2] whether Christianity is part of the common law, we may regard it as settled that maliciously to revile Christianity, as a religious faith of general acceptance, is an indictable offence at common law.[3] *A fortiori* is published blas-

Blasphemy indictable at common law.

[1] This is, in fact, declared in the definition already given. *Supra*, § 1595. "A gallows set up before a man's door" may be a libel. Steph. Dig. C. L. art. 268.

[2] *Supra*, § 20.

[3] 4 Black. Com. 60; Smith *v.* Sparrows, 4 Bing. 84, 88; R. *v.* Carlile, 3 B. & Ald. 161; R. *v.* Waddington, 1 B. & C. 26; Com. *v.* Kneeland, 20 Pick. 206; Thach. C. C. 346; Chapman *v.* Gillett, 2 Conn. 41; People *v.* Ruggles, 8 Johns. 290; Updegraff *v.* Com., 11 S. & R. 394; State *v.* Chandler, 2 Harring. (Del.) 553. Compare Story's Miscellaneous Writ. 451; 2 Life of Story, 431. As to profanity as a nuisance, see *supra*, § 1431.

In Vidal *v.* Girard, 2 How. 198, the heirs-at-law endeavored to set aside the will, on the ground that as it provided for a system of education from which "ecclesiastics" were to be excluded it was void at common law, and the charity fell. "We are compelled to admit," says Mr. Justice Story, in giving the opinion of the court, "that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and opened reviled and blasphemed against, to the annoyance of believers, or the injury of the public." This view, Mr. Binney, on the part of the devisees, in an argument, which has assumed a judicial weight from its fairness as well as from its ability, did not dispute. "Christianity is a part of the law of Pennsylvania, it is true, but what Christianity, and to what intent? It is Christianity without particular tenets; Christianity with liberty of conscience to all; and to the intent that its doctrines should not be vilified, profaned, or exposed to ridicule. It is Christianity for the defence and protection of those who believe, not for the persecution of those who do not." Argument, etc., in Vidal *v.* Girard, 103. *Supra*, § 20.

The English Commissioners of 1879 say:—

"Section 141 provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts upon the religious feelings of the community, and not in the expression of erroneous

phemy, written or printed, so indictable.[1] But the publication of controversies of learned men on controverted points cannot, if

opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing in good faith and decent language any opinion whatever upon any religious subject. We are informed that the law was stated by Mr. Justice Coleridge to this effect, in the case of R. *v.* Pooley, tried at Bodmin, 1857. We are not aware of any later authority on the subject. This provision is taken with some alteration from the bill." Draft Commission, p. 21.

Blasphemy against God, it is ruled in New York, and contumelious reproaches, and profane ridicule of Christ and the Holy Scriptures, are offences punishable at common law, whether uttered by words or writing; and it follows, therefore, that to revile the name of the Saviour, and wantonly and maliciously to ridicule his character, are indictable. People *v.* Ruggles, 8 Johns. 290. To say "that the Holy Scriptures were a mere fable; that they were a contradiction, and that, although they contained a number of good things, yet they contained a great many lies," has been held indictable in Pennsylvania; Updegraff *v.* Com., 11 S. & R. 394; and the same position was taken in Delaware, after an able and thorough examination, by J. M. Clayton, C. J. In the latter case, the jury having found the defendant guilty on an indictment under the act against blasphemy, charging him with having proclaimed publicly and maliciously, with intent to vilify the Christian religion and to blaspheme God, that (here follow words grossly indecent and blasphemous), the court held the offence found to be blasphemy, and refused to arrest the judgment. State *v.* Chandler, 2 Harring. Del. 553. The court refused to arrest the judgment, where the defendant was charged with uttering the same words, on another occasion, with intent to villify the Christian religion and to blaspheme God, and was found not guilty of the intent to blaspheme God, but guilty of the whole indictment with that exception. Ibid.

In Massachusetts, under Stat. 1782, c. 8 (Rev. Stat. c. 130, § 15), it is blasphemy to deny the existence of God, with an intent to impair and destroy the veneration due him, although no words of malediction, reproach, or contumely are used; Com. *v.* Kneeland, 20 Pick. 206; and the statute is in accordance with the Constitution. Ibid. It is not necessary, in the evidence, to prove every assignment of blasphemy set forth in the indictment; if one is sufficiently proved, it is enough. Ibid.; Whart. Cr. Ev. § 134.

On an indictment for blasphemy for the following publication: "The Universalists believe in a God, which I do not; but believe that their God, with all his moral attributes (aside from nature itself), is nothing else than a chimera of their imagination;" it was held that the intent to deny the existence of the Deity, in the sense of the statute, must be presumed to have been made out. Com. *v.* Kneeland, 20 Pick. 206; Thach. C. C. 346.

It may be said that some of the above cases are on statutes, and cannot therefore be regarded as authorities at common law. But they are authorities to the effect that such statutes are constitutional, and do not abridge freedom of speech. See further Com. *v.*

[1] R. *v.* Waddington, 1 B. & C. 26. See R. *v.* Gathercole, 2 Lew. 237.

couched in temperate and decent terms, be charged as blasphemy.[1] And the weight of authority is that blasphemy is only indictable

Hardy, 1 Ashmead, 410; State *v.* Kirby, 1 Murph. 254; State *v.* Powell, 68 N. C. 259.

The Constitution of the United States requires that all officers, "both of the United States and of the several States, shall be bound, by oath of affirmation, to support this Constitution. But no religious tests shall ever be required as a qualification for any office or public trust under the United States."

In reference to this clause, Judge Story, in his Commentaries on the Constitution, thus speaks: "It was not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test or affirmation. It had a higher object: to cut off, forever, every pretence of any alliance between Church and State in the national government." Afterwards comes the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

On this Judge Story proceeds: "Now there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally as a matter of sound policy as well as of revealed truth.

"The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to an hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the apostles to the present age." See Campbell's Lives of Ch. Justices, ii. 512.

In R. *v.* Foote (and Ramsay), 48 L. T. N. S. 733, it was said by Lord Coleridge, C. J., in charging the jury:—

"It is clear, therefore, to my mind that the mere denial of the truth of the Christian religion is not enough alone to constitute the offence of blasphemy. What then is enough? No doubt we must not be guilty of taking the law into our own hands, and converting it from what it really is to what we think it ought to be. I must lay down the law to you as I understand it, and as I read it in books of authority. Now, Mr. Foote, in his very able address to you, spoke with something like contempt of the person he called 'the late Mr. Starkie.' He did not know Mr. Starkie; he did not know how able and how good a man he was. Mr. Starkie died when I was young; but I knew him, and every one who

[1] R. *v.* Woolstan, 2 Str. 834; R. *v.* Atwood, Cro. Jac. 421; R. *v.* Taylor, Ven. 293; R. *v.* Curl, 2 Str. 789; R. *v.* Hall, 1 Ibid. 416; R. *v.* Sline, Dig. L. L. 83; R. *v.* Annett, 2 Burn, E. L. 217; R. *v.* Wilkes, 2 Stark. Slan. 141; R. *v.* Williams, Ibid.; R. *v.* Eaton, Ibid. 142; R. *v.* Carlisle, 3 B. & Ald. 161; R. *v.* Waddington, 1 B. & C. 26; R. *v.* Taylor, 2 Stark. Slan. 143; R. *v.* Pooley, Bodmin Sum. Ass. 1857, cited Steph. Cr. Law, tit. "Blasphemy;" Moxon's Case, 2 Town. Mod. St. Tr. 356; Gathercole's Case, 2 Lew. C. C. 237. See as to profanity, *supra*, § 1431.

when uttered in such a way as to insult the religious convictions of those at whom it is aimed. The gist of the offence is the insult to

knew him knew that he was a man not only of remarkable power of mind, but of opinions liberal in the best sense; and if ever the task of law making could be safely left in the hands of any man perhaps it might have been in his. But, what is more material to the present purpose, the statement of the law by Mr. Starkie has again and again been assented to by judges as a correct statement of the existing law. I will read it to you, therefore, as expressing what I laid down to you as law in words far better than any at my command.

"'There are no questions of more intense and awful interest, than those which concern the relations between the Creator and the beings of his creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering, that society is more than compensated for the partial and limited mischief which may arise from the mistaken endeavors of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt.

"'A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals—a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong.'

"Now that I believe to be a correct statement of the law."

In this case the defendants were indicted for blasphemous libel in the publication of certain cartoons, etc., in a newspaper called the Freethinker. The jury were directed that a blasphemous libel did not consist in an honest denial of the truths of the Christian religion, but in "a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects;" and further, that an authority to publish libellous matter was not a presumption of law, but a question of fact. See comments in Whart. Com. Am. Law, § 22.

By Sir J. F. Stephen, on the other hand, it is maintained that it is blasphemy at common law to deny the truth of Christianity, no matter how temperate and decent may be the terms used. The subject is reviewed with much ability by Mr. John Macdonnell in the Fortnightly Review for June, 1883, it being shown by him that so far from this being settled law it never was maintained, before the eighteenth century, that of blasphemy as such the secular courts had any jurisdiction. The first secular prosecutions were directed, in Queen Anne's time, against persons denying the doctrine of the Trinity, the ground being that such persons were excluded from the act of toleration, and that by the force of such exclusion such denial was made a penal offence. This position was afterwards embodied in a statute (9 & 10 Will. III.) which made it indictable not only to deny the doctrine of the Trinity, but to deny the truth of Christianity, and the inspiration of the Bible. This statute, however, was, in 1813, repealed, and with the repeal the limitation in the act of toleration may be said to have fallen away. This conclusion, however, is disputed by Sir J. F. Stephen, not only, as we have seen, in his History of Criminal Law, but in a pamphlet published by him in 1884 (see London Law Times, June 7, 1884, p. 91). But the sounder view is, that blasphemy, as is stated in the text, is only indictable when uttered in such a way as to insult those against whom it is directed, and in this way to provoke public disquiet and a breach of the peace. It is not necessary, however, as seems to be intimated by Lord Coleridge, that such blasphemy, to be indictable, should be directed against the prevalent religious belief. To insult the religious belief of a minority is in this sense as indictable as to insult the religious belief of a majority.

[1] This is illustrated in Com. v. Haines, 4 Clark (Phil.), 17, 6 Penn. L. J. 239 (Whart. on Cr. Ev. § 91), where it was rightly held by Gibson, C. J., that it was an indictable offence at common law to parade in a city, a stuffed "Paddy," as an effigy of St. Patrick, and thus to insult and provoke Roman Catholic Irish.

[2] People v. Porter, 2 Parker C. R. 14.

[3] State v. Brown, 1 Williams (Vt.), 619; Com. v. Holmes, 17 Mass. 336; Com. v. Dejardin, 126 Ibid. 46; People v. Muller, 39 Hun, 209; Knowles v. State, 3 Day's Cas. 103; People v. Hallenbeck, 2 Abb. (N. C.) 661; Com. v. Sharpless, 2 S. & R. 91; McNair v. People, 89 Ill. 441; Bell v. State, 1 Swan, 42; State v. Appling, 25 Mo. 315.

In R. v. Hicklin, L. R. 3 Q. B. 360, Cockburn, C. J., said: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influ-

the religious sense of individuals, irrespective of the truth of those religious views or the extent of their prevalence.[1]

The prisoner's mere confession that he used the words charged will not authorize a conviction for blasphemy. The prosecutor must show that some one heard the words.[2]

III. OBSCENE LIBELS.

§ 1606. It is an indictable offence at common law to publish, or expose to public view, an obscene book, photograph, or print;[3]

Obscenity indictable at common law.

or to publicly utter obscene language;[1] and so of any publication or other exhibition tending to corrupt the morals of the people;[2] and this is true, though

ences;" "a definition," says the Alb. L. J., June 21, 1879, "which was substantially adopted by Judge Benedict in his charge to the jury in U. S. *v.* Bennet, 1879; 6 Blatch. C. C. 338. The definition given by Judge Clark, on the trial of the indictment of Heywood under the same statute, was: "A book is said to be obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency." Hence in U. S. *v.* Bennett (Alb. L. J., June 21, 1879), it was held that under the federal statute prohibiting the mailing of obscene publications, it was for the jury to determine whether a publication was obscene.

In Montross *v.* State (Ga. 1884), a conviction of the vendor of the Police Gazette was sustained, and it was held inadmissible to put in evidence other newspapers alleged to be more indecent.

[1] Barker *v.* Com., 19 Penn. St. 412; Bell *v.* State, 1 Swan, 42. *Supra*, § 1603.

[2] *Supra*, § 1432; R. *v.* Hicklin, L. R. 3 Q. B. 360; Com. *v.* Holmes, 17 Mass. 336; Knowles *v.* State, 3 Day's Cas. 103; Com. *v.* Sharpless, 2 Serg. & Rawle, 91.

R. *v.* Hicklin, *ut supra*, the cases were thus reviewed by Blackburn, J., "In the case of R. *v.* Moxon, 2 Mod. S. Tr. 356, and in many of the instances cited by Mr. Kydd, a book had been published which in its nature was such as to be called obscene or mischievous, and it might be held to be a misdemeanor to publish it; and on that account an indictable offence. In Moxon's Case, *supra*, the publication of Shelley's 'Queen Mab' was found by the jury to be an indictable offence; I hope I may not be understood to agree with what the jury found, that the publication of 'Queen Mab' was sufficient to make it an indictable offence. I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance. So, whether the publication of the whole works of Dryden is or is not a misdemeanor, it would not be a case in which a prosecution would be proper; and I think the legislature put in that provision in order to prevent proceedings in such cases."

"I take the rule of law to be, as stated by Lord Ellenborough in R. *v.* Dixon, 3 M. & S. at p. 15, in the shortest and clearest manner: 'It is a universal principle that when a man is charged with doing an act' (that is, a wrongful act, without any legal justification), 'of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act.' And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not a legal excuse, unless the object was such as under the circumstances rendered the particular act lawful. That is illustrated by the same case of R. *v.* Dixon, 3 M. & S. 11. The question in that particular case was, whether or not an indictment would lie against a man who unlawfully and wrongfully gave to children unwholesome bread, but without intent to do them harm. The defendant was a contractor to supply

the publication or exhibition was made for the purpose of showing the errors of an obnoxious party either political or religious.[1] It

bread to a military asylum, and he supplied the children with bread which was unwholesome and deleterious, and although it was not shown or suggested that he intended to make the children suffer, yet Lord Ellenborough held that it was quite sufficient that he had done an unlawful act in giving them bread which was deleterious, and that an indictment could be sustained, as he must be taken to intend the natural consequences of his act. So in the case in which a person carried a child which was suffering from a contagious disease along the public road, to the danger of the health of all those who happened to be in that road, it was held to be a misdemeanor, without its being alleged that the defendant intended that anybody should catch the disease. R. *v.* Vantandillo, 4 M. & S. 73. Lord Ellenborough said that if there had been any necessity, as supposed, for the defendant's conduct, this would have been matter of defence. If, on the other hand, the smallpox hospital were on fire, and a person in endeavoring to save the infected inmates from the flames took some of them into the crowd, although some of the crowd would be liable to catch the smallpox, yet, in that case, he would not be guilty of a wrongful act, and he does not do it with a wrong intention, and he would have a good defence, as Lord Ellenborough said, under not guilty. To apply that to the present case: the recorder has found that one-half of this book is obscene, and nobody who looks at the pamphlet can for a moment doubt that really one-half of it is obscene, and that the indiscriminate circulation of it in the way in which it appears to have been circulated must be calculated necessarily to prejudice the morals of the people. The object in this case (R. *v.* Hicklin) was to produce the effect of exposing and attacking the Roman Catholic religion, or practices rather, and particularly the Roman Catholic confessional, and it was not intended to injure public morals; but that in itself would be no excuse whatever for the illegal act. The occasion of the publication of libellous matter is never irrelevant, and is for the jury; and the jury have to consider, taking into view the occasion on which matter is written which might injure another, is it a fair and proper comment, or is it not more injurious than the circumstances warranted? But, on the other hand, it has never been held that the occasion being lawful can justify any libel, however gross. I do not say there is anything illegal in taking the view that the Roman Catholics are not right. Any Protestant may say that without saying anything illegal. Any Roman Catholic may say, if he pleases, that Protestants are altogether wrong, and that Roman Catholics are right. There is nothing illegal in that. But I think it never can be said that in order to enforce your views you may do something contrary to public morality; that you are at liberty to publish obscene publications, and distribute them amongst every one,—school-boys and every one else,—when the inevitable effect must be to injure public morality, on the ground that you have an innocent object in view, that is to say, that of attacking the Roman Catholic religion, which you have a right to do.

[1] R. *v.* Hicklin, *ut sup.*

is not necessary, in such a case, to aver the offence to be a *common nuisance;* the indictment being for an action of evil example.[1] Where the object of a publication or exhibition is to excite and play upon the sexual passions of others, and when its tendency is to excite such passions, the party making the publication or exhibition is indictable at common law.[2] Obscenity does not depend upon truth or falsity. If the effect be to deprave and corrupt others, the offence is complete. And any public show or exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is punishable at common law as a nuisance.[3] The question of obscenity is for the jury,[4] and experts are inadmissible to prove a particular exhibition to be obscene.

It seems to me that never could be made a defence to an act of this sort, which is, in fact, a public nuisance. If the thing is an obscene publication, then, notwithstanding that the wish was, not to injure public morality, but merely to attack the Roman Catholic religion and practices, still I think it would be an indictable offence."

In Pensylvania the offence is prohibited by Rev. Code, § 55.

[1] Knowles *v.* State, 3 Day's Cas. 103. See State *v.* Appling, 25 Mo. 315; Slattery, *ex parte*, 3 Pike, 484.

[2] R. *v.* Hicklin, L. R. 3 Q. B. 360. In People *v.* Muller, 96 N. Y. 409, some of the pictures, "represented and were photographic copies of paintings, which had been exhibited in the salons in Paris and one of them at the Centennial Exhibition in Philadelphia, and that among them were pictures designated "La Asphyxie," "After the Bath," and "La Baigneuse." The jury, by the verdict of guilty, inferentially found that the photographs were obscene and indecent. The exhibits were produced on the argument of the appeal at the General Term, and the court in its opinion expressed its concurrence with the finding of the jury, saying that they might very well have found that the photographs were both indecent and obscene . . . . The test of an obscene book was stated in R. *v.* Hicklin, L. R. 3 Q. B. 369, to be, whether the tendency of the matter charged as obscenity "is to deprave and corrupt those whose minds are open to such immoral influences and who might come in contact with it. We think it would, also, be a proper test of obscenity in a painting or statue, *whether the motive of the painting or statue*, so to speak, as indicated by it, *is pure or impure;* whether it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, were merely accessory to this as the primary or main purposes of the representation," p. 410, per Andrews, J. See, also, Com. *v.* Landis, 8 Phila. 453.

[3] *Supra*, §§ 1432, 1469; Knowles *v.* State, 3 Day's Cas. 103. See R. *v.* Sedley, 2 Str. 791; R. *v.* Hill, Ibid. 790; R. *v.* Read, Fost. Rep. 98; R. *v.* Curl, 2 Str. 789; R. *v.* Wilkes, 4 Burr. 2527, 2574; Willis *v.* Warren, 1 Hilton, 591.

[4] Ibid.; People *v.* Muller, 39 Hun, 207; 96 N. Y. 409.

§ 1607. Persons publishing books necessary for medical instruction may be liable for uttering obscene libels, if such books are generally and non-professionally disseminated, and the effect is to debauch society, or to make money by pandering to lascivious curiosity.[1] That the object is philanthropic or scientific is no defence,[2] "if the publication is made, in such a manner, to such an extent, or under such circumstances as to exceed what the public good requires in regard to the particular matter published."[3] Whether the effect is to deprave and corrupt is a question of fact. The line is thus correctly drawn by the English Commissioners of 1869: "It shall be a question of law whether the occasion of the sale, publication, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent, or circumstances in, to, or under which the sale, publishing, or exhibition is made, so as to afford a justification or excuse therefor; but it shall be a question of fact whether there is or is not such excess. The motives of the seller, publisher, or exhibitor shall in all cases be irrelevant."[4]

Philanthropic or scientific intent no defence.

[1] Com. *v.* Landis, 8 Phila. 453.

[2] *Supra*, §§ 88, 119; R. *v.* Hicklin, L. R. 3 Q. B. 360. See *infra*, § 1654.

[3] Steph. Dig. C. L. art. 172.

[4] English Draft Code of 1879, § 147.

Sir J. F. Stephen, in discussing this topic, says: "There are many authors —*e. g.*, Aristophanes, Swift, Defoe, Rabelais, Boccacio, Chaucer—whose works can be published in a whole without the possibility of a prosecution, from whom, however, extracts could be made which, if put together, could not be published with impunity." As to scientific publications, he adds that "the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justice. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. Practically, I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures which pure-minded men and women could criticize without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it." Steph. Dig. C. L. note to art. 172. See *supra*, § 1432.

Of the law thus expressed he gives the following illustrations:—

"A., a bookseller, publishes the work of a casuist, which contains, among other things, obscene matter. The work is published in Latin, and appears, from the circumstances of its publication, to be intended for *bonâ fide* students of casuistry only. A. has not committed a misdemeanor.

"B. extracts the obscene matter from the work so published, translates

§ 1608. The *obtaining* and *procuring* of obscene prints, with intent to sell them, is a misdemeanor;[1] but it has been held, though with doubtful accuracy, that the mere keeping of them with that intent is not.[2]

Procuring obscene prints for distribution is indictable.

§ 1609. In the indictment, when the offence consists of words *spoken*, it has been said that the averment is sufficiently exact if there be a general conformity between the words *laid* and those *proved*;[3] but the more reasonable opinion is that the substance of what is alleged should be strictly proved.[4] As is elsewhere noticed, it has been held not necessary, when the indictment is for a libel, to set out the obscene language in full; it being considered enough to aver the fact of the obscenity of the writing, and to give this as an excuse for not setting it forth.[5] And however much doubt may be thrown

Obscenity need not be fully set forth.

it into English, and sells it as a pamphlet about the streets for the purpose of throwing odium upon casuists. B. has committed a misdemeanor."

To this he appends the following note:—

"The second paragraph of this illustration is based upon R. *v.* Hicklin, L. R. 3 Q. B. 360; and see Steele *v.* Brannan, L. R. 7 C. P. 261. The first part is merely my suggestion as to what ought to be held to be the law if the question should arise, but the point cannot be called clear. Keating, J., referred in passing, to the question in Steele *v.* Brannan, L. R. 7 C. P. 269, 270, but expressed no opinion upon it. I confine this article to obscenity, because I have found no authority for the proposition that the publication of a work immoral in the wider sense of the word is an offence. A man might, with perfect decency of expression, and in complete good faith, maintain doctrines as to marriage, the relation of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, etc., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases might throw doubt on this, but I do not think any instance can be given of the punishment of the decent and *bonâ fide* expression of opinions commonly regarded as immoral."

To same effect is Com. *v.* Landis, 8 Phila. 453.

It is inadmissible to prove that in other publications equally objectionable passages are to be found. U. S. *v.* Bennett, *supra*.

[1] R. *v.* Heath, R. & R. C. C. 184. See R. *v.* Fuller, Ibid. 308.

[2] Dugdale *v.* R., 1 Dears. & B. 64; 1 El. & Bl. 435. See *supra*, § 1432.

[3] Bell *v.* State, 1 Swan (Tenn.), 42. See Whart. Cr. Pl. & Pr. § 203.

[4] *Infra*, § 1615.

[5] U. S. *v.* Benedict, 16 Blatch. 338; U. S. *v.* Kaltmeyer, 16 Fed. Rep. 760; 5 McCrary, 260; State *v.* Brown, 1 Williams (Vt.), 619; Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 S. & R. 91; People *v.* Girardin, 1 Mich. 90; McNair *v.* People, 89 Ill. 441;

on this point, it is clear that an indecent picture need not be copied on the indictment.[1]

§ 1610. The *scienter*, in a count for selling obscene publications, should be inserted.[2]

Scienter.

As has been seen, two persons may be jointly indicted for singing an obscene song.[3]

IV. SEDITIOUS LIBELS.

§ 1611. Every man may publish temperate investigations on the nature and form of government. Such matters are proper for public information;[4] but if the object and effect of the publication be to disturb the peace of families, or the quiet of society, or the existence of government, either federal or state, it becomes subject to indictment.[5]

Libels aimed maliciously at the existence of government indictable.

Fuller *v.* People, 92 Ibid. 182; though see R. *v.* Bradlaugh, 38 L. T. (N. S.) 118; L. R. 3 Q. B. D. 607; 14 Cox C. C. 68; State *v.* Hanson, 23 Tex. 234. That the reason for not setting forth should be specifically averred, and that the libel should be individuated, see McNair *v.* People, 89 Ill. 441. And see discussion in 4 Southern Law Journal, 258 (June, 1878); Whart. Cr. Pl. & Pr. § 177. For form see Whart. Prec. 968.

[1] Com. *v.* Sharpless, 2 S. & R. 91. As to variance in describing obscene pictures, see Com. *v.* Dejardin, 126 Mass. 46.

[2] *Supra*, 119.

[3] R. *v.* Benfield, 2 Burr. 980. *Supra*, § 1603.

[4] See R. *v.* Collins, 9 C. & P. 456; R. *v.* Sullivan, 11 Cox C. C. 44, and cases cited *infra*.

[5] Hawk. P. C. c. 73, s. 7; King *v.* Beere, 12 Mod. 221; King *v.* Laurence, 12 Mod. 311; R. *v.* Bedford, Gilbert's Cases, 297; R. *v.* Tutchin, 5 St. Trials, 527; R. *v.* Franklin, 9 Ibid. 276; R. *v.* Horn, Ibid.; *Re* Crowe, 3 Cox C. C. 123; Thomas *v.* Croswell, 7 Johns. 264; King *v.* Root, 4 Wend. 113; Cramer *v.* Riggs, 17 Ibid. 209; Resp. *v.* Dennie, 4 Yeates, 270; Com. *v.* Meeser, 1 Brewst. 492; Robbins *v.* Treadway, 2 J. J. Marsh. 540. See, for forms, Whart. Prec. 953, etc.

In Steph. Dig. Cr. L. we have the following:—

"ARTICLE 93.

"*Seditious Intention defined.*—A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, her Majesty, her heirs or successors, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects. 60 Geo. III. & 1 Geo. IV. c. 8; and O'Connell *v.* R., 11 Cl. & F. 155, 234.

Yet while such is no doubt the law, prosecutions of this class have recently fallen, in England as well as in the United States, for several reasons, into disuse. In the first place, it is now generally felt that unless criticism be permitted to penetrate even to the foundations of government, revolution rather than reform may result. Time, says Bacon, is the greatest of destructives; and truth is to be constantly employed in repairing the breaches which time makes. The wise conservative, therefore, is often apparently the most destructive radical; as he is the most prudent repairer who, when the piers of a bridge are weakened by a storm, advises that the work of reconstruction should begin at the foundation. To prevent the application of revolutionary criticism to government is of all modes of government the most revolutionary. And closely allied with this position is another, that among countries used to freedom, libels only begin to bring the State into contempt when they are prosecuted by the State as contemptuous. The sedition laws, for instance, were among the chief causes of the overthrow of the administration of John Adams; and their repeal one of the chief causes of the popularity of that of Jefferson. If, however, seditious libels are to be prosecuted, it is well to keep in mind the noble words of princes from whose edicts the English common law, imbued as it is in so many other respects with the spirit of freedom, has much, in reference to the law of libel, to learn: "Imppp. Theodosius, Arcadius et Honorius, A. A. A., Rufino P. P. Si quis modestiae nescius et pudoris ignarus improbo petulantique maledicto nomina nostra crediderit lacessenda, ac temulentia turbulentus ob-

"An intention to show that her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of her Majesty's subjects, is not a seditious intention. R. *v.* Lambert and Perry, 2 Camp. 398; R. *v.* Vincent, 9 C. & P. 91.

"ARTICLE 94.

"*Presumption as to Intention.*—In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

trectator temporum nostrorum fuerit, *eum poenae nolumus subiugari neque durum aliquid nec asperum sustinere, quoniam, si ex levitate processerit, contemnendum est, si ex insania, miseratione dignissimum, si ab injuria, remittendum.*"[1]

§ 1612. Libels on the executive, if couched in such a shape as to bring the government into contempt, are by the English common law the subjects of penal prosecution.[2] Whether the defendant really intended by his publication to alienate the affections of the people from the government, has been held by Lord Ellenborough not to be material.[3] But to this it may be properly objected that though a mixture of other motives is no defence,[4] yet to a seditious libel either a seditious motive is essential, or such recklessness as in itself implies criminal liability. And if there be reasonable ground for a belief by the defendant in the facts stated, and no proof of malice, censures of this class are not indictable.[5]

So of libels on executive.

[1] L. un. Cod. si quis imperatori maledixerit (9. 7).

[2] See 4 Black. Com. 423; R. *v.* Harvey, 2 B. & C. 257; 3 D. & R. 464; R. *v.* Cobbett, Holt on Libel, 114; Starkie on Libel, 522, and comments, *supra*, § 1611.

[3] R. *v.* Burdett, 4 B. & Ald. 95; R. *v.* Harvey, 2 B. & C. 257; 3 D. & R. 464.

In U. S. *v.* Lyon, Whart. St. Tr. 336, the indictment being for a libel, the object of which was "to stir up sedition and to bring the President and the government of the United States into contempt," Judge Paterson, in charging the jury, said, "The only question you are to consider is that which the record submits to you. Did Mr. Lyon publish the writing given in the indictment? Did he do so seditiously? . . . . As to the second point you will have to consider whether language such as that here complained of could have been uttered with any other intent than that of making odious or contemptible the President and government, and bringing them both into disrepute." By the statute, afterwards repealed, under which this prosecution took place, "the jury have a right to determine the law and the fact, under the direction of the court, as in other cases." The salient point of the libel was as follows: "Whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice," etc. The defendant, then a member of Congress, was convicted, imprisoned, and fined. The prosecution, however, was impolitic, if within the letter of the statute; and was followed soon afterwards by the repeal of the statute and the overthrow of the party in power. "The bringing the government into contempt," alleged by the indictment, was done far more effectively by the prosecution than by the libel.

[4] *Supra*, § 119.

[5] See Brightly's Penn. Dig. 1631, citing Com. *v.* Reed, 30 Leg. Int. 424.

§ 1612 *a*. According to Sir J. F. Stephen, "Every one is guilty of a misdemeanor who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador, or other foreign dignitary, with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs."[1] No doubt this is the rule at common law, whenever the intent and effect are to stir up ill feeling with the power assailed. Such a prosecution may be instituted in a State court.[2] By

So of libels on foreign powers.

[1] Steph. Dig. C. L. art. 99. To this is appended the following note: "R. *v.* D'Eon, 1 Blac. 510; R. *v.* Lord G. Gordon, 22 St. Tr. 213–233. (This was the case of a libel on Marie Antoinette seven years after the defendant's acquittal for high treason.) R. *v.* Vint (1801). Vint wrote of the Emperor Paul, 'The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency.' Starkie, by Folkard, 669. R. *v.* Peltier, 28 St. Tr. 529; 6th Rep. C. L. Com. art. 50, p. 34."

[2] In Chief Justice McKean's charge to the grand jury of Philadelphia, in 1797, in view of the prosecution of Cobbett for libelling the Spanish minister, occurs the following:—

"At a time when misunderstandings prevail between the Republic of France and the United States, and when our general government have appointed public ministers to endeavor to effect their removal, and restore the former harmony, some of the journals or newspapers in the city of Philadelphia have teemed with the most irritating invectives, couched in the most vulgar and opprobrious language, not only against the French nation, and their allies, but the very men in power with whom the ministers of our country are sent to negotiate. These publications have an evident tendency, not only to frustrate a reconciliation, but to create a rupture, and provoke a war between the sister republics, and seem calculated to villify, nay to subvert, all republican governments whatever.

"Impressed with the duties of my station, I have used some endeavors for checking these evils, by binding over the editor and printer of one of them, licentious and virulent beyond all former example, to his good behavior; but he still perseveres in his nefarious publications; he has ransacked our language for terms of insult and reproach, and for the basest accusations against every ruler and distinguished character in France and Spain with whom we chance to have any intercourse, which it is scarce in nature to forgive; in brief, he braves his recognizance and the laws. It is now with you, gentlemen of the grand jury, to animadvert on his conduct; without your aid it cannot be corrected. The government that will not discountenance, may be thought to adopt it, and be deemed justly chargeable with all the consequences.

"Every nation ought to avoid giving any real offence to another. Some medals and dull jests are mentioned and represented as a ground of quarrel between the English and Dutch in 1672, and likewise called Louis the XIV. to make an expedition into the United Provinces of the Netherlands in the same year, and nearly ruined the commonwealth.

statute in England offences of this class are subjected to distinctive penalties.[1]

§ 1613. Libels on the legislature may be regarded not only as tending to breaches of the peace, but as high breaches of privilege.[2] They may also be punished as contempts. But while it may be proper to prosecute criminally the author of a libel charging a *legislator* with corruption, criticisms, no matter how severe, on a *legislature*, are within the range of the liberty of the press, unless the intention and effect be seditious.[3]

So of libels on legislature.

§ 1614. Intemperate reflections on the proceedings of courts of justice, when bringing public justice into contempt, are distinctively libellous.[4] As hereafter seen, it is libellous even to publish a correct account of judicial proceedings if accompanied with comments and insinuations tending to asperse a man's character.[5] It is libellous, also, to charge a judge or jury with malice or corruption.[6] But a constitutional guaranty of freedom of speech applies under the same limitations to the judiciary as to other officials.[7]

So of libels on courts.

§ 1615. Seditious words, though not in writing, are of themselves

"We are sorry to find our endeavors in this way have not been attended with all the good effects that were expected from them; however, we are determined to pursue the prevailing vice of the times with zeal and indignation, that crimes may no longer appear less odious for being fashionable, nor the more secure from punishment from being popular."

The indictment was ignored, so the prosecution went no further. See Whart. State Tr. 323, for full report.

[1] R. *v.* Most, L. R. 7 Q. B. D. 244, cited *supra*, § 179.

[2] See Sir W. W. Wynne, on the House of Commons. See, also, 1 Mod. 144; 2 Ld. Raym. 938; 1 Wils. 299; 8 Term R. 314; 14 East, 1. In this country may be noticed Wm. Ketalta's Case, Journ. Assembly of New York, 1795; George Clarke's Case, Ibid. 1810, Journ. of Senate; Jefferson Parliamentary Practice, § 3; Anderson's Case, Journ. of Congress, January, 1818. Compare discussion of Hansard's Case in Lord Denman's Life.

[3] *Infra*, § 1634.

[4] Holt's Law of Libel, 170; 1 Hawk. c. 73, s. 8; R. *v.* White, 1 Campb. 359, n.; R. *v.* Collins, 9 C. & P. 456; R. *v.* Staples, Andr. 228; Com. *v.* Snelling, 15 Pick. 321; Foster *v.* Com., 8 W. & S. 77. See Whart. Prec. 944.

[5] Com. *v.* Blanding, 3 Pick. 304; Thomas *v.* Croswell, 7 Johns. 264. A fair and strict report, however, is no libel. Lewis *v.* Walter, 4 B. & Ald. 605. See *infra*, § 1639.

[6] R. *v.* Spiller, 2 Show. 207; Com. *v.* Wright, 1 Cush. 46, and cases cited *supra*, § 1595.

As to justices of the peace, see R. *v.* Staples, Andr. 228.

[7] Storey *v.* People, 79 Ill. 45.

indictable when publicly uttered with malicious intent.[1] Great particularity, however, as in indictments for obscene or profane words, is requisite; for prosecutions of this class are perilous agencies, and should be kept within bounds. Thus, any variance in substance will be fatal; as where the words were set out in the indictment in the third person, "*He is*," etc., and proved to have been spoken in the second person, "*You are*," etc.;[2] and where the words set out imported they were spoken of a thing then present, and the words were proved to have been spoken of a thing not then present.[3]

Seditious words may be indictable.

§ 1616. Slanderous words spoken to a magistrate, when in the execution of his office, are of themselves indictable.[4]

§ 1617. Where the alleged libellous writing reflects on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is in almost all cases either directly or impliedly admitted by the libel itself;[5] proof that he was in the habit of acting as such officer or professional man would, in that case, be sufficient; but if the gist of the libel be that the prosecutor had acted in a particular office without proper appointment, it is said to be essential to prove such appointment.[6]

Public officer prosecuting need not prove his appointment.

[1] Cro. Jac. 407; 2 W. Blac. 790. Whart. Prec. 961; Whart. Cr. Pl. & Pr. § 203.

In the English Draft Code of 1879 we have the following:—

"Seditious words are words expressive of, or intended to carry into execution, or excite others to carry into execution, a seditious intention." As to this the commissioners say: "On this very delicate subject we do not undertake to suggest any alteration of the law. It is not easy to find explicit authority earlier than Frost's Case (22 St. Tr. 471, tried before Lord Eldon in 1793) for the proposition, that to speak seditious words is an indictable offence." Sec. 102.

[2] R. *v.* Berry, 4 T. R. 217. See *supra*, § 1609.

[3] Walters *v.* Mace, 2 B. & Ald. 756; Updegraff *v.* Com., 11 S. & R. 394. Compare R. *v.* Fussell, 3 Cox C. C. 291; R. *v.* Crowe, Ibid. 123.

[4] R. *v.* Pocock, 2 Str. 1157; R. *v.* Weltje, 2 Camp. 142; 2 Salk. 698. Whart. Cr. Pl. & Pr. §§ 203, 965.

[5] *Supra*, §§ 1570, 1589; Whart. Cr. Ev. §§ 164, 833; 4 T. R. 366; 1 B. & P. (N. R.) 196, 208; Jones *v.* Stevens, 11 Price, 235; Pearce *v.* Whale, 5 B. & C. 38.

[6] Whart. Cr. Ev. §§ 164, 835; Smith *v.* Taylor, 1 B. & P. (N. R.) 196; 11 Mod. 308; 4 M. & S. 548; 1 Ad. & El. 695; 3 Bing. 432. *Supra*, §§ 648 *et seq.*

V. PUBLICATION.

§ 1618. Publication of a libel is doing any act which is likely to expose its contents to another's observation.[1] Hence evidence which shows that a libel came to the hands of the person libelled[2] may amount inferentially to proof of publication.[3] Exhibition to a single person is enough; and this applies in cases of an obscene libel which such other person desires to see for the purpose of prosecution.[4]

To be seen by third person.

§ 1619. A publication consisting solely in exhibition to the party libelled is wanting in one of the necessary constituents of a libel; namely, exposure of the party libelled to public contempt. Hence, when the libel is in a sealed letter sent by mail, the indictment must charge that it was sent with

When libel is in sealed letter, intent to provoke breach of

[1] Com. *v.* Dorrance, 14 Phila. 671.

[2] R. *v.* Burdett, 4 B. & Al. 95; R. *v.* Wegener, 2 Stark. (N. P.) 245; R. *v.* Brooke, 7 Cox C. C. 251; State *v.* Avery, 7 Conn. 268; Hodges *v.* State, 5 Humph. 112; Swindle *v.* State, 2 Yerg. 581; State *v.* Hollon, 12 Lea, 482.

[3] R. *v.* Burdett, 4 B. & Al. 95; R. *v.* Wegener, 2 Stark. (N. P.) 245. See State *v.* Avery, 7 Conn. 268; Hazleton Coal Co. *v.* Megargel, 4 Barr, 324; Swindle *v.* State, 2 Yerg. 581.

According to Sir J. F. Stephen (Dig. Cr. L. art. 270), to publish a libel "is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to any person other than the person libelled, provided that the person making the publication knows, or has an opportunity of knowing, the contents of the libel [(submitted) if it is expressed in words, or its meaning if it is expressed otherwise.]"

"A libel, published in the ordinary course of the business of any person whose trade it is to deal in articles of the kind to which the libel belongs, is deemed to be published, not only by the person who actually sells or exhibits it, but also by his master, if his master has given him general authority to sell or exhibit for his master's profit articles of that kind.

"Provided, that whenever, upon the trial of any person for the publication of a libel, evidence has been given which establishes a presumptive case of publication against the defendant, by the act of any other person by his authority, the defendant may prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from any want of due care or caution on his part."

The law is thus given by the English Commissioners of 1879, Draft Code, p. 111:—

"Publishing a defamatory or other libel is exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by the person defamed, if any, or by any other person."

[4] R. *v.* Carlisle, 1 Cox C. C. 229. *Infra*, § 1828.

peace must be charged.

the intention of provoking a breach of the peace, or other misdemeanor.[1] But it has been held that the mere posting a sealed libel is an attempt.[2]

§ 1620. In cases of mailed libels, the defendant may be indicted for a publication either in the county in which the letter was mailed,[3] or in that to which it was directed. If a libel be written in one county, and sent by post addressed to a person in another county, or its publication in another county be in any way consented to, this is evidence of a publication in the latter county.[4] And if a libellous letter be sent by the post addressed to a party out of the county in which the venue is laid, but it is first received by him within that county, this is a sufficient publication.[5] Both the place of forwarding and the place of publication have, it seems, jurisdiction.[6]

Venue may be in place either of mailing or of delivery.

§ 1621. It is said, however, that the post-mark of a particular place within the county, upon a letter containing the libel, is no evidence of a posting in that county; for the post-mark might be forged.[7] But it would seem that post-marks are evidence that the letters on which they are printed were in the office post-marked, at the date thereby specified.[8] The better opinion is, that the post-mark is *primâ facie* evidence that the letter was put into the office at the place marked,[9] and that it was received by the person to whom it was addressed when the address is correct.[10]

Post-marks may be evidence of mailing.

[1] R. v. Wegener, 2 Stark. (N. P.) 245; Hodges v. State, 5 Humph. 112; 1 Hawk. c. 73, s. 11. That a postal card is a publication, see Robinson v. Jones, 20 Alb. L. J. 202.

[2] Hodges v. State, *ut sup.*

[3] R. v. Burdett, 4 B. & Al. 95; U. S. v. Worrall, 1 Dall. 388; Whart. St. Tr. 189; Com. v. Dorrance, 14 Phila. 671. See, fully, *supra*, § 288; and see, particularly, Whart Cr. Ev. § 113.

[4] Seven Bishops' Case, 12 How. St. Tr. 331, 332; R. v. Jones, 4 Cox C. C. 198; 1 Den. C. C. 551; Whart. Cr. Ev. § 113.

[5] R. v. Watson, 1 Camp. 215.

[6] *Supra*, § 288. See 22 Albany L. J. 505; 6 Crim. Law. Mag. 175.

[7] Ibid. See Whart. on Ev. § 1325.

[8] See R. v. Plumer, R. & R. 264; R. v. Johnson, 7 East, 65.

[9] R. v. Johnson, 7 East, 65; Fletcher v. Braddyll, 3 Stark. (N. P.) 64; 2 Stark. on Slan. 36, 38; and see cases in Whart. on Ev. § 1325.

[10] Shipley v. Todhunter, 7 C. & P. 680; Warren v. Warren, 4 Tyrw. 850; New Haven Bk. v. Mitchell, 15 Conn. 206; Callan v. Gaylord, 3 Watts, 321; 2 Greenl. on Ev. § 416.

§ 1622. Selling the libel to the agent of the person libelled is publication.[1] So the delivery of a newspaper to the officer of the stamp-office is a sufficient publication to sustain an indictment for a libel in that paper, inasmuch as the officer would at all events have an opportunity of reading the libel himself.[2]

Selling is publication.

§ 1623. A party who communicates libellous matter to another, with a view to its publication, is guilty of publishing, on the principle that in misdemeanors all participants are principals.[3] And one who furnishes the facts of a libel published in a paper, and consents to its publication, is indictable for the libel.[4]

Instigator is principal.

§ 1624. Printing is not sufficient proof of publication, as the writer may have acted as compositor and pressman himself.[5]

Printing not *per se* publication.

§ 1625. Where a libel was published in a newspaper printed in the State of Rhode Island, but which usually circulated in a county in Massachusetts, and the number containing the libel was actually circulated in such county, it was held that this was evidence of a publication in such county.[6]

Circulation proof of publication.

§ 1626. The identical libel published must be produced; though where it is in the prisoner's exclusive possession, or has been lost or destroyed, or where, from other circumstances, its production is out of the power of the prosecutor, then, as in other cases of non-producible papers, secondary evidence is admissible of its contents.[7]

Of non-obtainable libel parol proof is admissible.

§ 1627. Evidence that the libel was purchased in a bookseller's shop, or at a newspaper office, or the office of a newsvendor, of a servant there, in the course of business, will at common law maintain a count, charging the master with having published it,[8] even though it be proved that the master

Master responsible for servant.

[1] Brunswick v. Harmer, 14 Q. B. 185.

[2] R. v. Amphlit, 6 D. & R. 126; 4 B. & C. 35.

[3] Adams v. Kelly, R. & M. (N. P.) 157; R. v. Cooper, 8 Q. B. 533; Clay v. People, 86 Ill. 147.

[4] Clay v. People, 86 Ill. 147.

[5] R. v. Lovett, 9 C. & P. 462.

[6] Com. v. Blanding, 3 Pick. 304.

[7] Johnson v. Hudson, 7 Ad. & El. 233; Huff v. Bennett, 2 Sand. 703; Whart. Cr. Ev. § 199.

[8] *Infra*, § 1649; 4 Bac. Abr. Libel, b. 2; R. v. Almon, 5 Burr, 2686; Com. v. Morgan, 107 Mass. 199. See Com. v. Gillespie, 7 S. & R. 469, per Duncan, J.

was not privy to it,[1] though the better view is that the publisher is not responsible unless negligent.[2]

[1] R. *v.* Walter, 3 Esp. 21; R. *v.* Gutch, M. & M. 433; Atty.-G. *v.* Sidden, 1 C. & J. 220; Com. *v.* Willard, 9 Weekly Notes, 524. See fully *supra*, §§ 246 *et seq.*

[2] *Infra*, § 1649.

Under Lord Campbell's Act (6 & 7 Vict. c. 96), the publisher is not responsible for his servant's independent act, in cases where the master is non-negligently ignorant of the act. Under this act, on the trial of a criminal information against the defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed, named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants, it was ruled by Cockburn, C. J., and Lush, J., that there must be a new trial; for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendant's authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part. It was held by Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6 & 7 Vict. c. 96, s. 7, had no application to the facts proved; and that the case was properly withdrawn from the jury. R. *v.* Holbrook, L. R. 3 Q. B. D. 60; 14 Cox C. C. 185. For second trial, see *infra*, § 1649; compare London Law Times, Nov. 15, 1879, p. 48. And see R. *v.* Alexander, 71 London Law T. (Journ.) 41.

In R. *v.* Foote (and Ramsay), 48 L. T. N. S. 733, Lord Coleridge, C. J., in charging the jury, said: "As to the matter of publication, the law has been altered in most important respects by a statute passed early in the reign of the present queen—6 & 7 Vict. c. 96. It used to be the law that the proprietor of a newspaper was criminally, not merely civilly, but criminally responsible for a libel inserted in his paper, and that a bookseller or publisher was criminally responsible for a libel in any book which was sold or published under his authority, even though the newspaper proprietor, or the bookseller or publisher did not know of or authorize the insertion of any libel, and did not even know of its existence. But this in the criminal law was an anomaly and a grievance which the statute I have referred to was, in its seventh section, intended to remedy. That section came to be considered in the case of Reg. *v.* Holbrook, in which a gross libel on the town Clerk of Portsmouth had been published in a Portsmouth newspaper. The case was twice tried at Winchester, first before Lord Justice Lindley, and secondly before Mr. Justice Grove. On each occasion the ruling of the judge who tried the case, was questioned in the Queen's Bench in the time of my predecessor in this seat; on such occasion by the same three judges, Lord Chief Justice Cockburn, and Mellor, and Lush, JJ.; on each occasion there was the same difference of opinion, the Lord Chief Justice, and Lush, J., holding one way, and Mellor, J., the other. But, notwithstanding this difference of opinion, the case is a binding authority upon me, and I lay down the law to you in the terse and clear language of Mr. Justice Lush. 'The effect of the statute,' says he (4 L. R. Q. B. 60), 'read by the light of previous decisions, and read so as to make it remedial, must be, that an authority from the proprietor of a newspaper to the editor or publisher to publish what is libellous, is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the act the only question of fact was, whether the defendant authorized the publication of the paper, now it is whether he authorized the publication of the libel. . . . Criminal intention is not to be presumed, but is to be proved, and in the absence of evidence to the contrary, a person who employs another to do a lawful act, *i. e.*, to publish, is to be taken to authorize him to do it in a lawful and not in an unlawful manner.' Such is now the law laid down in admirable language by great authority, and it is for you to say whether according to the law as so laid down these defendants (either or both of them) did or did not authorize the publication of these libels."

In Com. *v.* McClure, 3 Weekly Notes, 58, it was held that under a provision in the Pennsylvania Constitution, where a libel relates to matter proper for public investigation, and is published without negligence or malice, the publisher is not responsible. See *supra*, §§ 246 *et seq.*

[1] Com. *v.* Guild, Thach. C. C. 329; Townsh. on Sland. 495 *a*.

[2] Seven Bishops' Case, 12 How. St. Tr. 331. See Whart. on Ev. §§ 623 *et seq.*

[3] *Supra*, §§ 91 *et seq.*

[4] R. *v.* Watson, 2 T. R. 199; State *v.* Atchison, 3 Lea, 729. *Supra*, § 173.

This was a case of a newspaper corporation whose organ called the prosecutors "a scoundrelly ring." Unless the position in the text be sustained, all that would be necessary to give impunity to libels would be to have them published by corporations.

[5] Sir J. F. Stephen, in note xvi. to his Dig. of Cr. Law, says:—

"The word 'malicious,' in reference to the offence of libel, has been elaborated by the judges into a whole body of doctrine on the subject, in the same sort of way as the words 'malice aforethought,' in the definition of murder.

"The process was of this sort. Malice was first divided into malice in fact and malice in law—malice in fact being personal spite, and malice in law being

§ 1628. The admission of the defendant himself, of the fact of his concern in the libel, is sufficient,[1] but does not prove that he published it in a particular county.[2] Admissions may prove libel.

§ 1628 *a*. Corporations, in conformity with the rules heretofore given,[3] may be indicted for libel.[4] Corporations.

VI. WHAT COMMUNICATIONS ARE PRIVILEGED.[5]

1. *From the Relation of the Parties.*

§ 1629. A publication, though defamatory, yet if written *bonâ fide*, or in confidence, or with a view of investigating a fact in which

Bonâ fide confidential personal communications are privileged.

the party making it is interested, may not be a libel.[1] A person, also, has a right to communicate to another any information he is possessed of in a matter in which they have a mutual interest, if there be no malice or officiousness.[2]

defined to be 'a wrongful act done intentionally, and without just cause or excuse.'

"Inasmuch as the publication of a libel must always be intentional, and inasmuch as the courts held that to publish defamatory matter of another was, generally speaking, a wrongful act, the result of this was that every publication of defamatory matter was a crime unless there was some just cause or excuse for it. What amounts to a 'just cause or excuse' was decided by a multitude of cases. The phraseology employed in their decisions has been as follows: Defamatory matter which it was considered lawful to publish has been described as a 'privileged communication.' This 'privilege' has been regarded as rebutting the presumption of malice arising from the fact of publication; and it has further been divided into absolute privilege and qualified privilege: absolute, if it justifies the publication, whatever may be the state of mind of the publisher; qualified, if it justifies such publication only under particular circumstances, as, for instance, when the publisher in good faith believes the defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public good, etc.

"The law thus falls into the singular condition of a see-saw between two legal fictions—implied malice on the one hand, and privilege, absolute or qualified, on the other.

"I will give a single instance of the intricacy to which this leads. A. writes of B. to C., 'B. is a thief.' Here the law implies malice from the words used. It appears that B. was a servant, who had been employed by A., and was trying to get into C.'s employment, and that A.'s letter was in answer to an inquiry from C. Here the occasion of publication raises a qualified privilege in A., namely, the privilege of saying to C. that B. is a thief, qualified by the condition that A. really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. B., however, proves not only that he was not a thief, but that A. must have known it when he said that he was. This raises a presumption of express malice, or malice in fact, in A., and proof of the existence of express malice overturns the presumption against implied malice raised by the proof of the qualified privilege.

"This machinery of express and implied malice, and qualified and absolute privilege, is only a roundabout and intricate way of saying that, as a

[1] See *infra*, § 1643.

[2] See Moore *v.* Terrill, 4 B. & Ad. 871; 1 N. & M. 559. Thus, a letter from a son-in-law to his mother-in-law, volunteering advice about her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication, and not actionable, unless malice be shown. Todd *v.* Hawkins, 2 M. & R. 20; 8 C. & P. 88. See Heme *v.* Bentinck, 2 B. & B. 130; Townsh. on Sland. 322.

§ 1630. *Meddlesomeness* is the test in respect to purely volunteer communications. If a communication be merely meddlesome—if it be not dictated by common interests or by any distinctive personal duty—then the privilege cannot be invoked.[1] In other words, "The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided that the publication does not exceed, either in extent or in manner, what is reasonably sufficient for the occasion."[2]

Meddlesomeness is the test.

general rule, it is a crime to publish defamatory matter; that there are, however, certain exceptions to that rule, by virtue of which it is not a crime to defame a man:—

"(*a*) If the defamatory matter is true, and its publication is for the public good.

"(*b*) Although the defamatory matter is false,

"(i.) If the libeller, in good faith, believes it to be true, and publishes it for certain specified reasons;

"(ii.) Although he knows it to be false, if he publishes it in a particular character.

"By working out this scheme, and stating in general terms that the publication of a libel is always malicious unless it falls within one or more of the specified exceptions, the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient, and proximately complete, the scaffold may be taken down."

[1] Shipley *v.* Todhunter, 7 C. & P. 680. The following are among the leading cases on this point.

Where B., a tradesman, is dismissed from serving A., one of his customers, A. stating as the reason of it that B. charged for goods never delivered, and B. after this writes a letter to A. vindicating himself, and imputing the dishonesty to a servant of A., this is a privileged communication, if it be done *bonâ fide*, and without malice. Compare, however, Coward *v.* Wellington, 7 C. & P. 531.

A. had sold goods to B., a tradesman, and before the delivery of them, C., without being asked or solicited in any way to do so, spoke words injurious to the credit of B., as a tradesman, this was held not a privileged communication; but if he had been asked by A. as to the credit of B., it would have been so. R. *v.* Watts, 8 C. & P. 614. See McDougall, *v.* Claridge, 1 Camp. 267; Storey *v.* Challands, 8 C. & P. 234.

[2] Steph. Dig. C. L. art. 278.

When the existence of the relation establishing the duty has been proved, the burden of proving that the state-

§ 1631. A master applied to for the character of a servant is privileged to give what he *bonâ fide* and non-negligently conceives to be a rightful answer; and no action lies in such case for such answer.[1] But it is otherwise where a false answer is given maliciously.[2]

Master's character of servant is privileged.

§ 1632. Public policy requires that the officers of all trusts, whether religious, charitable, or financial, should be closely watched by the governing bodies of such trusts. Hence *bonâ fide* communications from a director or member of any society exercising such trust, to a fellow director or member, as to the character of an officer or candidate for office, are privileged.[3] A communication from a charitable board as to the merits of an applicant for charity, is on the same footing.[4] The question of good faith is for the jury.[5] If there be malice, privilege may be no defence.[6]

So of *bonâ fide* communications by directors of companies.

ment was not honestly believed to be true is upon the prosecutor. Ibid.

Reasonableness of belief is immaterial when a communication is privileged. Clark *v.* Molyneux, 14 Cox C. C. 10.

[1] Hargrave *v.* Le Breton, 4 Burr. 2425; Pattison *v.* Jones, 3 Man. & R. 101; 8 B. & C. 578; Child *v.* Affleck, 9 Ibid. 403; 4 Man. & R. 338; 1 M. & P. 33, 61, 692.

[2] Kelly *v.* Partington, 4 B. & Ad. 700; 2 N. & M. 460.

Sir J. F. Stephen (Dig. C. L. art. 273) illustrates the topic in the text as follows:—

"A. being asked the character of B., who had been in his service, by C., who is about to engage B. as a servant, writes of B., in a letter to C., the words 'B. is a drunkard and a thief.' If A. honestly and on reasonable grounds believes that B. is a drunkard and a thief, though in fact he is neither, this is not a libel.

"If A. published this letter in a newspaper it would be a libel.

"As soon as the circumstances under which the letter was written are proved or appear, the burden of proving that A. did not honestly and on reasonable grounds believe B. to be a drunkard and a thief is upon B., in a prosecution or action by B. Beatson *v.* Skene, 5 H. & N. 838."

[3] Blackburn *v.* Blackburn, 4 Bing. 395; 1 M. & P. 33, 63; 3 C. & P. 146; Thompson *v.* Shackell, M. & M. 187; Green *v.* Chapman, 5 Scott, 340; 4 Bing. (N. C.) 92; Kelly *v.* Tinling, L. R. 1 Q. B. 699 (a case of a church warden criticizing a clergyman); though see Martin *v.* Strong, 1 N. & P. 29; 5 Ad. & El. 535. As to church discipline, see *infra*, § 1641. In Phil. etc., R. R. *v.* Quigley, 21 How. 202, it was held that a report of a committee of stockholders, containing defamatory matter, lost its privilege by being published.

[4] Waller *v.* Lock, 44 L. T. (N. S.) 212.

[5] Gassett *v.* Gilbert, 6 Gray, 94.

[6] Bodwell *v.* Osgood, 3 Pick. 379. But see *infra*, § 1654.

§ 1632 *a*. A business publication, which becomes necessary in a particular juncture of a party's affairs, may be privileged on the ground of necessity,[1] though it might otherwise be libellous. This is the case with an advertisement, by a party *bonâ fide* and reasonably believing notes to have been fraudulently obtained from him, notifying the public to this effect.[2] But it is otherwise when such publication is unnecessary.[3]

So of *bonâ fide* business publications.

§ 1633. A circular letter, sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication.[4] The test in such cases, and also in cases relative to commercial agencies, is that already invoked. If the communication be a *bonâ fide* reply to a business correspondent seeking for information, it is privileged.[5] If it be an officious address, purely volunteer, and sent unasked, there is no privilege. It follows that a commercial agency is not privileged to communicate to its subscribers information prejudicial to a party as to whom no inquiry was made.[6]

So of communications by commercial agencies, etc.

2. *From Public Policy.*

§ 1634. The defendant may show that the alleged libel formed part of a speech delivered by him as a member of a legislature; and

[1] See *supra*, § 95.

[2] Com. *v.* Featherston, 9 Phila. 594.

[3] Com. *v.* Sanderson, 5 Clark (Pa.), 54. See Com. *v.* Odell, 3 Pitts. R. 449.

[4] Getting *v.* Foss, 3 C. & P. 160. See Ward *v.* Smith, 6 Bing. 749.

[5] See Trussell *v.* Scarlett, 18 Fed. Rep. 214 and note.

[6] Com. *v.* Stacy, 8 Phila. 617.

"A business," said Allison, J., "such as that conducted by the defendant, if properly managed, may be of the greatest service to the business men of the country; but if carried on with a reckless disregard of the rights of others may be converted into an evil against which no man can protect himself. . . . . There is no great hardship imposed on an agency of this kind, if they are required to know beforehand that their statements are true, and *that the persons to whom they are sent have an interest in receiving the information;* and this could be accomplished by requiring every subscriber to furnish to the agency from time to time the names of the firms with whom they had established business relations, or who may apply to them for credit." Com. *v.* Stacey, 8 Phila. 621; S. P. State *v.* Lonsdale, 48 Wis. 348, where privilege in such cases is recognized, otherwise as to volunteer or non-confidential communications. Sunderlin *v.* Bradstreet, 46 N. Y. 188.

this privilege extends to the subsequent faithful report of his speech in a public newspaper.[1] So he may prove that the matter alleged to be libellous was contained in a petition to, or testimony before the legislature, or was a part of the proceedings of the legislature; though this has been ruled to be no excuse for an extrinsic publication wantonly malicious.[2] In England, in a case of great political celebrity, this law was reiterated by the Queen's Bench, and it was maintained that a publication which was *per se* a malicious libel could not be defended on the ground that it was directed by parliament.[3] Upon this was enacted the statute of 31 Vict. c. 23, making publication by direction of parliament a defence.[4]

So of legislative speeches and proceedings.

In the United States, in view of the vast benefit arising from full and faithful reports of the proceedings of the legislatures, both federal and State, we must conclude that the fact that a publication is a report of legislative proceedings, fairly and fully made, is an absolute bar. For it is only by a fair and full report of legislative action that the people are able to exercise a wise control over their representatives, and the due dignity and propriety of the representative body can be maintained. A legislature sitting in secret has great temptation to transcend its own bounds and invade private rights; and a legislature would be practically invested with secrecy if it was an indictable offence to publish its proceedings whenever those proceedings were offensive. In maintaining this great principle, as in the case of judicial reports to be hereafter noticed, the incidental annoyance to individuals must be overlooked.[5] But this reasoning does not apply to extracts maliciously made out of the range of the ordinary reports.

[1] Wason *v.* Walter, L. R. 4 Q. B. 73, qualifying R. *v.* Creevey, 1 M. & S. 273; R. *v.* Lord Abingdon, 1 Esp. 226; Coffin *v.* Coffin, 4 Mass. 1, 31; Com. *v.* Blanding, 3 Pick. 304.

[2] 1 Hawk. c. 73, s. 7. See Fairman *v.* Ives, 1 D. & R. 252; R. *v.* Lee, 5 Esp. 123; M'Gregor *v.* Thwaites, 3 B. & C. 24; 5 D. & Ry. 447; Townsh. on Sland. 342; Home *v.* Bentinck, 2 B. & B. 130 (though see Dickson *v.* Lord Wilton, 1 F. & F. 419); Goffin *v.* Donelly, 44 L. T. N. S. 141; Com. *v.* Clap, 4 Mass. 163; Com. *v.* Morris, 1 Va. Cas. 176.

[3] Stockdale *v.* Hansard, 11 Ad. & El. 253; 2 Per. & D. 346. A full discussion of this remarkable case will be found in Lord Denman's Life.

[4] See 11 Ad. & El. 297; 3 Per. & D. 346.

[5] See Davison *v.* Duncan, 7 E. & B. 229; Wason *v.* Walter, L. R. 4 Q. B. 95, argument of Cockburn, C. J.; Stanton *v.* Andrews, 5 Up. Can. (Q. B.) 221.

§ 1635. Personal censures, when within the proper limit of an official report, are privileged. Eminently is this the case in the military service, where the public safety requires that official duty in this respect should be fearlessly performed. So far has this been pushed in England, that it has been ruled by the Queen's Bench that the report of a military officer is privileged, even though made without probable cause.[1] But such publication becomes libellous when directed to parties disconnected with government.[2]

So of official reports.

§ 1636. Communications to a governor or other appointing power are privileged, if they do not contain malicious defamatory fabrications, or if they have such probable cause as may operate to show absence of malice.[3]

So of communications to electing or appointing power as to candidate.

A communication, however, to the public at large, in a newspaper, as to the qualifications of a candidate for office, the appointment to which is made by a board of limited number, does not stand on the same footing of privilege as if addressed to the appointing power.[4]

But pertinent criticisms on the character of a candidate for popular election, addressed to the electors, are held privileged,[5] if relating to an election and to his official character,[6] though the privilege does not extend to publications made outside the electoral body.[7] The privilege cannot protect where malice or negligence is shown.[8]

§ 1637. Counsel in the discharge of their duty, and in matters relative to the issue, may make observations injurious to indivi-

[1] Dawkins *v.* Lord Paulet, L. R. 5 Q. B. 94, Cockburn, C. J., dissenting; Beatson *v.* Skene, 5 H. & N. 838. See Dawkins *v.* Lord Rokeby, L. R. 8 Q. B. 255; Home *v.* Bentinck, 2 B. & B. 130; R. *v.* Abingdon, 1 Esp. 226.

[2] Harwood *v.* Green, 3 C. & P. 141.

[3] Harwood *v.* Green, 3 C. & P. 141; Thorn *v.* Blanchard, 5 Johns. 508; Com. *v.* Morris, 2 Wheel. C. C. 465; 1 Va. Cas. 176; Gray *v.* Pentland, 2 S. & R. 23; S. C., 4 S. & R. 420; Flitcraft *v.* Jenks, 3 Whart. 158. Compare Harrison *v.* Bush, 5 E. & B. 344; Curtis *v.* Mussey, 6 Gray, 261; Rogers *v.* Spalding, 1 Up. Can. (Q. B.) 258; Stanton *v.* Andrews, 5 Ibid. 311; Com. *v.* Odell, 3 Pitts. R. 449.

[4] Hunt *v.* Bennett, 19 N. Y. 173.

[5] See cases cited above; though see, as limiting this view, Aldrich *v.* Press Co., 9 Minn. 133. That a criticism of persons speaking at the hustings is privileged, see Davis *v.* Duncan, L. R. 9 C. P. 396.

[6] Com. *v.* Wardwell, 136 Mass. 164. See Briggs *v.* Garrett, Leg. Int., Jan. 11, 1884.

[7] State *v.* Balch, 31 Kan. 465.

[8] Com. *v.* Singerly, 15 Phila. 368.

duals, and publish the same when required by professional duty,[1] but the publication of such slanderous matter is not justifiable, unless it is shown that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence.[2]

So of professional publications by counsel.

The same reasoning prevents the defence of privilege from being maintained by counsel who publish defamatory speeches made by them on trial.[3]

"Neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case in court, the court will take notice of them as a contempt and examine on information."[4]

§ 1638. Libel cannot be maintained for works spoken or deposed on trial, no matter how malicious.[5]

And so of evidence of witnesses on trial.

§ 1639. It is lawful, also, to publish the history of a litigated case, consisting of the facts in evidence, and of the law as applied to those facts.[6] Hence it is lawful to publish the fact that an individual was arrested, and the charge made against him, though the publisher has no right, while the charge is in the course of investigation, to assume

And so of legal proceedings.

[1] Hodgson v. Scarlett, 1 B. & Ald. 232.

[2] Flint v. Pike, 6 D. & R. 528; 4 B. & C. 473; Com. v. Clap, 4 Mass. 163; Com. v. Culver, 1 Clark (Pa.), 361; 2 Penn. L. J. 359.

Thus, it was held indictable for a member of the bar, in an affidavit filed of record, wantonly to charge J. G. with fornication. Com. v. Culver, *ut supra*. So, where one acting as counsel prepared and presented a declaration, in which were inserted allegations that the defendant was "reputed to be fond of sheep, bucks, and ewes, and of wool, mutton, and lamb," and to be "in the habit of biting sheep;" and it was added, that "if guilty, he ought to be hanged or shot;" it was held that an indictment charging such matter as libellous, and alleging malice, was good on demurrer. Gilbert v. People, 1 Denio, 41.

[3] R. v. Creevey, 1 M. & S. 273; Com. v. Godschalk, 13 Phila. 575. See Snyder v. Fulton, 34 Md. 128.

[4] Lord Mansfield in R. v. Skinner, Lofft. 55, adopted by Fry, L. J., in Munster v. Lamb, 49 L. T. (N. S.) 258.

[5] Henderson v. Broomhead, 4 H. & N. 569; Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255; 4 F. & F. 806; Seaman v. Netherclift, L. R. 1 C. P. D. 540, cited at large in Whart. on Ev. § 722.

[6] Wason v. Walter, L. R. 4 Q. B. 73; Ryalls v. Leader, L. R. 1 Exch. 296; Usill v. Hales, L. R. 3 C. P. D. 206, 319.

that the accused is guilty.[1] Even though the report contain irrelevant statements defaming a stranger, this is no libel if the report be fair.[2] The privilege of the publisher, however, does not avail if an unfair summary of the evidence be given.[3] And a publication of proceedings in a court of justice, containing defamatory matter, would be a libel, if the account be highly colored or false;[4] or be commented upon with scandalous remarks and insinuations;[5] or be *ex parte*;[6] or where the publication is not for the purpose of making a true report,[7] but maliciously for libelling the party, or as a vehicle

[1] R. v. Fleet, 1 B. & Ald. 379; R. v. Lee, 5 Esp. 123; Wason v. Walter, L. R. 4 Q. B. 73; Usher v. Severance, 20 Me. 9.

[2] Ryalls v. Leader, L. R. 1 Exch. 296.

[3] R. v. Abingdon, 1 Esp. 726; Saunders v. Mills, 6 Bing. 213; Lewis v. Walter, 4 B. & Ald. 605. See Roberts v. Brown, 10 Bing. 519.

[4] Waterfield v. Bishop of Chichester, 2 Mod. 118; Stiles v. Nokes, 7 East, 493; Pittock v. O'Neill, 63 Penn. St. 253.

[5] Lewis v. Clement, 3 B. & Ald. 702; S. C. in error, 7 Moore, 100; 2 B. & B. 257; 1 Price P. C. 181; Stile v. Nokes, 7 East, 493; R. v. Fleet, 1 B. & Ald. 379; R. v. Fisher, 2 Camp. 563; R. v. Lee, 5 Esp. 123; Clark v. Binney, 2 Pick. 113; Com. v. Blanding, 3 Ibid. 304; Thomas v. Croswell, 7 Johns. 264.

[6] Saunders v. Mills, 6 Bing. 213; 3 N. & P. 520; R. v. Fisher, 2 Camp. 563; R. v. Fleet, 1 B. & Ald. 379. When there is an order of court made that a report of the proceedings should not be published, a subsequent publication is indictable. Graves v. State, 9 Ala. 447. See R. v. Gilham, M. & M. 165. In Cowley v. Pulsifer (Mass. 1884), it was held that this defence could not be set up as to a petition not filed and docketed.

[7] In Stevens v. Sampson, 27 W. R. 86, 41 L. T. (N. S.) 782, the defendant, who was not a reporter or otherwise connected with the press, sent to a newspaper a report of certain proceedings in a county court. The report contained matter defamatory of the plaintiff, and in an action brought by him against the defendant for the libel, the jury found that the report was a fair and substantially accurate one, but was sent with a certain amount of malice. It was ruled that the plaintiff was entitled to judgment upon these findings.

"The argument," said Lord Coleridge," C. J., "has arisen from the peculiar form of verdict given at the trial. To the question put by the learned judge whether the defendant sent this report to the papers honestly and with the purpose of furnishing information to the public on a matter on which he thought they ought to be informed, or from a desire to injure the plaintiff, the jury returned that it was a substantially accurate and fair report, though sent by the defendant to the paper with a certain amount of malice. Now, in my opinion, there are no shades of malice; if any malice exists it is sufficient to do away with privilege. I think that upon the findings judgment has been properly entered for the plaintiff. In every case in which the defence of privilege is relied on, the defendant must show,

of blasphemy, indecency, or the like.[1] The fairness of the report is a question for the jury.[2] But with these qualifications the policy of the law is to encourage full reports of judicial proceedings in the daily press. In this way public attention is given to litigated issues, and important evidence frequently elicited; the people generally are practically instructed in the law of the land; and a large auditory secured, by which the decorum of bench and bar is in no small degree improved. To these great public ends the occasional private inconvenience to individuals must yield.[3]—What has been said applies with increased strength to papers addressed to a court. It is not libellous to present charges as a basis for legal action to a court of justice having jurisdiction, and this rule holds good even in cases in which the party making the statement makes it maliciously, knowing it to be false.[4]

not only that the occasion was privileged, but also that he made use of the occasion in a *bonâ fide* manner and without malice. In this case the second element is wanting, for the jury have found that there was a certain amount of malice. Privileged communications are divided into those which are absolutely privileged, such as the statements made by judges, counsel, or witnesses in courts of justice, and those which are privileged only where the communication is made without actual malice. This is the first attempt to include the report, though fair, of proceedings in courts of justice containing defamatory matter in the first category. For myself I do not feel disposed to extend the cases of absolute privilege."

Bramwell, L. J., added: "This is a libel, and the only defence set up is that it is privileged. That being so, it is for the defendant to show that he acted on that privilege. It is found that he did not; then the privilege fails him. In the case of a master being applied to for the character of a servant, the answer, if honestly made, would be privileged, even though he entertained some ill-will towards the servant. So if an ordinary reporter, bearing malice towards a party to any legal proceedings, reported the true report of those proceedings, would he be liable because of that ill-will? I think he would be said to be acting under his duty there; but here the defendant was an entire volunteer, and had no duty whatever cast upon him to make these proceedings public, which is a distinction."

[1] R. *v.* Carlile, 3 B. & Ald. 161; R. *v.* Creevey, 1 M. & S. 279; Lake *v.* King, 1 Saund. 131, 133.

[2] Cooper *v.* Lawson, 1 P. & D. 15; 8 Ad. & El. 746, S. C.; Gompertz *v.* Levy, 1 P. & D. 214; Lewis *v.* Levy, E., B. & E. 551.

[3] See remarks of Cockburn, C. J., Wason *v.* Walter, L. R. 4 Q. B. 87, 88.

[4] Steph. Dig. C. L. art. 276, citing Cutter *v.* Dixon, 4 Co. 14 *b*; Henderson *v.* Broomhead, 4 H. & N. 569; Dawkins *v.* Rokeby, L. R. 7 H. L. 744; Dawkins *v.* Paulet, L. R. 5 Q. B. 94.

§ 1640. Every man has a right to give every public matter a candid, full, and free discussion; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, or is limited to a *bonâ fide* statement of public abuse or wrong, allowing something for the ordinary bias of partisanship, that will be no libel; but if a paper go beyond this limit, and be calculated to excite tumult, or by its bitterness to provoke an assailed party to violence, it is a libel.[1]

So of criticisms of public abuse and wrong, and of literary and artistic criticism.

It is also ruled that it is not libellous to publish a fair comment upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism. To constitute fairness, it is requisite that the comment should be either true, or if false, should express the real opinion of its author (as to the existence of matter of fact, or otherwise), such opinion having been formed with a reasonable degree of care, and on reasonable grounds. Malice, however, in either case, may rebut fairness.[2] It is further held that every person who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits that book, or literary production, or work of art, or advertisement, to public criticism, and every person who takes part in any dramatic performance, or other public entertainment, submits himself to public criticism to the extent to which he takes part in it.[3]

§ 1641. Privilege extends to publications made *bonâ fide* and without malice in the exercise of ecclesiastical discipline.[4] And where a member of a church consents that the church shall investigate any complaint which may be preferred against him in writing, by a person not a member, it has been held that such a complaint is not libellous, unless shown to have been made without probable cause, or as a pretence and cover for the design of slandering.[5] And so is it with charges

And so of discipline by voluntary societies.

[1] R. *v.* Collins, 9 C. & P. 456; Kelly *v.* Tinling, L. R. 1 Q. B. 699.

[2] But see *infra*, § 1654.

[3] Steph. Dig. C. L. art. 274, citing Dibdin *v.* Swan, 1 Esp. 28; Henwood *v.* Harrison, L. R. 7 C. P. 606; Carr *v.* Hood, 1 Camp. 354; Thompson *v.* Shackell, M. & M. 187; Jenner *v.* A'Beckett, L. R. 7 Q. B. 11.

[4] Shurtleff *v.* Stevens, 51 Vt. 501.

[5] Remington *v.* Congdon, 2 Pick. 310. See Bradley *v.* Heath, 12 Ibid. 163. So as to charges preferred in Friends' meeting; R. *v.* Hart, 1 W. Bl. 386; and as to charges against officers of churches or societies, *supra*, § 1632.

preferred *bonâ fide* by one member of an Odd Fellows society against another.[1]

The publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged; although it speaks of the expelled member as "the offender," and remarks that "the society has vindicated its action in this case, and its right to act in all parallel cases."[2]

So of publications in legitimate self-defence.

§ 1641 *a*. It may, also, happen that a person when attacked cannot, when defending himself, make out his case without aspersions on his assailant which, though true, might, if volunteered without this excuse, be held libellous. In such case the reply, if made honestly and without malice, is privileged.[3]

3. *Practice when Privilege is set up.*

Question of privilege for court.

§ 1642. When privilege is set up as a defence, the proper course, it is said, is for the judge to ask the jury whether the matter was published *bonâ fide;* and if they find it was, then it is for the judge to say whether the privilege is made out. It is error to leave the question of privilege to the jury.[4]

VII. TRUTH, WHEN ADMISSIBLE.[5]

§ 1643. At common law the general rule is, that the truth is inadmissible as a defence in a criminal prosecution for a libel,[6] though

[1] Streety *v.* Wood, 15 Barb. 105.

[2] Barrows *v.* Bell, 7 Gray, 301.

[3] Koenig *v.* Ritchie, 3 F. & F. 413; R. *v.* Veley, 4 Ibid. 1117; Com. *v.* Pavitt, Leg. Int., Nov. 30, 1883.

[4] Stace *v.* Griffith, L. R. 2 P. C. App. 428, by Lord Chelmsford.

[5] By a statute of the United States, applicable to the District of Columbia, "the truth may be given in evidence under the general issue as a justification of the alleged libel; and if it appears that the matter charged as libellous was true, or published with good motives or justifiable ends, the defendant shall be acquitted." Stat. Feb. 25, 1865.

A similar provision existed in the federal sedition act, passed in the administration of John Adams, and now repealed.

In Massachusetts: "In every prosecution for writing or for publishing a libel, the defendant may give evidence, in his defence upon a trial, of the truth of the matter contained in the publication charged to be libellous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall further be made to appear on the trial that the matter, charged to be libellous, was published with good motives, and for justifiable ends." Rev. Stat. Mass. c. 133, § 6.

Under this section, the burden is on the defendant, not only to prove the truth of the matter so charged, but also that it was published with good motives and for justifiable ends. Com. *v.* Bonner, 9 Met. 410.

In New York, "No reporter, editor, or proprietor of any newspaper, shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, of any statement, speech, argument, or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication." Laws of N. Y. 1845, c. 130, § 314.

"Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor, from an action or indictment for any libellous comments or remarks superadded to and interspersed or connected with such report." Ibid. § 2.

The Constitution of New York provides: "In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." Art. 7, § 8. Similar provisions exist in the Constitutions of Mississippi and Michigan.

In Pennsylvania, by the 7th section of the Bill of Rights (Const. of 1873), "the printing press shall be free to every person who may undertake to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury."

[6] 1 Hawk. P. C. p. 543; R. *v.* Dean of St. Asaph, 3 T. R. 428; R. *v.* Burdett, 4 B. & Ald. 95; R. *v.* Halpin, 9 B. & C. 65; 1 Doug. 387; State *v.* Burnham, 9 N. H. 34; Com. *v.* Clap, 4 Mass. 163; State *v.* Lehre, 2 Brev. 446.

At common law truth no justification.

the doctrine was doubted by Kent, J., and Thompson, J., in a celebrated case in which the Supreme Court of New York were equally divided, and which led to the passage of the act of 6th April, 1805, afterwards incorporated in the Constitution.[1] In those States, if there be any such,

[1] People *v.* Croswell, 3 Johns. Cas. 337.

where there is no statutory or constitutional limitation, the common law doctrine remains in force.[1] But these exceptions are too few and temporary to need discussion. It is enough to say that the general rule in England, as well as in the United States now is, that "the publication of a libel is not a misdemeanor if the defamatory matter is true, and if the publisher can show that it was for the public benefit that such matter should be published."[2]

When purpose is honest, truth may be admitted to disprove malice.

§ 1644. As it may be shown that the publication was for a justifiable purpose and not malicious, nor with the intent to defame, so there may be cases where the defendant, having acted in discharge of a supposed duty and with honest purpose, may give in evidence, even at common law, the truth of the words, when such evidence will tend to negative the malice and intent to defame.[3]

"Cases," so is this conclusion expressed, "may occur wherein circumstances extrinsic of the meaning published may rebut the presumption of malice in publishing matter in a certain degree detracting."[4] In a case determined in Massachusetts, before the truth was there made admissible by statute, it was said: "Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge by proving that

In Ohio: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted." Swan's Stat. p. 11.

In other States statutory provisions exist of the same general character. See 2 Starkie on Slander, by Wendell, 221, note.

[1] Davis's Va. Crim. Law, 276; State v. Burnham, 9 N. H. 34; Com. v. Clap, 4 Mass. 163, 168; Com. v. Blanding, 3 Pick. 304; Com. v. Snelling, 15 Ibid. 337, 339; Com. v. Sanderson, 3 Penn. L. J. 269; 5 Clark (Pa.), 54; Com. v. Morris, 1 Va. Cas. 176; 2 Wheel. C. C. 465; State v. Lehre, 2 Brev. 446; State v. Allen, 1 McCord, 525.

[2] Steph. Dig. C. L. art. 272, citing R. v. Newman, 1 E. & B. 263, 558; and see *supra*, § 1629. Compare argument of Lord Macaulay in Report on Indian Code, p. 550, *infra*, § 1654.

[3] State v. Burnham, 9 N. H. 34; Com. v. Clap, 4 Mass. 163, 169; Com. v. Morris, 1 Va. Cas. 176, and cases hereinafter stated. And see Bul. N. P. 8; 4 Burr. 2425; 1 T. R. 110; 3 C. & P. 587. *Supra*, § 1631.

[4] George on Libel, 153; 1 Starkie's Law of Slander, 292, and the cases there cited.

the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame."[1] In another case in the same State the same rule was recognized, though it was held that it must, in the first place, be shown, from the position of the parties or from extrinsic evidence, that the object of the publication was the discharge of a public or private duty.[2] And in a later case, in Philadelphia, it was held that where a guest in a public hotel had given out in the newspapers that he had been robbed of his money at the hotel, in the night-time, and the proprietor replied to the publication by a counter statement, in which he denied that the robbery charged had been committed at his house, and narrated facts which reflected unfavorably on the prosecutor, the truth was to be admitted to rebut the legal presumption of malice.[3] And in any view truth, there being malice, may be received to mitigate punishment.[4]

Under statute truth admissible on condition.

§ 1644 *a*. Under the English statute, which has been substantially adopted in most jurisdictions in this country,[5] the alleged truth of the libel, when specially pleaded by the defendant, may be put in evidence, but it "shall not amount to a defence unless it was for the public benefit that the matters charged should be published." The limitations of these statutes are to be strictly maintained, and the evidence of the truth of the libel is only admissible in the cases and under the conditions the statutes specify.[6]

§ 1645. But though the alleged libel be true, and though it were uttered under a sense of duty, the defendant, if the publication be

[1] Com. v. Clap, 4 Mass. 169; and see further, Coffin v. Coffin, Ibid. 1, 31; Graves v. State, 9 Ala. 447.

[2] Com. v. Buckingham, 2 Wheel. C. C. 438. See Com. v. Morris, 1 Va. Cas. 176.

[3] Com. v. Sanderson, 3 Penn. L. J. 269; 5 Clark (Pa.) 54.

[4] R. v. Halpin, 4 Man. & R. 8; 7 B. & C. 65; R. v. Burdett, 4 B. & Ald. 314.

[5] See Com. v. Bonner, 9 Met. 410; Barthalemy v. People, 2 Hill, N. Y. 248; State v. White, 7 Ired. 180.

[6] Under these statutes it has been held that where a criminal information for libel is laid, the magistrate, upon the preliminary inquiry before him, has no jurisdiction to hear evidence relating to the truth of the libel, or to any other justification. If publication be proved he is bound to commit. R. v. Carden, 4 L. T. N. S. 504; L. R. 5 Q. B. D. 1; 14 Cox C. C. 559; R. v. Townsend, 10 Ibid. 356.

malicious, may be guilty at common law of a libel.[1] And even under statutes making the truth in such cases admissible, if a person publish defamatory matter of another, without any lawful occasion for making a publication, and if the end were to gratify a spirit of detraction, or to bring the subject of it into contempt and disgrace, the proof of truth on trial does not justify or excuse the publication; and in such cases an indictment may be sustained, whether the libel be true or false. It is true that if the end to be attained by a publication be justifiable, *e. g.*, to remove an incompetent officer, or to prevent the election of an unsuitable one, or to give useful information to the community or to those who have a right and ought to be informed, the end is lawful; and the occasion being one in which matter of such a nature may properly be published, the party making the publication may either justify or excuse it. Where, however, there is merely the color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretence to publish and circulate defamatory matter, he is as liable as if no such pretence existed.[2] Truth, when proved, is in such cases sometimes an aggravation rather than a justification. It is the interest of the community that old offences should in most cases be forgotten. There are few men, no matter how valuable their services ultimately to society, who might not have been ruined, if at the turning points of their lives they had been visited by the publication of youthful wrongs done by them. Hence he who maliciously explores the past life of an intended victim, with the purpose of crushing him by bringing to public notice some act of shame, long past, it may be long repented of and condoned, may deserve a severer punishment than one who invents a false charge, easily disproved. In the former case, the injury inflicted by the libeller is far more destructive than in the latter. Even should the truth, under the statutes, be admissible, yet unless on public grounds it ought to have been published, it is no defence. And when the statutory condition is that the publication be with

Truth and honesty no defence when publication is malicious.

[1] R. *v.* Creevey, 1 M. & S. 273; Ld. Raym. 341; People *v.* Stone, 5 Best. L. Rep. 153; Gage *v.* Robinson, 12 Ohio, 250. But see *infra*, 1654.

[2] Com. *v.* Snelling, 15 Pick. 337; Stow *v.* Converse, 4 Conn. 17; Sterling *v.* Sherwood, 20 Johns. 204; Root *v.* King, 7 Cow. 613.

good motives and for good ends, if these requisites be not shown, the truth should be rejected.

§ 1646. When the defendant attempts to justify by proving the truth, the justification must be as broad as the charge. The verification of part will not be enough,[1] unless the part proved sustains the whole charge, as where on a charge of cheating at cards the defendant undertook to prove several cases of such cheating, and succeeded in proving two cases, which, it was held, was sufficient.[2] And the truth must be fully established.[3]

Justification must be as broad as the charge.

§ 1647. It is not sufficient justification, when a publication is not privileged, that the matter charged in the libel was a matter of common report. Thus in an indictment for a libel in charging one as being a "murderer and forsworn," it is not competent for the defendant to prove that there had been a general report in the neighborhood that such person was a murderer and forsworn.[4] It is otherwise when the question is one which involves reputation—*i. e.*, keeping a house of ill-fame, or being reported to be a prostitute.[5]

Common rumor or hearsay no justification.

VIII. MALICE, HOW PROVED AND REBUTTED.

§ 1648. To constitute malice in the publisher of a libel, it is not necessary that personal ill-will to the person libelled should be

[1] Usher *v.* Severance, 20 Me. 9; State *v.* Burnham, 9 N. H. 34; State *v.* Lyons, 89 N. C. 568. See Leader *v.* State, 4 Tex. Ap. 162.

[2] R. *v.* Labouchere, 14 Cox C. C. 419.

[3] Com. *v.* McClure, 3 Weekly Notes, 58.

[4] State *v.* White, 7 Ired. 180. See, also, State *v.* Lyon, 89 N. C. 589.

Under the Massachusetts statute the defendant cannot show, short of proving the truth, that the information upon which he acted came from so creditable a source and under such circumstances as to leave no doubt upon his mind of its truth. Com. *v.* Snelling, 15 Pick. 337; Thach. C. C. 318. Under the same statute, upon an indictment for a libel imputing general misconduct to a magistrate, it is competent for the court to order the defendant to elect whether he will give the truth in evidence; and upon his making his election to do so, to file a bill of particulars, specifying the particular instances of misconduct which he purposes to prove, and to hold him strictly to the proof of the particular specification. Com. *v.* Snelling, 15 Pick. 337; Thach. C. C. 318.

[5] Whart. Cr. Ev. § 261; State *v.* Rice, 56 Iowa, 431.

shown.[1] It is enough, as in the parallel case of homicide, if there be a general mischievous temper or recklessness analogous to that which throws dangerous missiles into a thoroughfare, without caring on whom they may fall.[2]

Malice need not be special.

§ 1649. Malice is inferred as a presumption of fact from publication;[3] and publication of a libel is not ordinarily excused by the publisher's ignorance that it contained libellous matter.[4] Hence the publisher of a newspaper is *primâ facie* responsible for all that appears in it; and it has been held that this presumption is not rebutted by evidence that he never saw or was aware of the libellous matter in his newspaper until after its publication, nor by proof that it was copied from another newspaper or from current report.[5] Under recent statutes, it is admissible as a defence for the publisher to prove that he used due care in directing the paper, and that the libel was inadvertently published notwithstanding such care.[6] And there is authority to the effect that this is the rule at common law.[7]

Publisher not excused by his ignorance of contents.

[1] Wason *v.* Walter, L. R. 4 Q. B. 73; Com. *v.* Bonner, 9 Met. 410. *Supra*, § 119.

[2] See *supra*, §§ 101 *et seq.*; 319; R. *v.* Lovett, 9 C. & P. 462; R. *v.* Harvey, 2 B. & C. 257.

[3] Barthelemy *v.* People, 2 Hill (N. Y.), 248.

[4] *Supra*, § 1627; Curtis *v.* Mussey, 6 Gray, 261; People *v.* Wilson, 64 Ill. 195; a case of contempt. For ignorance as a defence, see *supra*, § 88.

[5] R. *v.* Holt, 5 T. R. 436; Com. *v.* Snelling, 15 Pick. 337; State *v.* White, 7 Ired. 180.

[6] See Com. *v.* Morgan, 107 Mass. 199; Com. *v.* Damon, 136 Ibid. 442. *Supra*, § 1627.

[7] "I can never accede," says Lord Denman, in a note given by his biographer (1 Arnould's Life of Lord Denman, London, 1873, p. 200), "to the doctrine that the publisher is criminally answerable for a paper, of the contents of which he was utterly ignorant, notwithstanding the authority of Lord Mansfield or any other judge. . . . . It is to me incomprehensible that a jury should be charged to find such persons guilty on an indictment which states that they, 'with mischievous intentions maliciously published.'" No doubt if the evidence shows that the publication was not "malicious," and if this averment cannot be stricken out as surplusage so as to leave an indictable offence behind, the defendant should be acquitted. But if it was the defendant's duty to have supervised his paper either personally or through adequate agents, then he is liable for libellous publications which appear through his neglecting (either through himself or his agents) his duty of supervision.

For observation to the same effect by Cockburn, C. J., in Lambri's Case, see 67 London Law T. (Journ.) p. 1. See also, remarks of Lord Coleridge, C. J., in R. *v.* Alexander, 71 L. T. (Jour.) 41.

It is now a good defence, under 6 & 7 Vict. c. 96, § 7, to show that the libel was published without the authority, consent, or knowledge of the proprietor, and from no want of due care on his part. R. *v.* Holbrook, L. R. 3 Q. B. Div. 60; 14 Cox C. C. 185. *Supra*, § 1627.

On the second trial of R. *v.* Holbrook, Dec. 20, 1878 (reported in London Law Times, Dec. 28, 1878), Cockburn, C. J., said:—

"The question is as to what will give immunity to the proprietor under that enactment. No doubt it would not be enough, in the first instance, to show that he had not specifically authorized the insertion of the article; but it appears to me equally untenable to say that because a proprietor intrusts the conduct of a public journal to the plenary discretion of an editor, he thereby gives authority to the editor to commit a breach of the law by the insertion of libellous matter. If the principal were expressly to prohibit the insertion of libellous matter in the paper, would not that be sufficient? Surely the answer must be in the affirmative; for, unless he himself superintends the insertion of every article (in which case the statute would be useless), what can the proprietor do more? And surely the prohibition not to violate the law is impliedly involved in every service in which an agent is employed, and in which the law may possibly be broken by the agent." See, for full report, R. *v.* Holbrook, 39 L. J. (N. S.) 536.

[1] People *v.* Croswell, 3 Johns. Cas. 337.

[2] Davis's Va. Cr. Law, 280; State *v.* Lehre, 2 Brev. 446; State *v.* Allen, 1 McCord, 525; Shaver *v.* Linton, 13 Up. Can. (Q. B.) 534.

In State *v.* Goold, 62 Me. 509, it is said by Walton, J.:—

"It seems to be now settled in England as well as this country, that the judge is not bound to state to the jury, as matter of law, whether the publication in question is or is not a libel; that the proper course for him to pursue is to define to the jury what a libel is, and then leave it to them to determine whether the publication in question does or does not come within that definition. 2 Greenl. on Ev. § 411; Shattuck *v.* Allen, 4 Gray, 540.

"But while it is undoubtedly true that in prosecutions for libel the defendant has a right to have the question of libel or no libel submitted to the jury, we think it is equally clear that it is a right which it is competent for him to waive. If he chooses to admit for the purposes of the trial that the publication in question is a libel, we think he is no longer in a condition to complain because the question is not

§ 1650. In England, by the passage of Mr. Fox's bill, libels were put on the same basis as all other criminal offences, and the question of malicious intent was opened to the decision of the jury. With the exception of a single case, already referred to, where the Supreme Court of New York was equally divided,[1] the law in this country has been, even in those States where there is no statutory guarantee, that the jury have a right, under the instructions of the court, to give their verdict on the whole issue, and decide the question, as one of fact, whether the matter charged be libellous or not, as well as the questions of fact as to the publication, and the truth of the innuendoes.[2]

Question of malice for jury.

§ 1651. Evidence that the defendant published other copies of the same libel,[1] or other cognate libels,[2] provided they refer to the subject of the libel set out in the indictment,[3] or are such as to show a system of libelling,[4] is receivable, in order to prove the malicious or seditious intent.[5] But if such publications are *posterior* to the one complained of, it would seem they are not admissible,[6] unless offered as in the same line and as part of the same scheme as that on trial.[7] And libellous writings found on the defendant's person cannot be put in evidence, without in some way showing that he knew or approved of their contents.[8]

Other libels admissible to prove system.

§ 1652. The defendant, it is said, has a right to have read the whole of the publication from which the alleged libellous passage is an extract.[9] Two articles, however, not simultaneously published in the same paper or book, cannot be coupled, in order to ascertain whether or not one of them is libellous,[10]

Whole publication admissible.

submitted to the jury. Being admitted, it is no longer a question for either court or jury; and it is impossible for the defendant to be aggrieved by any views the court may entertain or express, as to whose province it would be to pass upon the question if the answer to it were not admitted.

"The bill of exceptions in this case shows that the defendant expressly admitted that the publication in question was a libel. He also admitted that he composed, wrote, and published the article. He claimed the right to go to the jury upon the question of malice only. This right was accorded to him as fully as he desired. All this appears by the bill of exceptions. He was not, therefore—in fact he could not be—an aggrieved party by the views expressed by the judge of the Superior Court, as to whose duty it would have been to pass upon the questions of law involved in the issue, if the answer to these questions had been controverted. He expressly waived his right to go to the jury upon these questions by his admissions."

[1] Whart. Crim. Ev. § 52; Plunkett v. Cobbett, 5 Esp. 136.

[2] R. v. Pearce, Peake (N. P.), 75; Com. v. Damon, 136 Mass. 442. See Whart. Crim. Ev. § 52.

[3] Finnerty v. Tipper, 2 Camp. 72; Com. v. Harmon, 2 Gray, 289.

[4] Whart. Crim. Ev. § 52.

[5] State v. Riggs, 39 Conn. 498; Com. v. Snelling, 15 Pick. 337; Thach. C. C. 318; Com. v. Damon (Mass. 1884), 17 Rep. 559; 136 Mass. 442.

[6] U. S. v. Crandall, 4 Cranch. C. C. 683; Thomas v. Crosswell, 7 Johns. 264; Whart. Crim. Ev. §§ 32–52.

[7] See Finnerty v. Tipper, 2 Camp. 72; Watson v. Moore, 2 Cush. 133; Townshend on Libel, § 390; Whart. Crim. Ev. § 38.

[8] U. S. v. Crandall, 4 Cranch. C. C. 683; Whart. Cr. Ev. § 682.

[9] Cook v. Hughes, R. & M. 112. See Thornton v. Stephen, 2 M. & Rob. 45; Scripps v. Foster, 41 Mich. 742.

[10] Usher v. Severance, 20 Me. 9.

§ 1653. When the defendant does not justify, he cannot be permitted to prove that the person libelled treated part of the libellous matter as a joke on himself.[1]

No defence that libel was a joke.

§ 1654. Evidence of public philanthropic designs on part of the defendant is not admissible to rebut the presumption of malice.[2] No man has a right to libel another for the latter's moral instruction, or for the edification of the community.[3]

Counter evidence of good motive inadmissible.

IX. INDICTMENT.[4]

§ 1655. It is necessary that the *publication* should be expressly averred, since a mere private composition and writing, seen only by the writer, is not an offence.[5]

Publication must be averred.

§ 1656. The alleged libellous matter, also, must be set out accurately, any variance being fatal,[6] though matters not in the libellous passage, or of record, need not be exactly alleged.[7] Mere variations of spelling, if the sound be retained, will not vitiate.[8]

Libellous matter must be exactly set forth.

Where parts are selected, they must be set forth thus: "In a certain part of which said," etc., "there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning," etc., "according to the tenor and effect following, that is to say:" "And in a certain other part,"[9] etc. etc.

The date at the end of the libel need not be set forth.[10]

If the libel be in a foreign language, it must be set forth in such language, verbatim, together with a correct translation.[11]

[1] Com. v. Morgan, 107 Mass. 199.

[2] R. v. Hicklin, L. R. 3 Q. B. 360; Com. v. Snelling, 15 Pick, 337. *Supra*, §§ 88, 119, 1607.

[3] Ibid. See Lord Macaulay's remarks given in 8th edition of this work, § 1654.

[4] For forms, see Whart. Prec. tit. "Libel."

[5] R. v. Burdett, 4 B. & Ald. 95.

[6] Cartwright v. Wright, 1 D. & R. 230; Wright v. Clements, 3 B. & Ald. 503; Com. v. Tarbox, 1 Cush. 66; Com. v. Sweeney, 10 S. & R. 173; State v. Brownlow, 7 Humph. 63; Walsh v. State, 2 McCord, 248. See Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; Whart. Crim. Ev. §§ 114 *et seq.*

[7] Com. v. Varney, 10 Cush. 402.

[8] Whart. Crim. Ev. § 114; State v. Townsend, 86 N. C. 676.

[9] See 1 Camp. 350, per Lord Ellenborough; Archbold's C. P. 494; Whart. Cr. Pl. & Pr. § 180.

[10] Com. v. Harmon, 2 Gray, 289.

[11] Zenobio v. Axtell, 6 T. R. 162; Whart. Cr. Pl. & Pr. § 181; and see *supra*, §§ 731–3.

It need not be averred that the libel was in a newspaper.[1]

§ 1657. In another work is considered the mode of setting out writings of this class.[2] It is enough now to say that if the indictment does not on its face profess to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient on demurrer, or in arrest of judgment.[3] It is not sufficient to profess to set it forth according to its substance or effect.[4] And where the indictment alleged that the defendant published, etc., an unlawful and malicious libel, *according to the purport and effect, and in substance* as follows, it was ruled that the words between *libel* and *as follows* could not be rejected as surplusage.[5]

Indictment must profess to set forth words of libel.

§ 1658. Where it does not appear from the paper itself who its author was, nor the persons of and concerning whom it was written, nor the purpose for which it was written, these facts should be explicitly averred, for the consideration of the jury, in all cases in which they are material.[6]

Authorship must be averred.

§ 1659. Where the persons alleged to have been libelled are alluded to in ambiguous and covert terms, it is not sufficient to aver generally that the paper was composed and published "of and concerning" the persons alleged to have been libelled, with innuendoes accompanying the covert terms, whenever they occur in the paper as set out in the indictment, that they meant those persons, or were allusions to their names. There should be a full and explicit averment that the defendant, under and by the use of the covert terms, wrote of and concerning the persons alleged to be libelled.[7]

Libellous matter must be charged to relate to prosecutor.

The court will regard the use of fictitious names and disguises, in a libel, in the sense that they are commonly understood by the public.[8]

Under a declaration which alleges the publication of a certain

[1] Rattray *v.* People, 61 Miss. 377.

[2] See Whart. Cr. Pl. & Pr. §§ 167 *et seq.*

[3] Whart. Cr. Pl. & Pr. §§ 167 *et seq.*; State *v.* Twitty, 2 Hawks, 248; State *v.* Goodman, 6 Rich. 387.

[4] Com. *v.* Tarbox, 1 Cush. 66; Com. *v.* Wright, Ibid. 46; State *v.* Brownlow, 7 Humph. 63. But see State *v.* Smith, 7 Lea, 249.

[5] Com. *v.* Wright, 1 Cush. 46; Whart. Cr. Pl. & Pr. §§ 167 *et seq.*

[6] State *v.* Henderson, 1 Rich. 179.

[7] R. *v.* Marsden, 4 M. & S. 164; State *v.* Henderson, 1 Rich. 179; State *v.* Brownlow, 7 Humph. 63.

[8] State *v.* Chace, Walker, 384.

"libel concerning the plaintiff," but contains no innuendoes, colloquiums, or special averments of facts to connect the publication with the plaintiff, if no evidence be offered to connect him therewith, except the publication itself, the question whether the publication refers to the plaintiff is for the court, and not for the jury.[1]

An allegation that the defendant published a libel, "tending to blacken the honesty, virtue, integrity, and reputation of the said A. B., and thereby to expose him to public hatred, ridicule, and contempt, in which said false, scandalous, malicious, defamatory, and libellous matters of and concerning the character, honesty, virtue, integrity, and reputation of the said A. B.," etc., is a sufficient allegation that it was "of and concerning A. B."[2]

§ 1660. An innuendo is an interpretative parenthesis thrown into the quoted matter to explain an obscure term.[3] It can explain only where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. It can interpret, but cannot add.[4] It may serve as an explanation, but not as a substitute.[5] Thus in an action for the words, "He is a thief," the defendant's meaning in the use of the word "he" cannot be explained by an innuendo "meaning the said plaintiff," or the like, unless something appear previously upon the record to ground that explanation; but if the words had previously been charged to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for when it is alleged that the defendant said of the

Innuendo can interpret but not enlarge.

[1] Barrows *v.* Bell, 7 Gray, 301.

[2] Taylor *v.* State, 4 Ga. 14.

[3] See *infra*, § 1665.

[4] See 2 Salk. 512; Cowp. 684; Mix *v.* Woodward, 12 Conn. 262; Van Vechten *v.* Hopkins, 5 Johns. 211; State *v.* Neese, N. C. T. R. 270; Bradley *v.* State, Walker, 156; State *v.* Henderson, 1 Rich. 179. It was held in Pennsylvania, in 1870, that where no new essential fact is requisite to the frame of an indictment for libel, which requires to be found by the grand jury as the ground of a colloquium, and where the only object of an innuendo is to give point to the meaning of the language, it is not proper to quash the indictment on the ground that the innuendo may be supposed to carry the meaning of the language beyond the customary meaning of the word. If some of the innuendoes in an indictment for libel extend the meaning of parts too far, but there be others sufficient to give point to it, the jury may convict under the latter alone. Com. *v.* Keenan, 67 Penn. St. 203.

[5] State *v.* Atkins, 42 Vt. 252; though see Com. *v.* Keenan, 67 Penn. St. 203; Com. *v.* Meeser, 1 Brewst. 492.

plaintiff, "He is a thief," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "he."[1] Whatever is insensible must thus be explained by innuendo. And "when the language is equivocal and uncertain, or is defamatory only because of some latent meaning, or of its allusion to extrinsic facts and circumstances, then an inducement or innuendo or both are indispensable to express and render certain precisely what the libel is of which the defendant is accused."[2] It is not necessary when the facts in question appear on the record.[3]

Where the plaintiff averred, by way of innuendo, that the defendant, in attributing the authorship of a certain article to a "celebrated surgeon of whiskey memory," or to a "noted steam doctor," meant by these appellations the plaintiff, it was held, notwithstanding the innuendo, that the declaration was bad, for want of an averment that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying them to him, or something to that effect.[4]

When an alleged libel affects the prosecutor only in his business standing, such business must be averred.[5]

In another case, in an action on the case against a man for saying of another, "He has burnt my barn," the plaintiff cannot, by way of innuendo, say, "meaning my barn full of corn;"[6] because this is not an explanation derived from anything which preceded it on the record, but is the statement of an extrinsic fact not previously stated. But if in the introductory part of the declaration it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete.[7]

[1] Archbold's C. P. 494; State *v.* White, 6 Ired. 418.

[2] Durfee, C. J., State *v.* Corbett, 12 R. I. 288, 1879, citing State *v.* Henderson, 1 Rich. 179; S. P., State *v.* Spear, 13 R. I. 324; People *v.* Isaacs, 1 N. Y. Cr. R. 148.

[3] State *v.* Mott, 45 N. J. L. 494.

[4] Miller *v.* Maxwell, 16 Wend. 9. See, also, 2 Hill, 472, and 12 Johns. 474.

[5] Com. *v.* Stacey, 8 Phila. 617.

[6] Barham *v.* Nethersal, 4 Co. 20 *a*.

[7] Archbold's C. P. 494; 4 R. Ab. 83, pl. 7; 85, pl. 7; 2 Ro. Rep. 244; Cro. Jac. 126; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, n. 3; Golstein *v.* Foss, 9 D. & Ry. 197; 6 B. & C. 154; Clement *v.* Fisher, 1 M. & Ry. 281; Alexander *v.* Angle, 1 C. & J. 143; 7 Bing. 119; R. *v.* Tuchin, 5 St. Tr. 532.

§ 1661. The question of the truth of the innuendoes is for the jury; and they must be supported by evidence, unless they go to matters of notoriety, or of which the court takes judicial notice.[1]

Truth of innuendoes is for jury.

§ 1662. How a lost or destroyed document is to be pleaded is elsewhere discussed.[2] As we have seen, the weight of opinion is that it is not necessary that obscene language should be set out in full; a general averment of its nature will be sufficient if there be a proper excuse.[3]

Unobtainable and obscene libel.

X. VERDICT.

§ 1663. "Guilty of publishing *only*" is not a verdict on which judgment can be entered; and the court should refuse to receive it, or, if it be received, direct a second trial.[4] But a verdict on an indictment for composing, writing, printing, and publishing a libel, that the defendant is "guilty of publishing as alleged in the indictment, and not guilty as to the residue," is equivalent to a general verdict of guilty; since the allegations in the indictment "compose," "write," etc., can be rejected as surplusage.[5]

"Guilty of publishing only" is insufficient

On an indictment, also, for "composing, printing, and publishing," the defendant may be found guilty of "printing and publishing."[6]

XI. THREATENING LETTERS—BLACKMAILING.

§ 1664. We have already noticed certain classes of threatening letters which have been held, when followed by extortion, to consti-

[1] See cases cited *supra*. State *v.* Atkins, 42 Vt. 252; Com. *v.* Keenan, 67 Penn. St. 203; State *v.* Perrin, 2 Brev. 474.

In an indictment for a libel against J. C., which libel described her as the only daughter of the widow Roach, the innuendo stated the identity of Mrs. R.'s daughter and of the prosecutrix, Mrs. C. It was held unnecessary to prove that the prosecutrix was the only daughter. State *v.* Perrin, 1 Tr. Con. Rep. 446; 2 Brev. 474.

[2] Whart. Cr. Pl. & Pr. § 176; Whart. Crim. Ev. §§ 118, 199.

[3] *Supra*, § 1609.

[4] R. *v.* Woodfall, 5 Burr. 2661. See Webber *v.* State, 10 Mo. 4.

[5] Com. *v.* Morgan, 107 Mass. 199.

[6] Whart. Crim. Ev. § 134; R. *v.* Hunt, 2 Camp. 583; R. *v.* Williams, Ibid. 646.; State *v.* Locklear, Busbee, 208. As to divisible verdict, see Whart. Cr. Pl. & Pr. § 742.

tute robbery.[1] We have now to consider the sending threatening letters as a substantive offence. In many cases such letters may be libels, whose publishers are indictable at common law.[2] The offence, however, is in most jurisdictions, both in England and in the United States, specifically indictable by statutes.[3] Under these statutes it is necessary, in order to sustain an indictment, that a threat should have been manifestly intended.[4] Where a particular statute[5] makes it indictable to accuse another of crime with "menaces" and "threats," with intent to extort money, it has been held that threatening to expose a clergyman charged with criminal intercourse with a woman in a house of ill-fame, in his own church and village, to his own bishop, to all the other bishops, and to the Archbishop of Canterbury, and also to publish his shame in the newspapers, is such a

Extorting money by threatening letters is indictable.

[1] *Supra*, § 852.

[2] *Supra*, §§ 1691 *et seq.*

[3] As to Massachusetts statute, see Robinson *v.* Com., 101 Mass. 27; Com. *v.* Dorus, 108 Ibid. 488; Com. *v.* Coolidge, 128 Ibid. 55; Com. *v.* Philpott, 130 Ibid. 59. As to New York, see Biggs *v.* People, 8 Barb. 547. As to Maine statute, see State *v.* Bruce, 24 Me. 71; State *v.* Patterson, 68 Ibid. 473. As to Ohio, see Brabham *v.* State, 18 Ohio St. 485. As to Indiana statute against blackmailing, see State *v.* Hammond, 80 Ind. 80. As to Missouri, State *v.* Linthicum, 68 Mo. 66.

[4] R. *v.* Girdwood, 1 Leach C. C. 142; 2 East P. C. 1120.

Demanding money by threats without "reasonable or probable cause" being indictable under the statute, it has been held that these words must be taken to apply to the state of the prisoner's mind at the time of making the demand; and the jury must look at all the circumstances for the purpose of deciding whether at that time the prisoner *bonâ fide* believed that she or he had reasonable cause. R. *v.* Miard, 1 Cox C. C. 22.

Upon an indictment for sending a letter demanding money, with menaces, and without reasonable or probable cause, it appeared that the prisoner, who had been in the prosecutor's employ as traveller, had afterwards set up in business for himself, married, and become the father of children. There was no evidence of the prosecutor having indulged in the slightest familiarity with the prisoner's wife, or of the prisoner having at any time any ground to suspect that such had been the case, and the prosecutor denied it; but the prisoner sent to him letters imputing to the prosecutor adultery with his wife; that he was the father of one of his children; stating that many a man would have sent a bullet through him; that he was to refund £44. The judge left to the jury whether the meaning of the letters was to demand a sum of money, and to menace him with adultery, or to send the child to the prosecutor's house; and whether there was any reasonable or probable cause for the demand. The jury having found against the defendant on all these points, the conviction was sustained. R. *v.* Chalmers, 16 L. T. (N. S.) 363.

[5] See 24 & 25 Vict. c. 96, s. 46.

threat as a man of ordinary firmness cannot be expected to resist, and therefore falls within the word menaces used in the statute.[1] And so, under another statute, has been held to be a letter to the effect that if money be deposited in a particular place an attack would be averted.[2] A false statement that a warrant has issued to arrest A. on a criminal charge is "threatening" to accuse A. of crime.[3] And so is threatening to enter a complaint;[4] and threatening to imprison on a fictitious charge.[5] Though it would seem not essential that the prosecutor should be actually frightened,[6] the threat must be such as would ordinarily create alarm.[7] It is immaterial, in such cases, so far as concerns the defendant's penal responsibility, whether the prosecutor was guilty or innocent;[8] but this issue may be material in considering the question whether, under the circumstances of the case, the intention of the prisoner was to extort money or merely to compound a felony.[9]

A threatening letter in the defendant's own name, sent to enforce the payment of a debt, is not within the statute;[10] and it has been further held that a threatening letter, referring in its terms to such circumstances as were plainly intended to denote who the writer was, and making a demand of a sum of money in controversy between him and the prosecutor, which the latter had received, and which the former had before insisted should be accounted for to him, was not a threatening letter within 9 Geo. I. c. 22, or 27 Geo. II. c. 15, although the writer did not subscribe his name. A letter is not regarded as anonymous when it indicates on its face the sender.[11]

§ 1665. A letter, when ambiguous, may be explained by parol proof of extraneous facts as well as by declarations of the writer.[12]

[1] R. *v.* Miard, 1 Cox C. C. 22. See Kistler *v.* State, 54 Ind. 400.

[2] R. *v.* Pickford, 4 C. & P. 227; R. *v.* Smith, T. & M. 214; 1 Den. C. C. 510; 2 C. & K. 882.

[3] Com. *v.* Murphy, 12 Allen, 449. *Supra*, § 1151.

[4] Com. *v.* Carpenter, 108 Mass. 15.

[5] R. *v.* Robertson, L. & C. 483; 10 Cox C. C. 9.

[6] State *v.* Bruce, 24 Me. 71.

[7] R. *v.* Walton, 9 Cox C. C. 268; L. & C. 483. Compare R. *v.* Smith, T. & M. 214; 1 Den. C. C. 510. For requisites of indictment, see Com. *v.* Moulton, 108 Mass. 309; Com. *v.* Dorus, Ibid. 307; State *v.* Young, 26 Iowa, 122; People *v.* Brannan, 30 Mich. 460; State *v.* Morgan, 3 Heisk. 262.

[8] R. *v.* Cracknell, 10 Cox C. C. 408; R. *v.* Richards, 11 Ibid. 43.

[9] Ibid.

[10] People *v.* Griffin, 2 Barb. 427; State *v.* Hammond, 80 Ind. 80.

[11] R. *v.* Heming, 2 East P. C. 1116; 1 Leach C. C. 445, n.

[12] *Supra*, § 1660; R. *v.* Tucket, 1 Mood. C. C. 134; R. *v.* Cooper, 3 Cox

The prosecutor may be asked as to what appeared to him to be the meaning of the letter.[1] The meaning is for the jury if the terms be ambiguous,[2] and is to be inferred from all the circumstances of the case;[3] though whether a certain charge, not ambiguous, is threatening, is for the court.[4]

Letters may be explained by parol.

§ 1666. The person threatened must be averred and proved,[5] and so must the fact of sending,[6] but as will be seen in the next section sending may be inferentially shown. The letter must be set out if obtainable.[7] The venue may be laid in the place of reception.[8] If inspection be desired, the court will, on motion of the prisoner's counsel, as soon as the bill is found, order that the letter be deposited with the officer of the court, that the prisoner's witnesses may inspect it.[9]

Material facts must be averred and proved.

§ 1666 *a*. To prove intent, prior threats of the same kind are admissible.[10] The sending is to be inferred from facts. It has

C. C. 547; R. *v.* Hendy, 4 Ibid. 243; State *v.* Linthicum, 68 Me. 66. Under the Massachusetts statute only the substance of the letter need be set forth. Com. *v.* Philpott, 130 Mass. 59.

[1] R. *v.* Tucket, 1 Mood. C. C. 134; R. *v.* Hendy, 4 Cox C. C. 243.

[2] Ibid.; R. *v.* Carruthers, 1 Cox C. C. 138; R. *v.* Cooper, 3 Ibid. 547.

[3] R. *v.* Menage, 3 F. & F. 310; R. *v.* Coghlan, 4 Ibid. 316; R. *v.* Braynell, 4 Cox C. C. 402; State *v.* Hollyway, 41 Iowa, 200; Longley *v.* State, 43 Tex. 490. That proof of reception of spoils is admissible to prove intent, see State *v.* Bruce, 24 Me. 17.

[4] Brabham *v.* State, 18 Ohio St. 485; Com. *v.* Carpenter, 108 Mass. 15; State *v.* Morgan, 3 Heisk. 262. As to what constitutes "infamous crime" under the statutes, see R. *v.* Hickman, 1 Mood. C. C. 34; R. *v.* Redman, 10 Cox C. C. 159; L. R. 1 C. C. 12; Kistler *v* State, 54 Ind. 400. And see State *v.* Bruce, 24 Me. 71; State *v.* Vaughan, 1 Bay (S. C.), 282; Robinson *v.* Com., 101 Mass. 27; Com. *v.* Moulton, 108 Ibid. 307; Com. *v.* Dorus, Ibid. 488; Shiffiet *v.* Com., 14 Grat. 652.

[5] R. *v.* Dunkley, 1 Mood. C. C. 90.

[6] R. *v.* Jones, 2 Cox C. C. 434; 2 C. & K. 398; R. *v.* Paddle, R. & R. 484. A letter signed by two initials, as R. R., was held a letter without a name subscribed thereto within 9 Geo. I. c. 22. R. *v.* Robinson, 2 Leach C. C. 749; 2 East P. C. 1110.

[7] R. *v.* Hunter, 2 Leach C. C. 624; R. *v.* Lloyd, 2 East P. C. 1122.

[8] *Supra*, §§ 288, 1206; R. *v.* Girdwood, 2 East P. C. 1120; 1 Leach C. C. 142; R. *v.* Essex, 2 East P. C. 1125; People *v.* Griffin, 2 Barb. 427.

[9] R. *v.* Harrie, 6 C. & P. 105. On an indictment with three counts for three separate letters, it was proposed to prove the sending of all three. It was held, that evidence of one only was admissible. R. *v.* Ward, 10 Cox C. C. 42.

[10] Whart. Crim. Ev. § 46; R. *v.* Cooper, 3 Cox C. C. 547; R. *v.* McDonnell, 5 Ibid. 153.

In the latter case it was proved that the prisoner had gone up to the prose-

been held that the dropping a letter in a man's way, in order that he might pick it up, was a sending of it;[1] and it was said that there was a "sending," although the party saw the prisoner drop the letter, if the prisoner did not suppose the party knew him, and intended he should not.[2] As will presently be seen, a letter threatening A., but directed to B., which is left at a place accessible to A., with the intention that it should reach as well A. as B., is "sent" to A.;[3] and fastening a threatening letter on a gate in a public highway is some evidence to go to the jury of a sending thereof.[4] A conviction, however, cannot be sustained where the only evidence against the defendant was his own statement that he should never have written it but for W. G.[5] And when there is no person in existence of the precise name which the letter bears as its address, it is a question for the jury whether the party into whose hands it falls was really the one for whom it was intended.[6] The bare delivery of a letter containing threats, though sealed, is held to be evidence of a knowledge of its contents.[7]

Sending a question of fact.

§ 1666 *b*. Letters threatening to "burn or destroy" are also made specifically indictable by statute in England.[8] Under this

cutor and said to him, "If you do not give me a sovereign I will charge you with an indecent assault." It was held that inasmuch as, if the jury believed that such language had been used by the prisoner, the intent was manifest, evidence for the prosecution tending to show that the prisoner had made a similar charge two years before ought not to be admitted. But this is no adequate reason for rejecting the evidence.

[1] R. *v.* Wagstaff, R. & R. 398.

[2] Ibid.

[3] R. *v.* Grimwade, 1 Cox C. C. 67; 1 Den. C. C. 30; 1 C. & K. 592.

[4] R. *v.* Williams, 1 Cox C. C. 16.

[5] R. *v.* Howe, 7 C. & P. 268.

[6] R. *v.* Carruthers, 1 Cox C. C. 138.

[7] R. *v.* Girdwood, 1 Leach C. C. 142; 2 East P. C. 1120.

[8] By 24 & 25 Vict. c. 97, s. 50, "whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce, in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping." (*Former provisions*, 4 Geo. IV. c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.)

statute, where a count charged T. with sending to V. and threatening to burn certain houses, laying them as the property of O., V.'s tenant, it was proved that T. dropped the letter in a public road near V.'s house; that A. found it and gave it to H., who opened and read it, and gave it to E., who showed it to both O. and V. It was ruled that this was a sending under the statute.[1]

Threats to destroy and kill indictable.

A threat of a false and malicious prosecution in order to extort money is indictable at common law.[2]

§ 1666 *c*. By another statute,[3] sending a letter threatening murder is made a felony. The letter, under this statute, must be construed in its natural sense, as explained by circumstances; though when necessary the indictment may explain by innuendoes and prefatory matter.[4] To put a letter in a place where it would be likely to be seen by the person to whom it is directed is "uttering" it.[5]

[1] R. *v.* Grimwade, 1 Den. C. C. 30; 1 C. & K. 592; 1 Cox C. C. 67. See, as to sending, *supra*, § 1666 *a*.

Under prior statutes we have the following rulings:—

Under 27 Geo. II. c. 15, a conviction for sending a letter to P., threatening "to set fire to his mill, and likewise to do all the public injury they were able to do him, in all his farms and seteres," was set aside, it appearing that P. had not then any mill to which the threat of burning would apply (having parted with it three years before); and the threat as to the farm, etc., not necessarily implying a burning. R. *v.* Jepson, 2 East P. C. 1115.

A conviction under 4 Geo. IV. c. 54, s. 3, was also set aside on an indictment charging that the prisoner sent a letter to T. L., threatening to burn the house of J. R., as the threat must be to the owner of the property; and if the letter was sent to T. L., with intent that it should reach J. R., and did reach him, it should have been charged in the indictment as sent to J. R. R. *v.* Jones, 2 C. & K. 398; 1 Den. C. C. 218; 2 Cox C. C. 434; R. *v.* Grimwade, 1 Ibid. 67.

[2] See *supra*, § 851; Embry *v.* Com., 79 Ky. 439; Williams *v.* State, 13 Tex. Ap. 723.

[3] 24 & 25 Vict. c. 100, s. 16.

[4] R. *v.* Boucher, 4 C. & P. 562. Under similar statute, see State *v.* Young, 26 Iowa, 122; Longley *v.* State, 43 Tex. 490; Buie *v.* State, 1 Tex. Ap. 58.

[5] R. *v.* Jones, 5 Cox C. C. 226.

CHAPTER XXX.

ESCAPE, BREACH OF PRISON, AND RESCUE.

I. AGAINST OFFICER FOR ESCAPE.[1]

§ 1667. "Every one who knowingly, and with intent to save the person escaping from trial or execution, permits any person in his lawful custody to regain his liberty, otherwise than in due course of law, commits the offence of voluntary escape; and

Escape is permitting prisoner to depart from custody.

"Is guilty of high treason if the escaped prisoner was in his custody for, and was guilty of, high treason;

"Becomes an accessary after the fact to the felony of which the escaped prisoner was guilty if he was in his custody for, and was guilty of, felony; and

"Is guilty of a misdemeanor if the escaped prisoner was in his custody for, and was guilty of, a misdemeanor."[2]

The law as to voluntary escapes is thus stated by Mr. Sergeant

[1] See Whart. Prec. 633 *et seq.* for forms of indictment.

[2] Steph. Dig. C. L. art. 144, citing Hawk. P. C. 192, 196, 197; 1 Russ. Cr. 583. See, also, Weaver *v.* Com., 29 Penn. St. 445. It does not appear what is the effect of voluntarily permitting the escape of a man lawfully charged, but innocent in fact. Steph. Dig. *ut supra*.

Hawkins, as approved by Sir W. Russell: "There can be no doubt but that wherever an officer who hath the custody of a prisoner, charged with, and guilty of a capital offence, doth knowingly give him his liberty with an *intent to save him either from his trial or execution*, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty and stood charged with."[1]

It is a misdemeanor at common law for an officer having lawful charge of a prisoner, negligently to permit the temporary departure of such prisoner from his custody, no matter how slight may be such departure.[2] The custody may be that of a prison, or a chamber, or even that of constructive tactual arrest in the open streets.[3] And any undue liberty wrongfully allowed to a prisoner, which he uses to effect his escape, makes the custodian giving the liberty indictable at common law.[4]

If the warrant of commitment be regular, and issue from a tribunal having jurisdiction, the question of the prisoner's guilt, or of the regularity of prior procedure, is irrelevant. The only way either of these questions can be raised is by application to the tribunal issuing the process, or to an appellate tribunal.[5]

No indictment lies for an escape when the imprisonment is on its face void and illegal.[6]

§ 1668. Where the offence charged is a negligent escape, it is not necessary to prove negligence in the defendant, as the law implies

[1] Hawk. P. C. *ut supra;* 1 Russ. on Cr. 583, approved by the Supreme Court of New Jersey, in 1884, in Meehan *v.* State (6 Crim. Law Mag. 202). To constitute this offence, however, the escape must be voluntary and intentional. Meehan *v.* State, *ut supra.*

[2] Colby *v.* Sampson, 5 Mass. 310, 312; Com. *v.* Farrell, 5 Allen, 130; State *v.* Addcock, 65 Mo. 590. See R. *v.* Shuttleworth, 22 Up. Can. (Q. B.) 372; Meehan *v.* State, *ut sup.*; State *v.* Martin, 32 Ark. 124.

Detention on mesne process is imprisonment under the statute. Com. *v.* Barker, 133 Mass. 399.

[3] R. *v.* Bootie, 2 Burr. 864; State *v.* Doud, 7 Conn. 384; Lucky *v.* State, 14 Tex. 400; R. *v.* Shuttleworth, 22 Up. Can. (Q. B.) 372.

[4] Smith *v.* Com., 59 Penn. St. 320; Hopkinson *v.* Leeds, 78 Ibid. 396; Green *v.* Hern, 2 Pen. & W. 167. See Meehan *v.* State, *ut sup.*

[5] *Infra*, § 1674; State *v.* Garrell, 82 N. C. 580; State *v.* Brown, Ibid. 585; Holland *v.* State, 60 Miss. 939.

[6] State *v.* Murray, 15 Me. 100; Com. *v.* Miller, 2 Ashm. 61; State *v.* Bates, 23 Iowa, 97. *Infra*, § 1674.

it;[1] and if it be alleged in defence that the prisoner by force rescued himself, or was rescued by others, and the officer made fresh pursuit after him, but without effect, and took throughout every precaution in his power, the burden of making out this defence is on the defendant. And so severe is the policy of the law in this respect, that nothing but the act of God, or of irresistible adverse force, is held an excuse.[2]

Negligence need not be proved by prosecution.

§ 1669. The deputies of a jailer are charged with the same high responsibilities as are imposed on the jailer himself. It is otherwise, however, with his servants, who are not deputies, and who are only responsible for negligence in their particular spheres, or for connivance.[3] But the custody must have been lawful.[4]

Deputy jailers are liable as jailers.

§ 1670. A *de facto* jailer is responsible for an escape; nor does the question of the legality of the jailer's appointment at all affect the issue.[5]

Jailer need not be *de jure.*

§ 1671. The indictment must allege the offence with which the defendant was charged,[6] and the character of the warrant;[7] though when there is no warrant, but simply a verbal arrest, the offence may be set out in popular terms.[8] Under the statutes making escape a substantive offence the indictment need not allege *scienter* on part of the officer permitting the escape.[9]

Indictment must specify offence.

[1] See 1 Hale, 600; Blue *v.* Com., 4 Watts, 215; Com. *v.* Connell, 3 Grat. 587.

[2] State *v.* Halford, 6 Rich. 58; Shattuck *v.* State, 51 Miss. 575.

It is enough also to prove that the warrant or authority on which the prisoner was convicted was legal; it is not requisite for the prosecution to prove that the person actually committed the offence with which he was charged. 2 Hawk. c. 28, s. 16.

[3] State *v.* Errickson, 3 Vroom (32 N. J. L.), 421. See Kavanaugh *v.* State, 41 Ala. 399.

[4] See State *v.* Beebe, 13 Kans. 589; Wilckens *v.* Willett, 4 Abb. Ap. Dec. 596.

[5] 2 Hawk. c. 19. See Com. *v.* Connell, 3 Grat. 587. *Supra*, §§ 1589, 1617; Whart. Cr. Ev. §§ 164, 833. As to *de facto* officers, see *supra*, § 652.

[6] Kyle *v.* State, 10 Ala. 236; and so as to those assisting the escape. State *v.* Jones, 78 N. C. 420.

[7] State *v.* Hollon, 22 Kan. 580.

[8] R. *v.* Bootie, 2 Burr. 864.

An indictment against a jailer for permitting a prisoner in his custody to have an instrument in his room with which he might break the jail and escape, and for failing to carefully examine, at short intervals, the condition of the jail, and the occupation of the prisoner at the said jail, in consequence of which the prisoner escaped, does not state an indictable offence. Com. *v.* Connell, 3 Grat. 587. *Sed quaere.*

[9] Wilson *v.* State, 61 Ala. 151.

II. BREACH OF PRISON.

§ 1672. Prison breach is the breaking out of the place of lawful confinement,[1] by a person involuntarily confined, against the will of his custodian; and by the English common law the offence is a felony if the commitment were for felony, or a misdemeanor, if the commitment were for a misdemeanor.[2] Force is not necessary to the constitution of the offence.[3]

Prison breach is a forcible departure from custody.

§ 1673. Where the defendant is confined simply on civil process, there are intimations that the old common law offence of breach of prison is not reached.[4] Certainly it is not, so far as the question of felony is concerned; but it is equally clear that it is misdemeanor at common law to escape from any lawful imprisonment, whether on civil or criminal process.[5]

Offence extends to escape from civil process.

§ 1674. It is enough to sustain the prosecution if the process were regular, and the imprisonment *primâ facie* authoritative;[6] though mere technical informalities in the process will be no defence.[7] The question of the defendant's guilt or innocence is not relevant to the issue.[8] At the same time, if no crime were committed at all, and there were no prior legal arrest of the prisoner, a mere commitment would be void, and the breaking innocent.[9] But the dismissal of a case by the magistrate is not such a discharge of a prisoner as will justify him in an escape from the lock-up, to which he was remanded by the magistrate.[10] And it has

Enough if process be regular.

[1] State *v.* Beebe, 13 Kans. 589.

[2] R. *v.* Haswell, R. & R. 458; R. *v.* Martin, Ibid. 196. See 2 Hawk. P. C. c. 18, s. 16; State *v.* Murray, 15 Me. 100; Com. *v.* Briggs, 5 Met. 559; People *v.* Tompkins, 9 Johns. 70; Com. *v.* Miller, 2 Ashm. 61; Kyle *v.* State, 10 Ala. 236.

[3] State *v.* Davis, 14 Nev. 439. See R. *v.* Payne, L. R. 1 C. C. 27; 10 Cox C. C. 232; Com. *v.* Mitchell, 3 Bush, 39; Barthelow *v.* State, 26 Tex. 175. *Supra*, § 1580.

[4] 2 Hawk. P. C. c. 28, s. 16.

[5] R. *v.* Allan, C. & M. 295. See State *v.* Murray, 15 Me. 100.

[6] As to arrest, see Whart. Cr. Pl. & Pr. §§ 1–12. *Supra*, § 652.

[7] Com. *v.* Morihan, 4 Allen, 588.

[8] 2 Hawk. P. C. c. 18, s. 16; Com. *v.* Miller, 2 Ashm. 61; State *v.* Bates, 28 Iowa, 96. See People *v.* Washburn, 10 Johns. 160.

[9] 2 Hawk. c. 18, s. 7; *supra*, §§ 647–52.

[10] *Supra*, § 1667.

In R. *v.* Waters, 12 Cox C. C. 390, the defendant was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him to custody without any evidence on oath. The defendant was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates. It was ruled by Martin, B., that the dismissal by the magistrates was not equivalent to an acquittal by a jury; that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand; and that these facts were no defence to the indictment for breaking prison.

been held in Kansas that it is no defence to an indictment for this offence that the prisoner was arrested without legal warrant, and was afterwards acquitted.[1]

§ 1675. The breaking need not be from a public prison. If there be force, it is a prison breach to escape from an officer in the streets.[2]

Custody of any kind enough.

§ 1676. When the breaking out is not accomplished the defendant may be indicted for an attempt.[3] But a breach is effected by throwing down, when escaping, a loose brick on top of a prison wall.[4]

Attempt is indictable.

§ 1677. Assistance to one breaking prison, or escaping from custody,[5] in his undertaking, is governed by the rules applying to principals and accessaries. If the prison breach be a felony, a person supplying the means to effect it, or waiting to carry off the prisoner after his escape, is accessary before or after the fact as the case may be. If the prison breach be a misdemeanor, then a person so assisting is a principal in the misdemeanor.[6] The indictment, if the offence be charged

Law of principal and accessary applies.

[1] State *v.* Lewis, 19 Kan. 260. See 10 Am. Law Rec. 290; compare State *v.* Garrell, 82 N. C. 580; State *v.* Brown, Ibid. 585.

[2] 2 Hawk. c. 18, s. 4; R. *v.* Bootie, 2 Burr. 864; R. *v.* Stokes, 5 C. & P. 148; Com. *v.* Filburn, 119 Mass. 297; State *v.* Beebe, 13 Kans. 589. *Supra*, § 1667.

[3] *Supra*, §§ 173 *et seq.*; State *v.* Murray, 15 Me. 100; People *v.* Rose, 12 Johns. 339. Under Alabama statute, see Luke *v.* State, 49 Ala. 30.

[4] R. *v.* Haswell, R. & R. 458. This does not apply to custody of bail. Redman *v.* State, 28 Ind. 205.

[5] Com. *v.* Filburn, 119 Mass. 297. See Perry *v.* State, 63 Ga. 402; Broxton *v.* State, 9 Tex. Ap. 97.

[6] See R. *v.* Haswell, R. & R. 458; R. *v.* Allan, C. & M. 295; State *v.* Murray, 15 Me. 100; Com. *v.* Filburn, 119 Mass. 297; People *v.* Tompkins, 9 Johns. 70. *Supra*, §§ 241, 652. As to Massachusetts statute and indictment thereon, see Com. *v.* Filburn, 119 Mass. 297, where it was held that when the attempt was violently to rescue from what seemed official custody, knowledge of the officer's actual character was not essential.

In People *v.* Duell, 3 Johns. 449, it was held that the offence, when the party in prison was charged with petit larceny, is felony; but see *contra*, 2 Hawk. P. C. 186–8.

as an accessaryship, must aver the principal's offence.[1] And a person knowingly harboring the fugitive after his escape, may be guilty as an accessary after the fact.[2] But when the offence is charged as a substantive misdemeanor, then it ought to be enough to aver that the person aided was at the time duly under arrest or imprisonment. And a charge of this character can be sustained by proof of aid furnished the prisoner such as would be likely to facilitate his escape.[3] Material assistance given by one prisoner to another falls under the same head, when such assistance has a natural tendency to facilitate escape.[4] But mere communications advising an escape, without supplying means, do not constitute the offence.[5]

Voluntary escape is indictable.

§ 1678. A distinction is taken by the old writers between breach of prison and escape. To breach of prison some force is necessary; some breaking of the continuity of the prison, some tearing away from custody.[6] But if this element be not present, *e. g.*, if the doors be left open and the prisoner walk without interruption out, the indictment must be for an escape, and is under no circumstances more than a misdemeanor.[7] Nor is a confinement within prison walls an essential condition of the offence. A prisoner's voluntary departure from bounds out of prison assigned him by the jailor is a "voluntary escape."[8] He is under arrest, if he is ordered to be subject to arrest.[9]

[1] *Supra*, § 1671.

[2] *Supra*, § 241. See Com. *v.* Miller, 2 Ashm. 61; and *infra*, § 1680.

[3] R. *v.* Paine, L. R. 1 C. C. 27; R. *v.* Allan, 1 C. & M. 295; Peeler *v.* State, 3 Tex. Ap. 533; Mason *v.* State, 7 Ibid. 623.

[4] Luke *v.* State, 49 Ala. 30.

[5] Hughes *v.* State, 1 Engl. (Ark.) 132.

[6] See R. *v.* Haswell, R. & R. 458; R. *v.* Kelly, 1 Cr. & Dix, 203.

[7] 2 Hawk. c. 18, s. 19; R. *v.* Allan, C. & M. 295.

[8] Riley *v.* State, 16 Conn. 47. See Green *v.* Hern, 2 Penn. R. 167.

[9] Com. *v.* Sheriff, 1 Grant, 187.

Whether, in a humane jurisprudence, the unresisted escape of prisoners from custody is a punishable offence may well be doubted. The later Roman common law holds that it is not. The law of freedom, so argue eminent jurists, is natural; the instinct for freedom irrepressible; if the law determines to restrain this freedom, it must do so by adequate means; and it cannot be considered an offence to break through restraint when no restraint is imposed. Undoubtedly it is a high phase of Socratic heroism for a man condemned to death or imprisonment to walk back, when let loose, to be executed or imprisoned. But the law does not undertake to establish by indictment Socratic heroism. It would not be good for society that the natural instinct for self-preservation should be made to give way to so romantic a sentiment as is here invoked; and it is a logical contradiction to say that the scaffold and the cell are to be used to prove that the scaffold and the cell are of no use. If men voluntarily submit to punishment, then compulsory punishment is a wrong. Beside this, a jailer may argue that if we hold that a prisoner is under bonds as much when he is let loose as when he is locked up, there is no reason for over-carefulness in locking up. Following these views, the conclusion has been reached that an unresisted escape is not *per se* an indictable offence (see Berner, Lehrbuch, p. 548; Henke Handbuch, iii. § 179; Koch, § 618); and this view has been adopted by all modern German codes. The English decisions on this point may be too firmly settled to be now shaken; but considerations such as those which have been mentioned may not be without their use in adjusting the punishment on convictions for unresisted escapes. On this topic may be consulted an article in the Albany Law Journal, reprinted in the London Law Times of Sept. 18, 1880.

Necessity a defence.

§ 1679. It need scarcely be added that for the technical offence of prison breach, necessity (*e. g.*, a conflagration in the prison) is a defence.[1] The same defence avails on an indictment against the officer.[2] But a plea by the defendant that the condition of the jail was intolerably injurious to his health will not be regarded as good where it does not appear that all other means of relief had failed.[3]

III. RESCUE.

Rescue is violent delivery of prisoner from custody.

§ 1680. Rescue is a violent delivery of a prisoner from lawful custody; and is committed by one who would be a principal in the second degree in a prisoner's breach of prison, and who was present actually or constructively assisting by violence in such prison breach.[4] It may also be consummated by wresting a prisoner violently from custody, even though the prisoner should take no part in the violence.[5] Rescue, like prison breach, is either felony or misdemeanor, as the crime charged on the prisoner rescued is felony or misdemeanor.[6] But there must be knowledge by the rescuer that the person rescued was under some arrest;[7] and if the person rescued be in the custody of a private person, the offender must

[1] See *supra*, §§ 95 *et seq.*

[2] Shattuck *v.* State, 51 Miss. 575.

[3] State *v.* Davis, 14 Nev. 439.

[4] See People *v.* Rathbun, 21 Wend. 509.

[5] State *v.* Cuthbert, T. Charl. 135. See Com. *v.* Filburn, 119 Mass. 297.

[6] 2 Hawk. P. C. c. 18, s. 10.

[7] State *v.* Hilton, 26 Mo. 199.

have notice of the fact that the person rescued is in such custody.[1]

An unsuccessful rescue may be indicted for an attempt.[2]

[1] Steph. Dig. C. L. art. 145:—

"Every one commits high treason, felony, or misdemeanor who rescues a prisoner imprisoned on a charge of, or under sentence for, high treason, felony, or misdemeanor, respectively."

Steph. Dig. C. L. citing 1 Hale P. C. 606; 1 Russ. on Cr. 597. See, for authorities, *supra*, § 652.

[2] See *supra*, §§ 173 *et seq.*, 652; State *v.* Murray, 15 Me. 100.

CHAPTER XXXI.

BIGAMY AND POLYGAMY.

§ 1682. BIGAMY is committed by a party who, when already legally married to one person, marries another person.[1] At common

[1] The following is from Steph. Dig. C. L. art. 257:—

"Every one commits the felony called bigamy, and is liable, upon conviction thereof, to a maximum punishment of seven years' penal servitude, who, being married, marries any other person during the life of his or her wife or husband.[1]

"The expression 'being married' means being legally married.[2] The word 'marries' means goes through a form of marriage which the law[3] of the place where such form is used recognizes as binding,[4] whether the parties are by that law competent to contract marriage or not, and although by their fraud the form employed may, apart from the bigamy,[5] have been insufficient to constitute a binding marriage.

"Provided, that this article does not extend,—

"(i.) [6] To a second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty; nor,

"(ii.) To any person marrying a second time, whose husband or wife has been continually absent from such person for seven years then last past, and has not been known by such person to be living within that time.

"The burden of proving such knowledge is upon the prosecutor when the fact that the parties have been continually absent for seven years has been proved;[7] nor,

"(iii.) To any person who, at the time of such second marriage, was divorced from the bond of the first marriage, nor to any person whose first marriage has been declared void by the sentence of any court of competent jurisdiction.

"A divorce *a vinculo matrimonii*, pronounced by a foreign court between persons who have contracted marriage in England, and who continue to be domiciled in England, on grounds which would not justify such a divorce in England, is not a divorce within the meaning of this clause.[8]

[1] 24 & 25 Vict. c. 100, s. 57, as explained by the authorities referred to in the Illustrations.

[2] See Illustration (2).

[3] Burt *v.* Burt, 29 L. J. (Probate), 133.

[4] See Illustration (3).

[5] See Illustration (4).

[6] The act does extend to a subject of her Majesty who has contracted a second marriage in Scotland during the lifetime of a wife previously married in Scotland. R. *v.* Topping, Dears. 647. The same rule would, of course, apply to a bigamous marriage in any foreign country.

[7] R. *v.* Curgerwen, L. R. 1 C. C. R. 1.

[8] R. *v.* Lolley, R. & R. 237. The decision does not refer to domicil, but this qdalification appears, from later cases, to be required. All the cases on this subject are collected in 2 Sm. L. C. 839–45. The question as to the exact time at which a person can be said to be divorced may arise. In 1 Hale, P. C. 694, a case is mentioned in which a person marrying after sentence of divorce, but pending an appeal, was held to be within a similar proviso in 1 Ja. c. 11. In R. *v.* Hale, tried at the Leeds Summer Assizes, 1875, a woman pleaded guilty to a charge of bigamy before Lindley, J., she having married after the decree *nisi* was pronounced, but before it became absolute, which it afterwards did. The judge's attention, however, was not directed to the passage in Hale.

[1] R. *v.* Chadwick, 11 Q. B. 205.

law bigamy is a misdemeanor.[1] It was made a felony by statute 1 Jac. I. ch. 11; but this statute is not, as to the grade of the offence,

Illustrations.

"(1) A. marries B., a person within the prohibited degrees of affinity, and, during B.'s lifetime, marries C. A. has not committed bigamy.[1]

"(2) A. marries B., and, during B.'s lifetime, goes through a form of marriage with C., a person within the prohibited degrees of affinity. A. has committed bigamy.[2]

"(3) A. marries B. in Ireland, and, during B.'s lifetime, goes through a form of marriage with C. in Ireland, which is invalid because both A. and C. are Protestants, and the marriage is performed by a Roman Catholic priest. A. commits bigamy.[3]

"(4) A., married to B., marries C., in B.'s lifetime, by banns. B. (the woman) being married, for purposes of concealment, under a false name. A. has committed bigamy.[4]

"(5) A., married to B., marries C. in B.'s lifetime, in the colony of Victoria. In order to show that A. committed bigamy, it must be proved that the form by which he was married was one recognized as a regular form of marriage by the law in force in Victoria."[5]

In art. 258, Steph. Dig. C. L., the law is thus further stated:—

"Every one is a principal in the second degree in the crime of bigamy who, being unmarried, knowingly enters into a marriage which renders the other party thereto guilty of bigamy."[6]

This question is discussed in future sections of the text. *Infra*, §§ 1687–8.

In Reynolds *v.* U. S., 98 U. S., 145, Waite, C. J., said;—

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon church, almost exclusively a feature of the life of Asiatic and African people. At common law the second marriage was always void (2 Kent's Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because, upon the separation of the ecclesiastical courts from the civil, the ecclesistical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they

[2] R. *v.* Brawn, 1 C. & K. 144; R. *v.* Allen, L. R. 1 C. C. R. 367.

[3] R. *v.* Allen, *ub. sup* pp 373–5, disapproving of R *v.* Fanning, 17 Ir. C. L. 289.

[4] R. *v.* Parson, 5 C. & P. 412. In R *v* Rea, the prisoner, at the bigamous marriage (before the registrar), gave a false Christian name, and was held to be rightly convicted.

[5] Burt *v* Burt, 29 L. J. (Probate), 133.

[6] R *v.* Brawn, 1 C. & K. 144.

[1] State *v.* Darrah, 1 Houst. C. C. 112.

regarded as having been brought to this country as part of the common law.[1]

I. EFFECT OF PLACE OF FIRST MARRIAGE.

Ordinarily marriage valid by *lex loci contractus* is valid everywhere.

§ 1683. Ordinarily a foreign marriage, valid by the place where it was solemnized, is regarded in bigamy as valid by the *lex delicti commissi*, which is usually the law of the place where the bigamous second marriage is prosecuted. But to this rule there are some marked exceptions. The first is where the parties to such foreign first marriage were, by the law of the place of prosecution, incapable of marrying. In such case the first marriage will be adjudged void by the *judex fori*, and the second marriage will be ruled not to be bigamous. The second is where the first marriage was not solemnized by forms which the law of the place of the second marriage holds to belong to the essence of marriage; when a similar result will be reached.[2]

§ 1684. Yet the converse of the last proposition is by no means universally true. A marriage which the law of the place of solemnization may hold, on grounds of purely local and arbitrary policy, to be invalid, may nevertheless be adjudged valid by the courts of the party's domicil.[1]

But not so as to converse.

were for testamentary causes and the settlement of the estates of deceased persons.

"By the statute of 1 James I. chapter 11, the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period reënacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that, on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, 'it hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth.' 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."

[1] Ibid.; Barber *v.* State, 50 Md. 161.

[2] *Infra*, § 1698; Whart. Confl. of L. §§ 160–5. See *supra*, § 271.

II. EFFECT OF TIME AND PLACE OF SECOND MARRIAGE.

Offence indictable in place of offence.

§ 1685. By the statute of James, the trial could be had only in the place in which the second marriage was solemnized, for the old common law reason that the *locus delicti commissi* has sole jurisdiction of the offence.[2] A man, therefore, could go abroad and marry a second wife, his first still living in England, and bring with impunity the second wife to the very place where the first resided. To meet this was passed the 9 Geo. IV., c. 31, s. 22, which provides that in case of a bigamous second marriage, the offence may be dealt with, where the offender is a British subject, "in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county."[3] In some of the United States a similar statute has been enacted; in others a "continuance" in a bigamous state is made indictable, no matter where the second marriage was solemnized.[4] But when the act of bigamous marriage is made the subject of indictment, then at common law the place of such act has exclusive jurisdiction.[5]

[1] Whart Confl. of L. §§ 169–181; though see Weinberg *v.* State, 25 Wis. 370; Bird *v.* Com., 21 Grat. 800; and fully, *infra*, § 1698; *supra*, § 271.

[2] 1 Hale, 693; 1 East P. C. 466; see People *v.* Mosher, 2 Parker C. R. 195; Finney *v.* State, 3 Head, 544.

[3] For a conviction under this statute, see R. *v.* Topping, 7 Cox C. C. 103; Dears. 647. Under the statute this "apprehending" must be averred in the indictment. R. *v.* Fraser, 1 Moody, 407; R. *v.* Whiley, Ibid. 186; State *v.* Fitzgerald, 75 Mo. 571.

[4] State *v.* Palmer, 18 Vt. 570; Com. *v.* Bradley, 2 Cush. 553; Finney *v.* State, 3 Head, 544; State *v.* Johnson, 12 Minn. 476. See State *v.* Sloan, 55 Iowa, 217; State *v.* Hughes, 58 Ibid. 165; Scoggins *v.* State, 32 Ark. 205.

In New York, trial may be in place of bigamous marriage; Collins *v.* People, 4 Thomp. & C. 77; 1 Hun, 610; or in county of arrest. Ah King *v.* People, 5 Hun, 297; see People *v.* Mosher, 2 Parker, C. R. 195.

In Arkansas, it is held that the legislature has no constitutional power to make the offence triable elsewhere than at the place of the bigamous marriage. Walls *v.* State, 32 Ark. 565.

In Alabama the venue must be the place of bigamous marriage. Baggs *v.* State, 55 Ala. 108; unless "continuous" bigamy is made indictable. Brewer *v.* State, 59 Ala. 101.

This topic is discussed *supra*, §§ 284 *et seq.*

[5] State *v.* Burnett, 83 N. C. 615; Brewer *v.* State, 59 Ala. 101; State *v.*

Unless the offence be made thus continuous, the statute of limitations begins to run from the date of the second marriage.[1]

III. THIRD MARRIAGE DURING SECOND BIGAMOUS MARRIAGE, BUT AFTER DEATH OF FIRST WIFE.

§ 1686. Supposing there is a second and bigamous marriage during which the first wife dies (or is divorced), and the man then marries a third time, is the third marriage bigamous?[2] Technically it is not in cases where the second marriage was void, for in such case the third marriage was valid.[3] But if the defendant, after the death of his first wife, acknowledged the second marriage, and recognized the second wife as his legal wife, this, according to the common law view of marriage elsewhere vindicated,[4] would constitute such a marriage as would make the third marriage bigamous.[5] Of course this does not hold in a trial where the *lex fori* treats a consensual marriage as invalid,[6] or where the indictment does not aver a valid marriage existing at the time of the alleged bigamy.[7]

Third marriage after second void marriage may not be bigamy.

IV. ACCESSARIES.

§ 1687. To bigamy, as to all other offences, applies the law of principal and accessary, as hereinbefore expressed.[8] Where the offence is a felony, then one present, knowingly aiding and abetting, even as a party, is a principal in the second degree;[9] and persons promoting, without being

If a misdemeanor, all concerned are principals.

Fitzgerald, 75 Mo. 571. See Wall *v.* State, 32 Ark. 565, as to statute to this effect.

[1] Gise *v.* Com., 81 Penn. St. 428; Scoggins *v.* State, 32 Ark. 205. See Brewer *v.* State, 59 Ala. 101; and for full discussion, Whart. Cr. Pl. & Pr. § 321.

[2] See R. *v.* Willshire, L. R. 6 Q. B. D. 366; Rep. 14 Cox C. C. 541; noticed in Whart. Cr. Ev. 9th ed., §§ 171, 810.

[3] 1 Hale, 693; 1 East P. C. 466; People *v.* Mosher, 2 Parker C. R. 195; People *v.* Chase, 27 Hun, 256; State *v.* Moore, 3 West. L. J. 134; Holbrook *v.* State, 34 Ark. 511. See State *v.* Palmer, 18 Vt. 570.

[4] *Infra*, §§ 1697–8, 1702.

[5] See Patterson *v.* Gaines, 6 How. 550; Hayes *v.* People, 3 Parker C. R. 325; 25 N. Y. 390. Thus, cohabitation, subsequent to emancipation, by an emancipated slave, with a woman to whom he was invalidly married prior to emancipation, validates the invalid prior marriage. McReynolds *v.* State, 5 Cold. 18; Hampton *v.* State, 45 Ala. 82; though see Williams *v.* State, 44 Ibid. 24.

[6] Denison *v.* Denison, 35 Md. 361.

[7] Hayes *v.* People, 25 N. Y. 390.

[8] R. *v.* Brown, 1 C. & K. 144.

[9] *Supra*, § 211; Boggus *v.* State, 34 Ga. 275. So under the English statute, which makes "counselling" *eo*

present, are accessaries before the fact. Where the offence is a misdemeanor, all concerned are principals.[1]

§ 1688. If this view be correct, a person who, knowing the fact,[2] marries another who has another husband or wife is principal in the bigamy. We must admit, however, on this point a probability of the same conflict of opinion as exists on the question whether a person having carnal intercourse with an adulterer is guilty of adultery.[3] But it has been held that a person thus marrying another who has a former husband or wife is not indictable, unless it be proved that there was knowledge of the incapacity of the other party to the marriage.[4]

Hence person marrying bigamous person is principal.

V. WHEN SECOND MARRIAGE WAS ON INDEPENDENT GROUNDS VOID OR VOIDABLE.

§ 1689. The offence consisting in entrapping another into marital intercourse on a false plea, it is no defence that the second marriage was void on other grounds than that of bigamy; or where the second marriage was within the prohibited degrees,[5] or was prohibited on the ground of difference of race;[6] and *a fortiori* where the second marriage was simply voidable, or technically defective.[7] But an informal and imperfect ceremony, not based on the assent of the parties, or followed by cohabitation, will not sustain an indictment.[8]

No defence that bigamous marriage was voidable.

VI. WHERE THE FIRST MARRIAGE WAS VOIDABLE OR VOID.

§ 1690. Though the first marriage be contracted under disabilities or impediments which render it *voidable*, yet a second marriage whilst the former is in fact subsisting comes within the statute, for the first, in judgment of law, is a

Nor that first marriage was voidable.

nomine indictable. R. *v.* Brown, 1 Cox C. C. 313; 1 C. & K. 144.

[1] See, fully, *supra*, §§ 206, 223.

[2] That this is necessary, see *supra*, §§ 214, 231.

[3] See *infra*, §§ 1717 *et seq.*

[4] Arnold *v.* State, 53 Ga. 574.

[5] R. *v.* Allen, L. R. 1 C. C. 367; 12 Cox C. C. 193; 26 Law J. 664 (disapproving R. *v.* Fanning, 10 Cox C. C. 411 Irish Q. B.); R. *v.* Brawn, 1 Cox C. C. 313; 1 C. & K. 144. *Supra*, § 1682, note.

[6] People *v.* Brown, 34 Mich. 339.

[7] R. *v.* Penson, 5 C. & P. 412; Hayes *v.* People, 5 Parker C. R. 325; S. C., 25 N. Y. 390; Carmichael *v.* State, 12 Ohio St. 553; Robinson *v.* Com., 6 Bush, 309.

[8] Kopke *v.* People, 43 Mich. 41.

marriage until avoided.[1] But should the first marriage be contracted under disabilities or incapacities which render it void *ab initio*, or be for other reasons void, the case is otherwise.[2]

VII. PARTIES BEYOND SEAS OR ABSENT.

Exception of beyond seas does not apply to cases where offender knows of continuous life of absentee.

§ 1691. It was held that the first exception, in the old statute, relieving "any person or persons, whose husband or wife shall be continually remaining beyond the seas by the space of seven years together," applied, though the party marrying have notice that the other is living.[3] Now, however, by 9 Geo. IV., if the party know that the other is alive, the exception does not relieve.[4] And this distinction is generally accepted in recent statutes."[5] To be in another State of the American Union is equivalent, it is held, to being beyond seas.[6]

Exception as to other absence only applies to cases where there is no

§ 1692. The second exception, that the statute shall not extend to any person or persons "whose husband or wife shall absent himself or herself, the one from the other, by the space of seven years together, in any place within the State of domicil or elsewhere, the one of them not knowing the other to be living within that time," according to

[1] 1 East P. C. 466; People *v.* Baker, 76 N. Y. 78; Cooley *v.* State, 55 Ala. 162.

[2] 1 Russ. on Cr. 290; R. *v.* Chadwick, 11 Q. B. 205. *Supra*, § 1686.

Thus, in Ohio a marriage contracted by parties, either of whom is under the age of consent, and not confirmed by cohabitation after arriving at that age, will not subject a party to punishment for bigamy, for contracting a subsequent marriage, while the first husband or wife is still living; Shafher *v.* State, 20 Ohio, 1; and, generally, if a boy under fourteen, or a girl under twelve, contract matrimony, it is void, unless both parties consent to confirm the marriage after the minor arrives at the age of consent. Co. Lit. 79. See R. *v.* Gordon, R. &. R. 48.

On the other hand, in conformity with the first proposition of this section, in South Carolina, where a marriage of a nephew to an aunt is valid, if the nephew, after such marriage, marry during the life of the first wife, he is indictable for bigamy. State *v.* Barefoot, 2 Rich. 209.

[3] 1 Hale, 693; 1 East P. C. 466. See R. *v.* Turner, 9 Cox C. C. 145; Gibson *v.* State, 38 Miss. 313.

[4] R. *v.* Turner, 9 Cox C. C. 145. See R. *v.* Briggs, 7 Ibid. 175; D. & B. 98; Com. *v.* Thompson, 6 Allen, 591.

[5] See Com. *v.* Johnson, 10 Allen, 196.

[6] Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373; Murray *v.* Baker, 3 Wheat. 541; Bank of Alex. *v.* Dyer, 14 Pet. 141; *aliter* in North Carolina; Whitlock *v.* Walton, 2 Murph, 23; Earle *v.* Dickson, 1 Dev. 16. See these cases discussed in Davie *v.* Briggs, 97 U. S. 628.

knowledge of such life.

its express words, only applies when the party marrying again has no knowledge that the former husband or wife is alive. The mode of proving this exception is hereafter distinctively discussed.[1] When there is no local statute, these exceptions are presumed to be part of the common law of the State.[2] In New York, Mississippi, and other States, the term is five years.[3] In Pennsylvania, "if any husband or wife, upon any false rumor, in appearance well founded, of the death of the other (when such other has been absent for two whole years)," shall marry again, this is not bigamy.[4] Under this statute, the rumor must not be vague or fleeting, but must be circumstantial, as to place, time, and mode of death.[5]

Exception does not apply to party deserting.

§ 1693. The phrase in the Massachusetts statute, which excepts cases where the absent party "voluntarily withdrew," does not release the party deserting; it only applies to the party deserted.[6]

VIII. CONSUMMATION NOT NECESSARY.

§ 1694. Marriage is in law complete when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity,[7] nor is cohabitation.[8]

IX. INTERMEDIATE DIVORCE.

Valid divorce from first marriage is a defence.

§ 1695. If a divorce be such as by the *lex fori* entitles the defendant to marry again, then he cannot be convicted of bigamy.[9] But this is a matter the *lex fori* alone

[1] *Infra*, § 1708.

[2] Barber *v.* State, 50 Md. 161; Eubanks *v.* Banks, 34 Ga. 407; Whart. Confl. of Laws, § 133.

[3] 2 Kent's Com. 79; Gibson *v.* State, 38 Miss. 313.

[4] Revised Act, Bill I. § 34 (reënacting Colonial Act of 1705, as modified in 1790 and 1815).

[5] Com. *v.* Smith, Whart. on Hom. App.; 1 Whart. Dig. 826.

[6] Com. *v.* Thompson, 11 Allen, 23.

[7] Gise *v.* Com., 81 Penn. St. 428; State *v.* Patterson, 2 Ired. 346.

[8] Ibid.; Beggs *v.* State, 55 Ala. 108; Scoggins *v.* State, 32 Ark. 205.

[9] Lolley's Case, 2 Cl. & F. 567 n.; R. & R. 237; State *v.* Weatherby, 43 Me. 258; People *v.* Hovey, 5 Barb. 117. But see People *v.* Faber, 92 N. Y. 146 (modifying People *v.* Hovey, 5 Barb. 117), where it was held bigamy in New York for a person divorced in that State for adultery to marry again, such second marriage being forbidden by the divorce. See 17 Cent. L. J. 83.

must decide.[1] When a man, for instance, is indicted in Pennsylvania for marrying a second time in that State, the first wife being alive, it is no defence to the indictment that the defendant was divorced from the first wife in Indiana, if the Indiana divorce is not valid by Pennsylvania law.[2] As a principle of international law, to give validity to such a divorce, the complainant, at least, must be domiciled in the divorcing State;[3] and there must be due personal notice, if possible, to the defendant. And in Pennsylvania, where the complainant has deserted the defendant, and gone to a foreign domicil, the divorce must be sued in the defendant's domicil.[4]

Clearly a divorce from the first marriage *subsequent* to the second marriage does not purge the bigamy.[5]

Honest belief in a divorce no defence.

The burden of proving the divorce is on the defendant.[6]

§ 1695 *a*. As has already been seen, an honest but erroneous belief in a divorce is no defence.[7]

[1] See, as to Massachusetts practice, Com. *v.* Richardson, 126 Mass. 34.

[2] Whart. Confl. of L. § 224. See People *v.* Chase, 27 Hun, 256.

[3] People *v.* Dawell, 25 Mich. 247. See Barber *v.* Root, 10 Mass. 260; Smith *v.* Smith, 13 Gray, 209; Shannon *v.* Shannon, 4 Allen, 134; Com. *v.* Richardson, 126 Mass. 34; Jackson *v.* Jackson, 1 Johns. 424; Borden *v.* Fitch, 15 Ibid. 121; Parish *v.* Parish, 32 Ga. 653; State *v.* Armington, 25 Minn. 29; though see Kinnier *v.* Kinnier, 45 N. Y. 535.

[4] Colvin *v.* Reed, 55 Penn. St. 375; Reel *v.* Elder, 62 Ibid. 308; Whart. Confl. of L. §§ 224 *et seq.*

[5] Baker *v.* People, 2 Hill (N. Y.), 325.

[6] Com. *v.* Boyer, 7 Allen, 306. See Whart. Cr. Ev. §§ 319 *et seq.*

[7] *Supra*, § 88; State *v.* Goodenow, 65 Me. 30; People *v.* Weed, 29 Hun, 628; Davis *v.* Com., 13 Bush, 318; Hood *v.* Hood, 56 Ind. 263. See, *contra*, Squire *v.* State, 46 Ibid. 450. *Cf.* R. *v.* Willshire, *supra*, § 1686. In State *v.* Whitcomb, 52 Iowa, 85, the evidence was that the defendant, in 1872, procured a decree of divorce from his wife, Roana Whitcomb, and, in 1873, was married to another woman. Afterward, at the suit of the said Roana, the decree divorcing her from defendant was set aside, on the ground of fraud practised by defendant in procuring it, and for want of jurisdiction of the court by which it was granted. Defendant was indicted for the crime of adultery in unlawfully cohabiting with the second wife, was convicted, and appealed. It was held that the decree of divorce having been adjudged void was so from the beginning, and afforded no protection to defendant even for acts done before it was set aside; and that evidence of the good faith with which defendant contracted the second marriage was properly excluded.

X. EVIDENCE.

1. *Proof of marriage.*

In bigamy prior marriage has to be proved beyond reasonable doubt.

§ 1696. Before discussing the question of proof of marriage, it is desirable to recall the fact that the issue in bigamy is different from the issue in other cases in which marriage is sought to be sustained. An emigrant, for instance, comes from Europe to this country with a wife whom he professes to have married in his domicil of origin. He rears children whom he acknowledges, and who claim after his death to inherit his estate. Here, the fact of marriage being conceded, come in two important considerations to sustain the legitimacy of the children. The first is that all acts are presumed to be regular until the contrary appears; and though this is not a presumption of law but a rule for the regulation of the burden of proof, it leads to a judgment, in case of equipoise, in favor of regularity. The second, which is also a rule for the adjustment of the burden of proof, is that when the evidence is equally balanced, the courts on all questions of legitimacy, will favor the hypothesis of matrimony.[1]

Suppose, however, the emigrant in question has come to this country without a wife; marries here; establishes a home and family; and then is arrested here on the charge of bigamy, based on an alleged marriage in his native land. Here the prosecution, instead of being aided by rules which in a doubtful case would turn the scales in its favor, has to encounter considerations which in a doubtful case will turn the scales against it. The defendant's second marriage is not contested, and is looked on with peculiar favor by the judicial polity of a country such as this, which seeks to encourage family growth.[2] But what is much more important, the fact of the first marriage is the gist of the prosecution's case, and to it applies eminently the maxim, that the charge of guilt, to justify a conviction, must be made out beyond reasonable doubt. Hence, as presently more fully seen, we find courts which are ready, when a marriage is to be adjudicated on its civil relations, to regard the husband's own admissions as proof of the fact, shrinking from this

[1] See Patterson *v.* Gaines, 6 How. U. S. 550; Shafer *v.* State, 20 Ohio, 1. Compare *supra*, §§ 271, 1685, and Whart. Cr. Ev. §§ 827, 828, as to presumptions of marriage and legitimacy.

[2] See Whart. Confl. of L. § 150.

conclusion, when the object is to sustain a criminal prosecution against him for bigamy. Confessions are only authoritative, it is well argued, when there is clear proof of the *corpus delicti*;[1] and here the *corpus delicti* is the alleged first marriage, which must be "clearly proved," independently of the defendant's confession. Now, in view of the issue being criminal, we can easily understand how a court should say, as some courts have said: "The *lex loci contractus* prescribes certain solemnities as necessary to constitute the formalities of marriage, and, therefore, in view of the maxim, '*locus regit actum*,' we must hold that any other proof of the fact of marriage is but secondary, and is not to be received." Had the first wife been brought to this country, and here acknowledged, the case would have been different. But when the prosecution rests simply on a technical first marriage, not followed by cohabitation in this country, it is not inconsistent in courts which recognize the validity of a consensual marriage to hold that such technical first marriage should, in a criminal issue, in order to be made out beyond reasonable doubt,[2] be proved by the record, if there be such; and that secondary evidence should only be received when the prescriptions of the *lex loci contractus* are peculiarly onerous, or when the primary evidence cannot be obtained. What are the modes of proving a record, or registry of marriage, when this is insisted on, is elsewhere fully discussed.[3]

[1] *Infra*, § 1700. See Whart. Cr. Ev. §§ 624–633; and see R. *v.* Flaherty, 2 C. & K. 782.

[2] That the presumption of regularity applies to such marriages, see Whart. on Cr. Ev. § 827; R. *v.* Griffin, 14 Cox C. C. 36.

[3] Whart. Cr. Ev. §§ 169 *et seq.* See People *v.* Humphrey, 7 Johns. 314; Weinberg *v.* State, 25 Wis. 270; Bird *v.* Com., 21 Grat. 800; Squire *v.* State, 46 Ind. 458; Com. *v.* Jackson, 11 Bush. 679; People *v.* Gonce, 79 Mo. 600; Harris *v.* Cooper, 31 Up. Can. (Q. B.) 182, and *infra*, § 1700; Dumas *v.* State, 14 Tex. Ap. 465.

In these countries where a contract in writing is by the law of the country made essential to the marriage, it should, as a rule, be produced. 1 Camp. 61.

In England, the register of the parish is admissible for the same purpose. 2 Bacon's Ab. Ev. F.; Gilb. Ev. 72; 1 Greenleaf on Ev. §§ 434, 493, 544, 545, though the original record is not necessary. Sayer *v.* Glossop, 2 Exch. 409; 2 C. & K. 694.

In New Hampshire, a copy of the record of the marriage from the clerk's office, duly certified, with proof of the identity of the party, is proper evidence. State *v.* Wallace, 9 N. H. 515.

In Illinois, it is competent, on a trial for bigamy, to prove the first marriage, or either marriage, by producing a copy of the marriage license, with the certificate of the justice, indorsed on the license, that he had solemnized the marriage, and a certificate of the clerk of the county commissioners' court of the county that the same was a true copy, transcribed from the original on file in his office. Jackson *v.* People, 2 Scam. 231. Mere reputation is not enough. Whart. Crim. Ev. § 170. "There must be strict proof of the fact" of marriage or cohabitation, which implies marriage. Thornton, J., in Miner *v.* People, 58 Ill. 59; citing Harman *v.* Harman, 16 Ibid. 85. Compare Westfield *v.* Warren, 3 Halst. 249; Buchanan *v.* State, 55 Ala. 154.

In Vermont, where it was proved that parties appeared before a magistrate, or one acting as such, in New York, and declared their consent to a marriage, and this was followed by cohabitation and recognition of each other as man and wife, it was held to be sufficient proof *primâ facie* of such marriage. State *v.* Rood, 12 Vt. 396.

It will be seen in the next section that mere consent is sufficient, by the common law of Christendom, to establish marriage. See Glasson, Marriage Civil, Paris, 1879; London Law Mag., 1878, 236. And, so far as concerns the United States, this may be viewed as judicially determined. Patterson *v.* Gaines, 6 How. 550; Hayes *v.* People, 5 Parker C. R. 325; 25 N. Y. 390; Hutchins *v.* Kimmell, 31 Mich. 126. See Denison *v.* Denison, 35 Md. 361, and cases cited to § 1700, note.

§ 1697. Marriage is not merely a contract, but is an institution of Christendom, internationally recognized in all Christian States. But while this is the case, each State, in determining the constituents of marriage, is governed by its distinctive policy. As establishing this position, the following survey of the law may be not irrelevant:—

Consensual marriage valid.

The common law of marriage in the English settled portions of the United States is the common law of England as it was at the time of the settlement of the American colonies. We have, therefore, first to inquire, what was at that time the English common law as to marriage. Did that law validate consensual marriages, contracted without any ecclesiastical or secular sanction?

The common law of England on the subject of marriage, we have first to remark, is the canon law as it obtained in England at the time of the Reformation, and as it remained until altered by legislation in the reign of George II., under the auspices of Lord Hardwicke. And the canon law as to marriage at the time of the Reformation is the canon law of the Catholic Church as it was before the rupture, and as it remained in the Roman Catholic branch until modified by the Council of Trent. In order, therefore, to get at our common law as to marriage, on this interesting issue, we have to inquire what was the canon law of the undivided Catholic Church, at and before the Reformation.

What this canon law was is a question as to which there is not much doubt. If it appeared that there was a marriage agreed to and consummated by competent parties, the church sustained the marriage, even though there was no ecclesiastical benediction; and in this the State followed the Church. It is true that the church recommended a *benedictio sacerdotalis in ecclesia*, or ecclesiastical benediction; and it is true, also, that various local councils made provision for the publishing of banns. But neither banns nor benedictions were the conditions precedent of marriage. A marriage without either, though reprobated as *matrimonium clandestinum*, subjecting the parties under certain circumstances to ecclesiastical censure, was, notwithstanding, a legal marriage. Even a marriage in secret, of which none but the parties were at the time cognizant, was regarded, if satisfactorily proved by the acknowledgments and conduct of the parties, as creating all the incidents of marriage, both as to property and as to offspring. Cap. 30. x. de sponsal. et mat. "The essence of the sacrament of matrimony," said Peter Lombard, "is not the performance of marriage by the priest, but the *consensus* of husband and wife." Dist. xxvii. c. Or, to adopt the language of an authoritative German commentator, made still more authoritative by its indorsement by an eminent American divine, "The scholastics generally held that the will of the contracting parties constitutes the marriage; they complete the sacrament. Secret marriages, though forbidden, are valid. In none of the ancient rituals is there a sacramental form of marriage to be spoken by the priest."[1] The same conclusion is stated by Lingard, whose weight on the Roman Catholic side is as great as is that of Hagenbach and Smith on the Protestant side. We may, therefore, regard it as settled that theologians concur in the validity of consensual marriages by the old canon law, although to such marriage neither consent of parents nor guardians, nor the benediction of the church, nor sanction by civil officers, were given. In fact, while there were evils in sanctioning all consensual marriages, the old canonists, as well as the old jurists, agreed that these evils were not so great as were the evils of validating only such marriages as were solemnized in a particular way. The first alternative might lead occasionally to hasty and improvident unions. The second

[1] Hagenbach's History of Doctrine, by Prof. Smith, ii. § 20.

would certainly lead to wrong being done to many innocent persons, to the abandonment of women and the bastardizing of children through the neglect or fraud of others. The duty of the State, it was insisted, is to encourage matrimony, as the essential basis of society, not to discourage it by artificial restrictions, thereby fostering the establishment of illicit sexual relations. And so far as to consensual marriages being hasty and improvident, this danger would be diminished, so it was said, if it were known that such marriages were recognized as binding. And it was retorted that improvidence, if not haste, often characterized marriages solemnized with the benediction of both State and Church. The statute 2 & 3 Edw. VI. c. 23, goes a great way by implication to show that by the common law the essence of marriage consists in the executed contract,—*sponsalia de praesenti*; and that when this exists, either party may be compelled to submit to an ecclesiastical solemnization. That statute provides that "when any cause or contract of marriage should be pretended to have been made, it shall be lawful to the king's ecclesiastical judge to hear and examine the same; *and having the said contract sufficiently and lawfully proved before him, to give sentence for matrimony, commanding solemnization, cohabitation, consummation and tractation, as in times past, before the said statute* (that of 32 Henry VIII.), the king's ecclesiastical judge, by the king's ecclesiastical laws, might have done."[1]

Did the decree of the Council of Trent in this respect change the canon law so as to affect those portions of the United States which, at the time of the action of the council, were subject to Roman Catholic princes? We must remember, in answering this question that the decrees of the council are not, by their own limitation, binding in any country in which they are not technically "published;" and we have a series of rulings of the Supreme Court of Louisiana to the effect that in the great territory acquired by the United States from France and Spain, no such publication was ever made. Even in France, Pothier tells us, the decree of the council was treated by the secular courts as a sacerdotal usurpation, having

[1] The fact that the law lords were equally divided on this point in R. v. Millis, 10 Cl. & F. 534, appears superficially to throw doubt on the conclusion stated in the text. That it does not have this effect I have shown at large in another work (Whart. Confl. of Laws, § 172), in an argument which it would occupy too much space to reproduce.

no local authority.[1] In Italy the same judicial results have been reached.[2] And even where the decrees of the council are published, they bind only persons in union with the Roman See. In the Sussex Peerage Case, before the English House of Lords, in 1844, when the question of the validity of the marriage of the Duke of Sussex to Lady Augusta Murray, in the city of Rome, by a Protestant minister, came up for adjudication, it was expressly stated by Cardinal Wiseman, under oath, that the marriage in the eye of the Church of Rome was valid. Lord Campbell's comments on this evidence are direct to the point before us. "The evidence that has been given to us of the Roman law, uncontradicted as it is, would prove that a marriage at Rome of English Protestants, contracted according to the laws of their own church, would be recognized as a marriage by the Roman law, and therefore would be a marriage all over the world." "I own that that evidence surprised me. I had imagined that it was impossible there could be a valid marriage at Rome between Protestants, by a Protestant clergyman, such as the Roman law would recognize. As the evidence stands at your lordships' bar, it would appear, however, that the Roman law . . . would treat it as a marriage valid by the universal law of the church before the date of the decree of the council; and it would appear that the decree of the Council of Trent respecting marriages was not meant to apply to Protestants, who could not conform to it."

The action of the Council of Trent was followed by a series of secular edicts and legislative acts, on the Continent of Europe, the motives being partly religious and partly political. On the one side, Protestant States were determined not to be overawed by Rome, and they hastened, when there was an established church, to make the assent of the local parish minister essential to marriage. On the other side, the desire to check the over-growth of population led to measures that would prevent marriage from being too easy. The religious limitation is now almost universally removed by the enforcement of civil marriages; but the secular limitations remain, and are in some relations very inconsistent with the policy of

[1] Pothier, Traité de Mariage, part 4, c. i. § 4.

[2] Lawrence, Étude sur le Mariage, p. 10; Glasson, Mariage Civil, Paris, 1879.

encouragement of marriage which prevails in the United States. In England, Lord Hardwicke's Act, passed in 1753, which is in most respects still in force, established a series of requisites as to time, place, and office, the omission of any of which is fatal. The French Code requires the assent of parents; and the same restriction exists in other continental States. In Austria, as it is stated in a late report of a committee of the English House of Commons, the minimum age is fourteen years; in Russia and Saxony, it is eighteen years, for men and sixteen for women; in France, Belgium, and Italy, eighteen for men and fifteen for women; in Saxe Coburg Gotha, no man is permitted to marry until the age of twenty-one years. The recent German Code makes the minimum twenty years for men and sixteen for women; and the same limit prevails in several Swiss cantons. But, independently of this restriction, the consent of parents or guardians, in several German States, is necessary in the case of men under twenty-five years, and of women under twenty-one years. And marriages repugnant to these conditions are nullities.

How far such restrictions on domiciled subjects will be regarded as extra-territorially effective is illustrated in an interesting English case,[1] decided in March, 1877. In this case, which was a petition for a decree of nullity of marriage, and which was undefended, the petitioner, who styled herself "Clara Maxima Pacheco Pereiva Pamplona da Cuntra Sottomayer," was the daughter of Gonçalo de Sottomayer, a Portuguese of wealth, who resided with his family in Portugal, as late as 1858. In that year, his health failing, he moved with his wife, and his only child, the petitioner, to London, she being then eight years old. When in London, as had been previously the case in Portugal, Mr. and Mrs. Sottomayer occupied the same house with her brother, Mr. De Barros, and his family. Mr. Sottomayer becoming so imbecile as to be incapable of business, his wife and her brother entered into a partnership with a Portuguese house, which in 1866 became bankrupt. Mrs. Sottomayer, under the impression that by a marriage of her daughter to a son of Mr. De Barros an ostensible party for the protection of the

[1] Sottomayer v. De Barros, decided by Sir R. Phillimore in the Divorce Division, 36 L. T. R. 746; L. R. 2 P. D. 81.

family estates might be found, obtained the consent of Mr. De Barros and his son to the marriage. In Portugal the marriage would have been void, as the parties were first cousins. The petitioner, Miss Sottomayer, who, with the other members of her family retained her Portuguese domicil, appears to have at first vehemently resisted the marriage, but afterwards yielded to her mother's entreaties, and the parties were duly married at a registry office in London, on June 21, 1866, she being then fourteen years and five months old, and he being sixteen years old. The young couple returned to the house where they had previously resided, but never lived together as man and wife. In 1874, the husband becoming a bankrupt, Mr. Sottomayer's estate, partly in his son-in-law's hands, was again imperilled. At the first crisis, it was thought that the estate could be rescued by the daughter's marriage. Now it was to be rescued by her divorce. On November 18, 1874, she filed the petition before us, on the ground, first, that the parties were domiciled at the time in Portugal, by whose laws the marriage would have been void; and, secondly, that the marriage was entered into by her ignorantly, and was induced by fraudulent representations. Sir Robert Phillimore did not hesitate to say, in giving judgment, that the marriage was one "which the court would not be reluctant to pronounce invalid," if there were legal grounds for such a conclusion; but while thus expressing his sympathy with the petitioner, he held that the Portuguese law restricting matrimonial capacity could not be regarded, by an English court, as restraining marriages of Portuguese in England. "This marriage," he argued, "cannot be pronounced invalid, because it is viewed as incestuous according to the general law of Christendom. It is not a marriage between persons in the direct lineal line of consanguinity, or in the collateral line within the degree of brother and sister, both which classes of marriage are by the usage and practice of Christian States, and the general concurrence of Christian law and authority, considered as incestuous, unnatural, and destructive of civilized life." The Portuguese law, vacating the marriages of first cousins, was a law restraining the right of marriage; and it was therefore held that an English judge would not be a party to enforce it against Portuguese subjects marrying in England. The principle, therefore, is, that domiciliary restriction on marriage, not resting on natural law, when imposed by one State, will not be enforced by another State where the solemnization took place, with whose policy they conflict.

On an appeal from Sir R. Phillimore's decision, which was heard before James, Baggallay, and Cotton, L. JJ., November 26, 1878, the case was remitted to ascertain the real facts, James, L. J., however, intimating that if both parties were domiciled at the time of the marriage in Portugal, the Portuguese law should prevail.[1] At a subsequent hearing before Sir James Hannen, the proposition was laid down that where of the two contracting parties to a marriage in England one is there domiciled and the other in a foreign country, and neither of the parties is subject to any incapacity recognized by the laws of England, the marriage is valid, even though the party having the foreign domicil be subject to a personal incapacity recognized by the laws of the country in which such party is domiciled.[2] In the course of his opinion it was said by Sir J. Hannen: "Numerous examples might be suggested of the injustice which might be worked to our own subjects if a marriage was declared invalid on the ground that it was forbidden by the law of the domicil of one of the parties. In his excellent treatise on 'Domicil,' Mr. Dicey says that 'a marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which, though imposed by the law of his or her domicil, is of a kind to which our courts refuse recognition.' But on what principle are our courts to refuse recognition if not on the basis of our own laws? If this guide alone be not taken, it will be open to every judge to indulge his own feelings as to what prohibitions of foreign countries on the capacity to contract a marriage are reasonable. What have the English tribunals to do with what may be thought in other countries on such a subject?"

The marriage of Jerome Bonaparte to Miss Patterson, also, though invalid in France, would unquestionably have been held valid in the United States, had it been here litigated; and it was expressly sanctioned by the Papal court.

To the same effect may be cited a leading English case, already incidentally noticed.[3] In that case, which was argued before the

[1] Sottomayer *v.* De Barros, L. R. 3 P. D. (C. A.) 1.

[2] Sottomayer *v.* De Barros, 41 L. T. 281

[3] Simonin *v.* Mallack, 2 Sw. & Tr. 67.

Court of Divorce, the parties were French subjects, domiciled in France, and came to England for the purpose of contracting a marriage, which, for want of consent of parents, would have been void by French law if contracted in Paris. They were married in England by license, and immediately returned to France. The marriage was annulled in France, as in fraud of French law. It was, however, sustained in England, where a petition was filed for a decree of nullity, and where Sir C. Creswell declared for the validity of the marriage with the concurrence of the entire court. "It is very remarkable," he said, "that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold the marriage void because the parties to the contract were the domiciled subjects of another country where such marriage would not be allowed."

§ 1698. The following summary may be here given, reserving the specific examination of the authorities to the second edition of my book on Conflict of Laws:—

Lex fori determines as to requisites.

1. When a marriage by competent parties is proved to have been solemnized abroad, the presumption is that it was in accordance with the *lex loci contractus*.

2. The old common law of England, adopting in this respect the canon law, validates marriages contracted by competent parties irrespective of ecclesiastical benediction; and this law was brought to the United States by the English colonists, and became part of the common law of the English settled States.

3. Each sovereignty will maintain its distinctive policy as to marriage. France, for instance, as in Jerome Bonaparte's Case, may decline to accept an American marriage as changing the *status* of one of her domiciled subjects. On the other hand, in the United States, we would hold the marriage binding, when validly solemnized within our borders, by parties whom we regard competent. This is now settled in England to be the case when it is only by the law of the domicil of one of them that the marriage is invalid. But on reason and on authority we must hold with Sir J. Hannen,[1]

[1] Sottomayer *v.* De Barros, 41 L. T. 281; L. R. 3 P. D. 1.

that even though by the court of the domicil of both parties the marriage is invalid, it would still be sustained by the courts of the State where the marriage is solemnized, where by the laws of that State the parties would have been capable of marriage if subjects.

Each sovereignty applying its distinctive policy, as has been said, to its subjects, the courts of domicil, should the parties return to it after contracting a marriage abroad, would hold the marriage invalid in all cases in which its own prohibition is based on national policy, or on national conception of morals, and not on matters of form. We may illustrate this by the English rulings as to the marriage of a man with his sister-in-law, and by our own rulings in cases of marriages of negroes with whites. In some States these marriages are void. There can be no question that domiciled citizens of such States, marrying in England in defiance of this prohibition, would be regarded in England as validly married. There is no doubt, as we shall hereafter see, that should they return after the marriage to their domicil, the courts of that domicil would hold the marriage invalid.

Nor does it follow that because a State requires certain conditions to validate marriages within its borders, the marriage of foreigners within such borders, without complying with such conditions, would be held invalid by the courts of the domicil of the parties so marrying. I express this opinion with great deference to the arguments in which the contrary conclusion is ably maintained by several eminent jurists. My reasons are threefold: *First*. In marriage, as has been said, each sovereignty is governed, as to matters involving state policy or morals, by its distinctive standards. *Secondly*. We have American rulings to this effect, holding that American citizens marrying abroad, though without complying with requisites established by the law of the place of solemnization, will be regarded as lawfully married by the courts of their domicil if such marriage would have been valid if solemnized at such domicil. The examination of the recent rulings to this effect I must remand to the second edition of my book on Conflict of Laws. *Thirdly*. In France, if not in Germany, it is held that in such cases the *lex domicilii* is to control, and that if the marriage of Americans in Paris, for instance, is in conformity with the law of their domicil, though not in conformity with the law of France, it would be held good in France. If good in France, it would be regarded, even by those who insist

upon the ubiquity of the *lex loci contractus*, as good as in the United States.

4. What has been said applies to marriages by persons abroad, on the eve and in expectation of making their matrimonial domicil in the United States. The expressions in the first edition of my book on Conflict of Laws, pressing the rule further, I desire to recall. Except in the case of persons having their matrimonial domicil in the United States, the law of the place of the solemnization of a marriage is to be regarded by us as determining its validity.

Internationally marriage may be proved by parol.

§ 1699. Where the *lex fori* simply prescribes certain formalities as the sole evidence of marriage, then the judge, so far as concerns a domestic marriage, must require that such proof should be given.[1] But when the question is the validity of a foreign marriage, such proof, as relating solely to domestic marriages, cannot be exacted. By international law, marriages may be proved by parol.[2]

Where prior consensual marriage is set up, it should not be rested on mere admissions.

§ 1700. When the *lex fori* recognizes, as is the case in all those jurisdictions in which the English common law continues in force, consensual marriages, the admissions of the parties may be received as tending to establish such marriages, whatever may be the weight to which they may be entitled, provided such admissions have not been extorted by force or fraud.[3] As to the weight to be attached to such admissions, however, the following distinctions are to be kept in mind:—

(1) *Admissions during Cohabitation.*—When these admissions are part of cohabitation (as where a man living with a woman as man and wife says, "this is my wife"), the condition of things under which the admission was made is to be taken into consideration. "Cohabitation as man and wife" may take place in a country where such cohabitation does not necessarily mean marriage according to the English common law; or it may be the subterfuge of an adulterer, seeking in this way to shelter himself and his paramour from

[1] See Whart. Cr. Ev. § 169.

[2] Whart. Cr. Ev. § 170; Com. v. Holt, 121 Mass. 61; Murphy v. State, 50 Ga. 150; State v. Hilton, 3 Rich. 434; Williams v. State, 54 Ala. 131. If the marriage is *primâ facie* regular, it will be presumed that all necessary technical conditions existed. R. v. Creswell, 13 Cox C. C. 126. As to English practice, see R. v. Simpson, 15 Ibid. 323.

[3] See Whart. Cr. Ev. §§ 623 *et seq.*

immediate scandal. On the other hand, an admission concomitant with cohabitation for any long continued period, in a country where monogamous marriages alone are tolerated, and in a community which resents any invasions of this rule, is entitled to great weight.

(2) *Admissions when Cohabitation has ceased.*—These are to be closely scanned, and should not be regarded as sufficient to sustain a conviction, without proof of continuous cohabitation, under the circumstances last specified, or of an actual performance of the marriage ceremony. They may have been made: (*a*) in ignorance of impediments which would have avoided the marriage; or (*b*) under a mistake of law; or (*c*) in levity, using the term marriage as a euphemism for a less honorable connection; or (*d*) for self-serving purposes, or in order to shield a paramour. This does not make such admissions technically inadmissible, but it makes them insufficient, unless corroborated, to sustain a conviction. They may be corroborated by proof of cohabitation under circumstances which make cohabitation strong proof of marriage, or by proof of the performance of the marriage ceremony.

(3) *Confessions of Guilt.*—Of course these, when deliberately and intelligently made, are strong proof; yet even these may be made under a mistake of facts, or for the purpose of getting rid of the subsequent marriage.[1]

But where the admission is not incidental to cohabitation, and there is no proof of marriage *aliunde*, such admission is not enough to prove marriage.[2]

[1] That admissions are admissible in proof of marriage, when not excluded by the *lex fori*, and, with cohabitation, may prove marriage, see R. v. Simmonsto, 1 C. & K. 164; Trumman's Case, 1 East P. C. 470; R. v. Newton, 2 M. & Rob. 503; Miles v. U. S., 103 U. S. 304; Cayford's Case, 7 Greenl. 57; State v. Hodgkins, 19 Me. 155; State v. Libbey, 44 Ibid. 469; Com. v. Holt, 121 Mass. 61; State v. Lash, 1 Harr. (N. J.) 380; Com. v. Murtagh, 1 Ashm. 272; Wolverton v. State, 16 Ohio, 173; Carmichael v. State, 12 Ohio St. 553; State v. Seals, 16 Ind. 352; Squire v. State, 46 Ibid. 459; Quin v. State, Ibid. 725; State v. Sanders, 30 Iowa, 582; Warner's Case, 2 Va. Cas. 95; Oneale v. Com., 17 Grat. 582; State v. Hilton, 3 Rich. 434; State v. Britton, 4 McCord, 256; Cook v. State, 11 Ga. 53; Arnold v. State, 53 Ibid. 574; Cameron v. State, 14 Ala. 546; Langtry v. State, 30 Ibid. 536; Williams v. State, 54 Ibid. 131; Robinson v. Com., 6 Bush, 309; Com. v. Jackson, 11 Ibid. 679; Holbrook v. State, 34 Ark. 511; Gorman v. State, 23 Tex. 646.

[2] Whart. Cr. Ev. §§ 623 *et seq.*; R. v. Flaherty, 2 C. & K. 782; Com. v. Littlejohn, 15 Mass. 163; State v. Ros-

§ 1701. It is true that we can conceive of cases in which we may refuse to admit that oppressive local regulations can bind persons

well, 6 Conn. 446; Gahagan *v.* People, 1 Parker C. R. 378; Dove *v.* State, 3 Heisk. 348; Weinberg *v.* State, 25 Wis. 370. Compare Com. *v.* Jackson, 11 Bush, 679; Williams *v.* State, 54 Ala. 131. Under Massachusetts statute, see Com. *v.* Holt, 121 Mass. 61.

That dissent by one of the parties at the time of marriage invalidates, see Kopke *v.* People, 43 Mich. 41.

In amplification of the text may be considered the following extracts from an article by me in the Criminal Law Magazine for January, 1880:—

"It is in respect to admissions and cohabitation, however, that we have the wildest *mêlée* of presumptions of law. Before we undertake to consider these we must notice that it is now settled by a great preponderance of authority that to prove a marriage, even in prosecutions for bigamy, it is admissible to put in evidence the admission of the defendant.[1] In both civil and criminal cases, also, it is admissible, in order to prove marriage, to introduce evidence of marital cohabitation, which may be regarded as evidence that the parties tacitly admitted themselves to be man and wife. But why is this? Does admitting a marriage demonstrate a marriage? So far from this being the case, we can conceive of multitudes of instances in which a marriage is admitted under a mistake of law, or, in face of a consciousness that there has been no real marriage, merely for purposes of temporary convenience. The circumstances of the case may be such as to deprive such admissions of any weight. An adulterer, eloping with his paramour, may register their names in a hotel, as Mr. and Mrs. ——; but this would be no ground for drawing an inference of a marriage, so as to sustain a conviction against him for bigamy, because the inference of marriage drawn from such an entry is overcome by the inference that no person would, with an elopement, with all its dangers, already on his hands, expose himself to an indictment for bigamy. Or the admissions may be made in a country, such as Australia is depicted by Mr. Trollope, in his novel of John Calderwood, where it is usual for men to call their temporary female companions by their own names, and where this is regarded as indicating nothing in the way of an acknowledgment of marriage. Or the admission may be by a Mormon, who has already been married several times, and who, in admitting a marriage, admits something very different from what is considered a marriage among ourselves. Admission and cohabitation as man and wife may constitute abundant evidence of marriage in a country where the marriage tie is respected, where consensual marriages, without any distinctive civil or ecclesiastical rite, are held valid, and where the cohabitation is kept up for a series of years, undisturbed by the assertion of any inconsistent relationship, and fitting in as an acknowledged ingredient of the society in which the parties live. On

[1] R. *v.* Simmonsto, 1 C. & K. 164; R. *v.* Newton, 2 M. & Rob. 503; R. *v.* Upton, 1 C. & K. 55; Cayford's Case, 7 Greenl. (Me.) 57; State *v.* Hodgkins, 19 Me. 155; State *v.* Libbey, 44 Ibid. 469; State *v.* Lasn, 1 Harr. (N. J.) 380; Com. *v.* Murtagh, 1 Ashm. (Pa.) 272; Wolverton *v.* State, 16 Ohio, 173; Carmichael *v.* State, 12 Ohio St. 553; Jackson *v.* People, 2 Scam. (Ill.) 231; Squire *v.* State, 46 Ind. 458; State *v.* Sanders, 30 Iowa, 382; State *v.* Hilton, 3 Rich. (S. C.) 434; State *v.* Brinton, 4 McCord (S. C.) 256.

marrying in the place of such regulations with the intention of fixing their matrimonial domicil in the United States. But while we may thus occasionally dispense with these formalities, we must, nevertheless, insist, when a foreign marriage is made the basis of a criminal prosecution in our own land, that such foreign marriage should be proved by showing that in such marriage there was a *bonâ fide* matrimonial contract by parties capable of contracting, followed by cohabitation. To establish the contract, the foreign registry, or a duly certified copy, sustained by proof of the foreign law, is the best evidence,[1] if a registry be required by the foreign law.[2] For this, however, the testimony

Of foreign marriages registry is best evidence.

the other hand, there are cases when must say that from the cohabitation of parties as man and wife marriage cannot logically be inferred; cases in which the cohabitation, as in the case just put, is that of an adulterer eloping with his paramour from a marriage tie acknowledged on all sides to be still binding; or in which such cohabitation is in a country where it is not regarded as an admission of marriage; or in which, during the cohabitation, one of the parties to it solemnly and publicly, in conformity with the marriage rite in popular use, marries another person. It is the last case that arises most frequently, and of which an instance will be presently given. What are we to infer in such a case? The inference, the answer is, is one of inductive reasoning. It is governed by law, indeed, but by the law of logic, based on social facts, not by the law of technical jurisprudence."

See further, as indicating the danger of unduly pressing such inferences, Clayton *v.* Wardell, 5 Barb. (N. Y.) 214; S. C., 4 N. Y. 230; Jones *v.* Jones, 45 Md. 159; aff. 48 Ibid. 391; Senser *v.* Bower, 1 Pen. & W. 450.

[1] In State *v.* Dooris, 40 Conn. 145, a document purporting to be a copy of an entry in an Irish registry was rejected for reasons thus stated by Park, J.:—

"We think the document which purports to be a copy of the marriage record of the accused in Ireland was improperly received by the court as evidence tending to prove the facts stated in it. The document is not authenticated in any respect whatsoever. It purports to be a copy of the entry number twenty-six in the Marriage Register Book, in the office of the superintendent registrar of births, deaths, and marriages for the district of Mohill, and is signed by Thomas Woodward in his official capacity as such registrar. But it does not appear in the case that the law of Ireland required the registration of marriages; nor does it appear that Woodward was the superintendent registrar at the time the certificate was given, if there was such record; neither does it appear that his signature is genuine, if he was such an officer. Indeed, nothing appears tending to authenticate the instrument in any way. For aught that appears it may have been a forgery, got up by some designing person for the occasion." Compare Squire *v.* State, 46 Ind. 459.

That a non-expert cannot prove a foreign law, see cases cited *infra*; Whart. on Ev. §§ 305–8.

[2] See Bird *v.* Com., 21 Grat. 800.

of witnesses to the fact may be substituted, supposing the registry or copy cannot be obtained.[1] It must, at the same time, be kept in mind that as a consensual marriage is, by the common law of Christendom, valid,[2] proof of such marriage, by admissions and conduct (*e. g.*, cohabitation and recognition), is sufficient at common law, when there is no conflicting statute of the place of solemnization, to establish the marriage. Neither registry nor testimony of attendant witnesses is necessary to prove the fact.[3]

A foreign ecclesiastic is competent to prove the marriage law of his country;[4] but not a layman;[5] nor even a lawyer, unless a practitioner in the country whose law is to be proved.[6]

Prior invalid marriage may be ratified.

§ 1702. As has been already stated, a marriage which is at its solemnization invalid (*e. g.*, where at the time of solemnization it was bigamous, or where, by the *lex loci contractus*, the parties were incapable of contracting) may, after the impediments have ceased to exist, be ratified (though not retrospectively) by the parties living together as man and wife, and acknowledging each other as such.[7] But this only attains where the *lex fori* acknowledges consensual marriages as valid. And under no circumstances can mere cohabitation, without acknowledgment, have such validating power.[8]

[1] R. *v.* Manwaring, Dears. & B. 132; 7 Cox C. C. 192; R. *v.* Craddock, 3 F. & F. 837; R. *v.* Hawes, 2 Cox C. C. 432; 1 Den. C. C. 270; State *v.* Kean, 10 N. H. 347; State *v.* Clark, 54 Ibid. 456; Com. *v.* Putnam, 1 Pick. 136; Warner *v.* Com., 2 Va. Cas. 95; Wolverton *v.* State, 16 Ohio, 173; Murphy *v.* State, 50 Ga. 150; Arnold *v.* State, 55 Ibid. 574; Brown *v.* State, 52 Ala. 338; Whart. Crim. Ev. § 170. As to other witnesses, see *infra*, § 1710.

[2] See Whart. Cr. Ev. §§ 169, 170.

[3] R. *v.* Simmonsto, 1 C. & K. 164; Miles *v.* U. S., 103 U. S. 304, and cases there cited.

[4] Sussex Peerage Case, 11 Cl. & F. 84; State *v.* Abbey, 29 Vt. 60; Am. Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507; Bird *v.* Com., 21 Grat. 800. That he may prove the marriage, see *infra*, § 1710.

[5] R. *v.* Povey, Dears. 32; 6 Cox C. C. 83.

[6] Bonelli's Case, L. R. 1 P. D. 69; Cartwright *v.* Cartwright, 26 W. R. 684. *Infra*, § 1710.

[7] See cases cited *supra*, § 1686; McReynolds *v.* State, 5 Cold. 18; State *v.* Sloan, 55 Iowa, 277.

[8] Williams *v.* State, 44 Ala. 24. *Supra*, § 1700.

Thompson *v.* Thompson, 114 Mass. 566, was a petition for a decree of nullity of a pretended marriage between the petitioner and the respondent. When the respondent married the petitioner, or went through the form of marriage, he had a wife living who had obtained a divorce from him. After the pretended marriage with the petitioner, he filed his petition for leave to marry again, and some months after it was granted; after which the petitioner continued to live with him, and they cohabited as husband and wife. The respondent contended that the subsequent cohabitation and acknowledgment as husband and wife was a good marriage at common law, and further, that if the ceremony prescribed by our statute be essential to a valid marriage, such ceremony had been performed while the respondent was under a disability, that the disability was afterwards removed, and the ceremony then took effect. The court granted a decree of nullity on the ground that the parties were never legally married.

2. *Proof of Death or Divorce of First Husband or Wife.*

§ 1703. First must we remember, when we approach this point, that presumptions of fact (or inferences, as we may properly call them, from matters of notoriety) are proofs; and are proofs sufficient, in default of other evidence, to carry a case.[1] Keeping this in mind, the proof of the death of a former husband or wife may be discussed as follows:—

Death, if occurring within seven years, must be substantively proved.

§ 1704. A party who marries within the time limited by the statute does so, so far as this exception is concerned, at his own risk. No inference of death, no matter how strong, will be a defence to him if the other party turn up alive before the period fixed by the statute has arrived. And, under the California statute, a conviction for bigamy cannot be sustained if the sole evidence of the continued life of the first consort is of life three years before the second marriage, there being proof of a final separation before the limitation began to run.[2] If there be no evidence of separation, the inference of death rests exclusively on proof of disappearance.[3]

Divorce to be proved by record.

§ 1704 *a*. The burden of proving a divorce, as we have seen,[4] is on the defendant, and to sustain it, the record of the divorce must be produced.[5] In cases of disputed identity either of subject matter or of parties, such identity may be proved or disproved by parol;[6] and it may also be proved by parol that the proceedings were irregular or fraudulent.[7]

[1] Whart. Crim. Ev. §§ 7 *et seq.*, 809.

[2] People *v.* Feilen, 58 Cal. 218.

[3] R. *v.* Jones, L. R. 11 Q. B. D. 118; 48 L. T. N. S. 768, distinguishing R. *v.* Curgerwen, L. R. 1 C. C. R. 1, in which it was held that when there was a proof of a long separation extending beyond seven years, the burden was on the prosecution to prove a knowledge of the wife's continued life within seven years. *Infra*, § 1708.

[4] *Supra*, § 1695.

[5] See Com. *v.* Boyer, 7 Allen, 306; State *v.* Barrow, 31 La. An. 691; and cases in Whart. Cr. Ev. § 153.

[6] Ibid.

[7] Ibid.; State *v.* Gonce, 79 Mo. 600.

§ 1705. Even an honest belief in the death of the other party, will not, as we have seen, avail as a defence.[1] Hence on an indictment for bigamy, the death of the husband, if claimed to have occurred within seven years from his absence, must be proved as any other fact, aside from the legal presumptions created by the exception to the statute. If the husband died before the second marriage, this is a defence, though the wife did not know of his death. If he did not die before the second marriage (the seven years not having run), then the case is bigamy, though the wife believed him dead. "Men readily believe what they wish to be true," is a maxim of the old jurists. To sustain a second marriage, and to vacate a first, because one of the parties believed the other to be dead, would make the existence of the marital relation determinable, not by certain extrinsic facts, easily capable of forensic ascertainment and proof, but by the subjective condition of individuals. To avoid this, the statutes have made the dissolution of marriage, whether by death or divorce, dependent, not upon the personal belief of parties, but upon certain objective facts easily capable of accurate judicial cognizance. Only on proof of such facts can marriage be treated as so dissolved as to permit of second marriages.[2] The same distinctions apply to the defendant's "honest belief" in a prior divorce.[3]

Honest belief no defence.

[1] R. *v.* Gibbons, 12 Cox C. C. 237; R. *v.* Bennett, 14 Ibid. 45; Com. *v.* Mash, 7 Met. 472. See Dotson *v.* State, 62 Ala. 141; Jones *v.* State, 67 Ibid. 84; State *v.* Armington, 25 Minn. 29.

In Watson *v.* State, 13 Tex. Ap. 76, it was held that, under the Texas statute, a mistake which could not have been avoided by proper care was a defence. S. P., State *v.* Stank, 10 Cin. Law Bull. 16. In R. *v.* Howlett, 27 Law T. (Journal) 153, Manisty, J., is reported to have declined to follow R. *v.* Gibbons, and R. *v.* Bennett, leaving the question of reasonable ground of belief to the jury, and following R. *v.* Moore, 13 Cox C. C. 544.

The question is discussed at large *supra*, § 88, where numerous authorities bearing on it are examined. See *contra*, Squire *v.* State, 46 Ind. 459. *Cf.* comments of Sir J. F. Stephen in Nineteenth Century, Jan. 1880.

[2] As to inadequacy of "honest belief" in parallel cases, see Thompson *v.* Thompson, 114 Mass. 566; State *v.* Whitcomb, 52 Iowa, 85. *Supra*, § 1695 *a*; and see particularly *supra*, §§ 87–8. What has been said does not apply to the *particeps criminis* who marries the bigamous person. As to such *particeps criminis* the *scienter* must be proved. Arnold *v.* State, 53 Ga. 574. *Supra*, § 1688.

[3] *Supra*, § 1695 *a*. See R. *v.* Willshire, *ut sup.*, § 1686.

§ 1706. The indictment must aver, and the prosecution must prove, that the first spouse was alive at the time of the second marriage. Of course, when there is proof that he was alive at such period, the question is one simply of identity. But if the prosecution trace his life down to a specific period (within seven years) before the second marriage, and there rests, questions of conflicting presumptions of fact may arise, as to which, the jury, under the advice of the court, are to decide. That a man who was alive and well yesterday is alive to-day is a presumption of fact we may unhesitatingly adopt, and which can only be overcome, as a process of inferential reasoning, by positive evidence of intermediate death. That a man who was alive and well last year is alive to-day is a presumption of fact more attenuated, it is true, but at the same time enough to justify a jury in finding a verdict of continued life. How peculiarly this is a presumption of fact is illustrated by the circumstance, that where the party in question was alive a year ago, but is declared by competent expert testimony to be at that time laboring under a mortal disease in which immediate death was probable, the burden, as a matter of ordinary reasoning, shifts on those maintaining continuance of life. The inference, however, it must be again stated, is one of fact, to be adjusted by the jury, under advice of the court.[1] The only presumption of death that the law (independently of the seven years of absence of the bigamy statutes) regards as binding in law (*presumtio juris*), as distinguished from inferences of fact, is, that after seventy years from birth an absent person is dead.[2] Within this period, the presumption that a particular person is dead, made from the length of his absence, is a mere inference of fact to be drawn generally from all the evidence of the particular case. In civil issues, the courts will adopt the analogy of the bigamy statutes, and will advise the jury that when a person has

Presumption of continuance of life depends upon circumstances.

[1] R. *v.* Lumley, L. R. 1 C. C. 196, approved in Hull *v.* State, 7 Tex. Ap. 593; People *v.* Feilen, 58 Cal. 218. See Squire *v.* State, 46 Ind. 459, where the court announces, as a matter of law, that the presumption of continuance of the wife's life, who was last heard of two years before the defendant's second marriage, is "neutralized" by the presumption of innocence. But, as is seen in the text, this, as a matter of a law, cannot be sustained. At the most, the presumption of continuance is one purely of fact. Whart. Crim. Ev. § 810.

[2] See Rivier, in Holzendorff's Encycl. ii. 262; Tenge, Vermuthung des Todes, Civ. Archiv. xlv.

not been heard of for more than seven years, this throws upon the opposite side the burden of proving that such person is still alive, and in default of such proof he may be inferred to be dead.[1] In bigamy prosecutions this is exacted by the exceptions of the statutes. Of course, when the disappearance in a bigamy prosecution falls within the seven years, there is technical evidence on which a conviction may be had. But it must be remembered that this evidence, in proportion as the period of unexplained absence increases, is susceptible of being overcome by contervailing proof. Of such countervailing proof the presumption of the defendant's innocence is an available item. Hence we can suppose cases of unexplained absence of less than seven years, in which the inference of continued life has become so faint (by sickness or otherwise) as to be cancelled by the presumption of innocence.[2]

[1] Webster *v.* Birchmore, 13 Ves. 362; Lloyd *v.* Deakin, 4 B. & Al. 433; Nepean *v.* Knight, 2 M. & W. 894; Baily *v.* Hammond, 7 Ves. 590; In *re* Phene, L. R. 5 Ch. App. 139; Com. *v.* Harman, 4 Barr, 269.

[2] Best on Evidence (1870), § 409; People *v.* Feilen, 58 Cal. 218. See R. *v.* Twyning, 2 B. & A. 386; R. *v.* Harborne, 2 Ad. & El. 540. In the latter case Lord Denman said: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of facts, *without reference to accompanying circumstances, such, for instance, as the age or health of the party*. There can be no such strict presumption of law. It may be said: Suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Proof, therefore, that the party was alive twenty-five days before the second marriage, was held to overcome the presumption of innocence; which, on the other hand, prevailed in R. *v.* Twyning, against proof that the defendant had been heard of alive one year previous to the marriage. To the same effect is Lapsley *v.* Grierson, 1 H. L. Cas. 498. And see, as to such presumptions generally, Whart. Crim. Ev. §§ 810 *et seq.*

That nature is uniform in her operations is also assumed by us, and on this assumption business depends. The probability of the inference to be drawn from such uniformity rests, as we have already seen, upon the number of exceptions to which a general rule is, in actual operation, shown to be subject. We know of no instance in history in which day has not succeeded night; and therefore we infer, as a matter of certainty, that night will be succeeded by morning. The proportion of fair days to cloudy days in June is about three to one, and therefore we infer that it is three to one that some one designated day next June will be fair. On the other hand, taking a series of years in mass, we find that in these years there is an average rain-fall to a specific amount; and we infer that in each successive year there will be approximately the same average. It is on this reasoning that the courts admit in evidence tabulated statements of human life, based upon accepted scientific calculations, such as the Carlisle Tables. Whart. on Ev. § 667; Whart. Crim. Ev. §§ 539, 824. These tables are not admissible for the purpose of showing that a particular person will die on a particular day, any more than a tabulated statement of rain-fall in preceding years will be admissible to enable us to determine whether it will rain to-morrow. But such statements are admissible, when duly verified, to show what are the gradual processes by which generation succeeds generation, and what, viewing mankind in the abstract, is the value of individual lives at specific periods.

§ 1707. But the seven years having expired, the period being calculated from the time when the party, whose death is presumed, separated from the other, how is the party who marries a second time to avail himself of the exceptions of the statute? Here a subordinate question emerges.

§ 1708. The burden after the seven years, of proving knowledge that the absent party was still alive at the time of the second marriage, is on the prosecution. In other words, suppose, after her husband's seven years' absence, a wife marry again, and be prosecuted for bigamy; what is to be the course of trial? Can the prosecution rest, after proving that the husband was alive at the time of the second marriage? This would be bad law, as it would throw on the defendant the task of proving a negative, namely, "that she did not know" her husband to be alive at the time of her second marriage. Hence, in such a case, the burden is on the prosecution to put in evidence facts which would justify the inference that the defendant *did* know of her husband's continued life; and in default of such proof, there must be an acquittal.[1] Other matters material to the defence, when set up in confession or avoidance, the burden is

After seven years, burden is on prosecution to prove knowledge by defendant.

[1] R. *v.* Dane, 1 F. & F. 323; R. *v.* Briggs, 7 Cox C. C. 195; Dears. & B. 98; R. *v.* Jones, C. & M. 614; R. *v.* Curgerwen, L. R. 1 C. C. 1; 10 Cox C. C. 152. See R. *v.* Heaton, 3 F. & F. 819; R. *v.* Ellis, Ibid. 309; Barber *v.* State, 50 Md. 161; State *v.* Barrow, 31 La. An. 691.

In Briggs's Case the woman was tried for bigamy, and the evidence was that her first husband had been absent from her for more than seven years. The jury found that they had no evidence that at the time of the second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them. It was held upon this finding that the conviction could not be supported.

on the defendant to prove.[1] The question of notice, in such cases, is for the jury.[2] But it is not enough to impute notice, that if the party had used great diligence, knowledge of the continued life of the absent party would have been obtained.[3]

3. *Witnesses.*

When first marriage is proved second wife is a witness.

§ 1709. When the first marriage is proved to the satisfaction of the court, the second husband (or wife, as the case may be) is an admissible witness either for or against the defendant;[4] though, as long as the first marriage is contested, the second husband (or wife) is at common law inadmissible.[5] The first wife (or husband), however, is inadmissible at common law for the prosecution.[6] And it has been ruled in Canada that she is inadmissible for the defence to prove that her marriage was invalid.[7] This, however, is founded on a *petitio principii*. The question is whether the first marriage is valid. If so, she is not a witness, but she is a witness if such marriage is invalid.[8] For the court to refuse to admit her, when called by the defence to disprove the marriage, is to prejudge the question in issue. That she cannot be called to sustain the marriage is clear, for she is excluded by the very hypothesis she is called to support. If she claim to be the first wife, on her own showing she is inadmissible. If she deny that she was married to the defendant, then she should be admitted, and the jury directed to disregard her testimony if they believe her to be the defendant's wife.[9] Otherwise material testimony might be excluded on a hypothesis not only artificial but false.

[1] Fleming *v.* People, 3 Parker C. R. 352; 27 N. Y. 329. See Noble *v.* State, 22 Ohio St. 541.

[2] R. *v.* Cross, 1 F. & F. 510; R. *v.* Dane, Ibid. 323; R. *v.* Ellis, Ibid. 309; R. *v.* Jones, 21 L. T. (N. S.) 396. See Noble *v.* State, 22 Ohio St. 541.

[3] R. *v.* Briggs, *ut supra*; Whart. Crim. Ev. § 811.

[4] Whart. Crim. Ev. § 397; 1 Hale, 693; 1 Hawk. c. 42, s. 8; R. *v.* Jones, C. & M. 614; State *v.* Patterson, 2 Ired. 346; State *v.* Brown, 67 N. C. 470; Finney *v.* State, 3 Head, 544; State *v.* Brown, 28 La. An. 279; State *v.* Johnson, 12 Minn. 476; R. *v.* Madden, 14 Up. Can. (Q. B.) 588.

[5] Miles *v.* U. S., 103 U. S. 304, citing 1 Hale C. P. 693; 1 East P. C. 469.

[6] Peat's Case, 2 Lew. C. C. 111, 288; Williams *v.* State, 44 Ala. 24; R. *v.* Bienvenu, 15 Lower Can. J. 181. See *contra*, by statute, State *v.* Sloan, 55 Iowa, 217; State *v.* Hughes, 58 Ibid. 165. In R. *v.* D'Ayley, 15 Cox C. C. 328, a wife was admitted in a case where the marriage was *primâ facie* illegal.

[7] R. *v.* Madden, 14 Up. Can. (Q. B.) 588; R. *v.* Tubbee, 1 Up. Can. (P. R.) 103.

[8] See, however, Peat's Case, *ut sup.*

[9] Peat's Case, 2 Lew. C. C. 111, 288; R. *v.* Wakefield, Ibid. 279; which cases, however, only intimate such a course, without positively sanctioning it. In Dumas *v.* State, 14 Tex. Ap. 465, the distinction in the text is affirmed. See Whart. Crim. Ev. § 397.

Other witnesses admissible to prove marriage.

§ 1710. As has been already seen, the testimony of a witness present at the marriage is admissible and adequate proof, unless the law require official evidence.[1] When the marriage is extra-territorial, the officiating clergyman, according to American cases, may not only prove the marriage, but the foreign law under which it was solemnized.[2] But unless a witness be an expert, he cannot prove the foreign law.[3] In domestic marriages, the fact that a justice of the peace or clergyman performed the ceremony is proof that he professed and was generally understood to have the authority to do so.[4]

XI. INDICTMENT.[5]

Second marriage must be averred to be unlawful.

§ 1711. The indictment must show by facts or averment that the second marriage was unlawful.[6] On an indictment for polygamy, under the statute of Vermont, which alleged that both marriages were had in another State, and that the respondent has unlawfully continued with his second wife in Vermont, it was held that the indictment should have alleged that the second marriage was unlawful in the State where it was contracted.[7] Yet where the unlawfulness consists in the want of some international requisite, of which the trial court would take notice, unlawfulness in the place of marriage need not, it is submitted, be averred.

In Massachusetts, under the statute for continuing to cohabit in that State with a second wife, the defendant having a former wife

[1] *Supra*, § 1701.

[2] State *v.* Abbey, 29 Vt. 60; Bird *v.* Com., 21 Grat. 800; State *v.* Goodrich, 14 W. Va. 851.

[3] R. *v.* Povey, 6 Cox C. C. 83; S. P., R. *v.* Smith, 14 Up. Can. (Q. B.) 565; and cases cited *supra*, § 1701. See [illegible]. Confl. of L. § 775, and Sussex Peerage Case, there cited. And see fully Whart. on Ev. § 300.

[4] State *v.* Abbey, 29 Vt. 60; Bird *v.* Com., 21 Grat. 800; Whart. Cr. Ev. §§ 164, 833. *Supra*, §§ 1570, 1617.

[5] For forms of indictment, see Whart. Prec. 985, tit. "Bigamy."

[6] See State *v.* Stank, 10 Cin. Bull. 16; State *v.* Grant, 79 Mo. 113.

[7] State *v.* Palmer, 18 Vt. 570; but see *contra*, State *v.* Johnson, 12 Minn. 476.

living, it is a sufficient statement of the time when the offence was committed to allege that the second marriage was on a certain day, and that the defendant "afterwards did cohabit and continue to cohabit with said S. J., at L., in said county, for a long space of time, to wit, for the space of six months."[1]

A second marriage by a party who, divorced for misconduct, is not entitled to marry again, is not technically bigamy, but may be a special statutory offence.[2]

It is sufficient to aver that the first wife was alive at the time of the second marriage, without alleging that the first marriage still subsists.[3]

Variances as to second marriage are fatal.

§ 1712. A variance in setting out the second wife's name is fatal; and so is a variance in any material averment as to the second marriage.[4]

Exceptions in statute need not be negatived.

§ 1713. The exceptions in the statute, when not part of the description of the offence, need not be negatived,[5] nor is it necessary to allege that the defendant knew at the time of his second marriage that his former wife was then living, or that she was not beyond seas, or to deny her continuous absence for seven years prior to the second marriage.[6]

First marriage must be averred.

§ 1714. It has been held that the time of the first marriage need not be specially averred, and that it is enough if a prior existing marriage be stated.[7] But if an averment be attempted, and the date be left blank, this is fatal.[8]

[1] Com. *v.* Bradley, 2 Cush. 553.

[2] Com. *v.* Richardson, 126 Mass. 34. See Com. *v.* Lane, 113 Ibid. 458. As to extra-territoriality of divorce restrictions, see Whart. Confl. of L. § 385.

[3] Murray *v.* R., 7 Q. B. 700; State *v.* Norman, 2 Dev. 222.

[4] R. *v.* Deeley, 4 C. & P. 579; 1 Mood. C. C. 303. But this is amendable under 14 & 15 Victoria.

[5] Murray *v.* R., 7 Q. B. 700; State *v.* Abbey, 29 Vt. 60; Stanglein *v.* State, 17 Ohio St. 453; State *v.* Williams, 20 Iowa, 98; State *v.* Johnson, 12 Minn. 476; State *v.* Loftin, 2 Dev. & Bat. 31. It is otherwise where the exception describes the offence in the enacting clause. Whart. Cr. Pl. & Pr. § 238; Fleming *v.* People, 27 N. Y. 329; Brutton *v.* State, 4 Ind. 601.

[6] Barber *v.* State, 50 Md. 161, citing Bode *v.* State, 7 Gill, 326.

[7] Ibid. State *v.* Bray, 13 Ired. 289; Hutchins *v.* State, 28 Ind. 34; Watson *v.* State, 13 Tex. Ap. 76; *contra*, State *v.* La Bore, 26 Vt. 765; Davis *v.* Com., 13 Bush. 318, overruling Com. *v.* Whaley, 6 Ibid. 266. In New York, see Sanser *v.* People, 15 N. Y. Sup. Ct. 302.

[8] State *v.* La Bore, 26 Vt. 765.

Unless the place of marriage is other than that of the place of arrest,[1] it is not necessary to aver the place of the first marriage.[2]

In several States it is held unnecessary to set out the name of the first spouse,[3] and there are precedents in the books sustaining this view;[4] and if we lean on the analogy of indictments for receiving stolen goods, we should hold that the more general statement is enough. If we are forced to state in detail the marital relations of the parties, it would be necessary to go still further and aver that the first wife or husband of the defendant was capable of consenting to marriage, and was not bound by other matrimonial ties. As, however, the first marriage in all its relations is simply matter of inducement, it is enough, so it is maintained, to state that the defendant, at the time of the second marriage, had a legal husband or wife, as the case may be, without giving name, place, or date. If further specifications be needed, they can be supplied by a bill of particulars.[5] Where, however, the details of the first marriage are given, a variance in the name is fatal.[6]

XII. RELIGIOUS PRIVILEGE NO DEFENCE.

§ 1715. It is no defence that polygamy is a religious privilege, sanctioned by local usage.[7]

Unless bigamy is made a continuous offence, the statute of limitations begins to run at the date of the bigamous marriage. Scroggins *v.* State, 32 Ark. 205; Gise *v.* Com., 81 Penn. St. 428. *Supra*, § 1685.

That "feloniously" is bad at common law, see State *v.* Darrah, 1 Houst. C. C. 112. As to Maryland, see Barber *v.* State, 50 Md. 161.

[1] That in this case there must be special averment of the place of marriage and the place of arrest, see R. *v.* Whiley, 2 Mood. C. C. 186; State *v.* La Bore, 26 Vt. 765; Davis *v.* Com., 13 Bush, 318; Sauser *v.* People, 15 N. Y. Sup. Ct. 302.

[2] State *v.* Bray, *ut supra*; Hutchins *v.* State, *ut supra*; State *v.* Hughes, 58 Iowa, 165; State *v.* Armington, 25 Minn. 29; People *v.* Giesea, 61 Cal. 53.

[3] State *v.* Bray, 13 Ired. 239; Hutchins *v.* State, 28 Ind. 34; Watson *v.* State, 13 Tex. Ap. 76; see Com. *v.* Whaley, 6 Bush, 266.

[4] Whart. Prec. 985–999.

[5] Hutchins *v.* State, 28 Ind. 34; Sauser *v.* People, 8 Hun, 302; *contra*, State *v.* La Bore, *supra*. Davis *v.* Com., 13 Bush, 318; State *v.* Bray, 13 Ired. 289.

[6] R. *v.* Gooding, C. & M. 297.

[7] U. S. *v.* Reynolds, 1 Utah T. 226; aff. S. C. U. S., 98 U. S. 145. See *supra*, §§ 84–8, and Bankus *v.* State, 4 Ind. 114; State *v.* Pearce, 2 Blackf. 318; State *v.* Fore, 1 Ired. 378. As to conscientious convictions as a defence see *supra*, §§ 88, 336.

CHAPTER XXXII.

ADULTERY.

I. DEFINITION.

Ecclesiastical law in this respect part of American common law.

§ 1717. Adultery is not cognizable penally by the English common law, its punishment being reserved in England to the ecclesiastical courts. As, however, in those portions of the United States which accept the English common law, the ecclesiastical law is considered, so far as concerns the definition of the offence, to be in force, we must begin by inquiring what the ecclesiastical law in this respect prescribes. And this inquiry is doubly pertinent, because not only does this portion of the English ecclesiastical law form part of our own common

law, but the component elements of the ecclesiastical law—the Roman and the canon law—form the old common law of marriage in those parts of the United States which were originally territories of France and Spain.[1]

By Roman law, adultery is illicit intercourse with married woman

§ 1718. Adultery, by the Roman law, was confined to illicit sexual intercourse with a married woman, the woman and her paramour being principals in the offence. A married man, who had illicit intercourse with an unmarried woman, was not guilty of this specific crime. Two reasons were assigned for this limitation: *first*, the exclusive rights of the husband, as head of the family, were thus distinctively asserted; *secondly*, the line of descent from father to child was thus signally guarded. The old law authorized the husband to kill the adulterer caught in the act, and to punish at his discretion, as head of the family, the wife. But the growing license of the empire required more definite legislation; and this was supplied by the *Lex Julia de adulteris*. By this famous statute the adulteress and her paramour were, on conviction, to be transported to separate islands, so as to be permanently separated: "Dummodo in diversas insulas relegantur." The adulteress was fined half of her Dos, and one-third of her remaining estate; the paramour one-half of his entire estate.[2] And the husband was obliged, on discovery, to prosecute, on pain of being convicted as an accomplice.[3] By an edict of Constantine, an adulteress was to be confined for life in a convent, and the adulterer (*i. e.*, the man married or unmarried who had sexual intercourse with a married woman) was amenable to capital punishment. "Sacrilegos nuptiarum gladio puniri jubemus."[4] For such adultery was an invasion of a fundamental sanction of the Roman law, the absolute supremacy of the husband and father in his own home. It was a species of high treason, and was to be punished as such.

By ecclesiastical law it is a sexual viola-

§ 1719. But Christianity, speaking through the canon law, materially modified this feature of Roman jurisprudence. On the one side, the autocratic power of the *paterfamilias* was greatly reduced; on the other side, the sanctity of

[1] See Whart. Confl. of L. §§ 171–3, *Supra*, § 20.

[2] "Adulteris vero viris dimidiam bonorum partem auferri." Paull. Rec. sent. ii. 26. 14.

[3] L. 2. § 2. D. h. t.—Nov. 134, cap. 9.

[4] L. 10. Cod. ad leg. Jul. § 1.

tion of the marriage relation.

the marriage vow was greatly enhanced. Marriage, as a solemn tie, binding as long as life lasts, was regarded as the true *principium urbis, et quasi seminarium reipublicae.* Hence the offence was committed by a sexual violation of the marriage vow, be the offender male or female. The married man having sexual intercourse with a woman other than his wife was as guilty of adultery as a married woman having sexual intercourse with another than her husband. "*Christiana religio adulteriam in utroque sexu pari ratione condemnat.*"[1] Adultery, according to the definition thus established, is sexual connection between a man and a woman, one of whom is lawfully married to a third person; and the offence is the same whether the married person in the adulterous connection is a man or a woman. The Roman law being in this respect superseded, this definition was accepted by every Christian State at the time of the colonization of America; and is no doubt part of the common law brought with them by the colonists of all Christian nationalities. That it corresponds with a sound judicial philosophy is illustrated by the fact that it is incorporated in the codes of the principal continental European States.[2]

In the United States definition varies with local statutes.

§ 1720. Such was the common law brought with them by the American colonists; but while some of the States, as they established their independent jurisprudences, held that the offence, at least when creative of public scandal, was cognizable at common law;[3] others, adhering to colonial precedents, were inclined to hold that the offence is one of which there is no common law jurisdiction.[4] In those States, however, which hold the offence is not cognizable by the common law courts, the subject has been generally covered by legislation. And as in many cases this legislation consists simply in making "adultery" penal, the question has constantly arisen, What is adultery? Unfortunately, in seeking for the international common law on this point, the courts have gone back sometimes to the old Roman

[1] Causs. 32. qu. 5. can. 23.

[2] See Berner, Lehrbuch, 473.

[3] *N. Hampshire:* State *v.* Wallace, 9 N. H. 515; *Connecticut:* State *v.* Avery, 7 Conn. 267; *N. Carolina:* State *v.* Cox, N. C. T. R. 165. See, also, State *v.* Moore, 1 Swan, 136.

[4] *Vermont:* State *v.* Cooper, 16 Vt. 551; *S. Carolina:* State *v.* Brunson, 2 Bailey, 149; *Virginia:* Anderson *v.* Com., 5 Rand. 627; Com. *v.* Isaacs, Ibid. 634; Com. *v.* Jones, 2 Grat. 555.

law, sometimes to the Jewish, both of which were superseded by the canon law, which, as we have seen, at the time of the colonization of America, was in this respect the common law of Christendom. But whatever may have been the sources of authority, we find, in the United States, the following definitions propounded: *First*, that which has just been stated, that *adultery consists in the sexual connection between a man and a woman, of whom one is lawfully married to a third person.* In such case both participants are guilty of adultery.[1]

Second, that it consists in sexual connection by a married person with one who is not such married person's husband or wife.[2]

Third, that it consists in sexual intercourse with a married woman by one not her husband, in which case both the married woman and her paramour are guilty; this being the view of the Roman law.[3]

The reasoning resorted to in this line of cases is that of the old Roman jurists, that the offence is in part the interference with the husband's and father's autocracy, and in part the pollution of the channel of descent.[4]

[1] State *v.* Hinton, 6 Ala. 864; State *v.* Wilson, 22 Iowa, 364. See Weatherby *v.* State, 43 Me. 258.

[2] State *v.* Hutchinson, 36 Me. 261; State *v.* Brown, 49 Vt. 440; Searle *v.* State, 56 Ibid. 516 (subsequently altered by statute); Com. *v.* Call, 21 Pick. 509; Com. *v.* Lafferty, 6 Grat. 672; Cook *v.* State, 11 Ga. 53; State *v.* Buchanan, 55 Ala. 154; Miner *v.* State, 58 Ill. 59; State *v.* Fellows, 50 Wis. 65. Such is the rule in Pennsylvania both at common law and by statute. Helfrich *v.* Com., 33 Penn. St. 68; Rev. Act, Bill I, §§ 36, 38. This was the old colonial rule as stated in Resp. *v.* Roberts, 2 Dall. 124; Com. *v.* Kilwell, 1 Crumrine, 255; Com. *v.* Wentz, 1 Ashm. 269; and see Hunter *v.* U. S. 1 Pinn. (Wis.) 91. Of the offence thus restricted, an unmarried person cannot be guilty, either as principal or accessary. Smith *v.* Com., 54 Penn. St. 209; Swancott *v.* State, 4 Tex. Ap. 105.

[3] State *v.* Wallace, 9 N. H. 515; State *v.* Taylor, 58 Ibid. 331; State *v.* Armstrong, 4 Minn. 335; State *v.* Lash, 1 Harr. 380; State *v.* Pearce, 2 Blackf. 318. In Massachusetts this is specially directed by statute. Gen. Stat. c. 165, § 3. Com. *v.* Elwell, 2 Met. 190; Com. *v.* Reardon, 6 Cush. 78. But in this State, a married man is also guilty of adultery in having connection with an unmarried woman.

In Com. *v.* Bakeman, 131 Mass. 577, it was held that a man could be convicted of adultery with a married woman who was so drunk as to be incapable of consent. See, also, State *v.* Sanders, 30 Iowa, 582; State *v.* Donavan, 61 Ibid. 278.

Under the Iowa statute it is essential that the complaint should be made by the offended husband or wife.

[4] See remarks of Galbraith, J., 4 Am. Law Reg. 209; and of Lewis, C. J., Lewis C. L. 41.

§ 1721. Where there is a positive local statute defining adultery, of course such statutory definition must be accepted. But when "adultery" simply is made indictable, then it must be remembered that, as just stated, the term is to be taken in the sense accepted at the time of the settlement of America, and for many centuries internationally received, namely: sexual connection by a man and a woman, one of whom is lawfully married to a third person. And this definition alone meets the full evil, which is the contempt cast on the marriage state, and the misery and demoralization produced in families by marital disloyalty of either father or mother. Nor is it easy to see how this definition can be escaped except by legislative exclusion, either express or implied. If an adulteress be a principal in her own adultery, her paramour is a principal in the second degree. Of course, when, as in Pennsylvania, the offence is limited by statute to married persons, this reasoning fails. It also fails in jurisdictions in which sexual intercourse by an unmarried person is made by statute fornication; since in such case the common law offence is absorbed in the statutory offence. In other jurisdictions, both parties to an adulterous connection may be indictable as principals.[1]

When statute makes "adultery" alone indictable, it includes both sexes.

§ 1721 *a*. The offence of "living in adultery" is constituted by living together adulterously for a single day.[2] But a single act does not make out the offence.[3] The parties must be living for some appreciable time in an adulterous connection.

"Living in adultery" implies continuous living.

II. DEFENCES.

§ 1722. As in bigamy, and with the same limitations,[4] it is a defence that the party whose alleged marriage gives the offence its distinct type was duly divorced from the alleged marriage. Whether such divorce dissolves the prior marriage tie it is for the *lex fori* to decide;[5] and it has been

Divorce is a defence.

[1] See State *v.* Taylor, 58 N. H. 331.

[2] Hall *v.* State, 53 Ala. 463. See State *v.* Way, 5 Neb. 283. Parks *v.* State, 4 Tex. Ap. 134.

[3] State *v.* Crowner, 56 Mo. 147; People *v.* Gates, 46 Cal. 53; Richardson *v.* State, 37 Tex. 346; Swancott *v.* State, 4 Tex. Ap. 105. *Infra*, § 1747.

[4] *Supra*, § 1695.

[5] State *v.* Weatherbee, 43 Me. 256. Where a husband obtained a divorce for utter and wilful desertion by the wife, for five years consecutively, without his consent, and the wife afterwards went into another State, and was there married to another man,

held that a divorce without the right to marry again is such a divorce as will be a defence to an indictment for adultery.[1] A mere honest belief in a divorce is no defence.[2]

§ 1723. While the exceptions in bigamy statutes are not technically applicable to adultery prosecutions, it is otherwise with such exceptions as are declaratory of the common law. But, in any view, seven years' absence is only a defence when there are grounds to reasonably infer death.[3]

But not desertion.

§ 1724. In other joint offences, it is necessary to prove the concurrence of participants. This, however, has been said, under the Iowa statute, not to be necessarily the case in adultery,[4] though if the case prove rape there may be a merger;[5] and it is a serious question whether, as a matter of substance, if rape be proved, the charge of adultery does not fall, the offences being essentially distinct.[6] But force is a defence when set up by a party ravished, if charged with adultery.

Nor want of consent in participant.

§ 1725. Local customs form no defence.[7] Nor can domiciled subjects of a foreign power set up the laws of their domicil as a justification for adultery committed on our soil.[8]

Nor local or foreign custom.

§ 1726. It has been seen that an "honest belief" that an illicit act is lawful is, in general, no defence to an indictment for such act.[9] In prosecutions for adultery, it is peculiarly important to keep this principle in mind, since it is on the plea of alleged "honest belief" in the invalidity

Nor "honest belief" or "ignorance."

with whom she returned to Massachusetts, and there lived and cohabited, it was held in that State, that if the wife were guilty of any offence under the Mass. Rev. Stat. c. 1, § 130, she was indictable under the second section, for unlawful cohabitation, and not under the fourth section, for lewd and lascivious behavior. Com. *v.* Hunt, 4 Cush. 49. That divorce of non-residents is invalid, see Hood *v.* Hood, 56 Ind. 263.

[1] See State *v.* Weatherbee, 43 Me. 258.

[2] *Infra*, § 1726.

[3] Com. *v.* Thompson, 6 Allen, 591; S. C., 11 Allen, 23.

[4] State *v.* Sanders, 30 Iowa, 582.

[5] See Whart. Cr. Pl. & Pr. § 464; Com. *v.* Parr, 5 W. & S. 345; State *v.* Lewis, 48 Iowa, 578. *Infra*, § 1764. But see *supra*, § 1344. In Com. *v.* Bakeman, 131 Mass. 579, it seems to have been held that in such cases the prosecution could elect between adultery and rape. See *supra*, § 1720.

[6] See *infra*, § 1751.

[7] Bankus *v.* State, 4 Ind. 114. Charge of Drummond, J., as to Mormon laws, cited 6th ed. of this work, § 2656. See, also, *supra*, § 88.

[8] Whart. Confl. of L. §§ 133–65.

[9] *Supra*, §§ 84, 88, 1704.

of the marriage vow that the various systems of free love are defended; and if such plea were allowed, these systems would be sanctioned by law. Hence ignorance on the part of the man that the woman was married has been considered to be no defence to an indictment of adultery against him;[1] and it is held no defence that he believed the woman's husband to be dead,[2] or divorced.[3] Nor can a married person defend on the ground of a wrongful though honest belief that the marriage tie was dissolved by divorce.[4] An honest but erroneous belief by the parties, also, that they had been lawfully married, is no defence.[5] That ignorance that the other party was married is no defence to one knowingly having illicit connection with such party, we may infer from the rule, heretofore stated, that a party undertaking to do an unlawful act is liable, when he executes this act deliberately, for any probable incidents of such act.[6] But this does not apply to cases where the intent was lawful, as where a married woman has intercourse with a stranger, believing him to be her husband, which act has not the evil intent necessary to adultery.

§ 1727. Hence, also, morganatic, left handed, or "sealing" marriages are no defence, if they are invalid by the *lex delicti commissi*, however binding the parties may believe them to be.[7]

Nor illusory marriage of defendant.

III. INDICTMENT.

§ 1728. The allegation of marriage is essential, and has been already discussed.[8] It is sufficient, in several jurisdictions, to aver a lawful marriage on the part of the married defendant to some other person except the paramour;[9]

Allegation of marriage is essential.

[1] Com. *v.* Elwell, 2 Met. 190.

[2] Com. *v.* Thompson, 6 Allen, 591; 11 Ibid. 23. *Supra*, § 88.

[3] *Supra*, § 1695 *a*.

[4] State *v.* Goodenow, 65 Me. 30; Hood *v.* State, 56 Ind. 263; State *v.* Whitcomb, 52 Iowa, 85. See *supra*, §§ 84, 85, 88.

[5] See Com. *v.* Munson, 127 Mass. 459; State *v.* Fore, 1 Ire. 378. *Infra*, §§ 1747, 1748 *b*.

[6] *Supra*, §§ 88, 120. That the fact that the woman is a common prostitute is no defence, see Holland *v.* State, 14 Tex. Ap. 182.

[7] Berner, *ut supra*; Reynolds *v.* U. S. 98 U. S. 145; State *v.* Fore, 1 Ired. 378; State *v.* Pearce, 2 Blackf. 318.

[8] *Supra*, § 1714.

[9] See Com. *v.* Moore, 6 Met. 243, where Chief Justice Shaw intimated that it is not necessary to give the name of the paramour's husband or wife. And see Com. *v.* Thompson, 2 Cush. 551, where the first wife was alleged to be unknown. Whart. Prec.

but in any view the adulterer must be averred to be married to a person other than the paramour.[1]

§ 1729. The allegation of sexual intercourse has been held in Pennsylvania to be laid sufficiently by the words "did commit adultery;"[2] and where the parties are jointly charged, it has been held

995. In Com. *v.* Corson, 2 Parsons, 475, it was said that the name of the husband of the woman with whom the defendant committed adultery must be set forth; but the better opinion is to the contrary. *Supra*, § 1714. To this effect may be construed the ruling in Helfrich *v.* Com., 33 Penn. St. 68. See, under Texas Code, Collum *v.* State, 10 Tex. Ap. 708; Randle *v.* State, 12 Ibid. 250; Burns *v.* State, Ibid. 394. In Indiana, see State *v.* Chandler, 96 Ind. 591. In Maine, State *v.* Hutchinson, 36 Me. 261.

[1] Com. *v.* Moore, 6 Met. 243. The following are the cases in detail: In Maine, an indictment found October, 1852, charging that the defendant "at Avon, on the 25th March, 1851, did commit the crime of adultery with one E. W., the wife of one S. H. W., she, the said E. W., being a married woman, and the lawful wife of said S. H. W.," was held insufficent. State *v.* Thurstin, 35 Me. 205. The ground taken was the want of an averment of time to the fact of E. W. being married. Subsequently, however, an indictment was sustained in the same State which averred that the defendant, "being then and there a married man, and having a lawful wife alive, did commit the crime of adultery with L. H., the wife of one M. H., by having carnal knowledge of the body of her, the said L. H." State *v.* Hutchinson, 36 Me. 261. An indictment which alleges that P. M., on a certain day, and at a certain place, "did commit the crime of adultery with one M. S., by then and there having carnal knowledge of the body of the said S., she, the said M. S., then and there being a married woman, and having a husband alive," is not sufficient to support a conviction. These allegations do not show with certainty that M. S. was not the wife of P. M. Com. *v.* Moore, 6 Met. 243. Where, however, there was a distinct averment that the defendant, R., committed adultery with C. A. S., "then the lawful wife of P. J. S.," this was held enough. Com. *v.* Reardon, 6 Cush. 78. The indictment may charge the offence to be "with a certain woman whose name is to said jurors unknown," the defendant being then and there a married man, and then and there having a lawful wife alive, other than said woman whose name to said jurors is unknown as aforesaid. Com. *v.* Tompson, 2 Cush. 551. Where the indictment is against a married man, for adultery, it has been held sufficient to state that the defendant having a wife, M. A. H., in full life, did commit adultery with one M. M., without otherwise alleging carnal knowledge, and without averring that M. M. was not his wife. Helfrich *v.* Com., 33 Penn. St. 68. If one of the persons charged with the offence of adultery be known by the name charged in the indictment, the other is not entitled to an acquittal by showing that it is not the true name. State *v.* Glaze, 3 Ala. 283. See other cases of indictment, State *v.* Bridgman, 49 Vt. 202; State *v.* Tally, 74 N. C. 322.

[2] Helfrich *v.* Com., 33 Penn. St. 68; State *v.* Hinton, 6 Ala. 864; Maull *v.* State, 37 Ibid. 160. And compare State

enough to aver that they had carnal knowledge together, each of the body of the other, and did thereby commit adultery."[1] This method of specification is more consistent with the rules of criminal pleading than is the mere statement of "commit adultery."

"Commit adultery" a sufficient description.

§ 1730. In States where both parties to the adulterous act are guilty of adultery, both parties may be joined in the indictment,[2] or they may be tried singly.[3] But even where both parties are by the local law capable of being joint principals in the offence,[4] the offence is not necessarily joint, as the man, when the woman was unconscious or irresponsible, may be the sole guilty agent.[5] Hence there may be severance in the verdict.[6]

Defendants may be joined.

§ 1731. It is not necessary to aver a knowledge by either party that the other was married.[7]

Scienter unnecessary.

IV. EVIDENCE.

§ 1732. The evidence of marriage in case of adultery is the same as in bigamy, and, in this respect, has already been discussed.[8]

Marriage must be proved as in bigamy.

v. Thurstin, 35 Me. 205; State v. Bridgman, 49 Vt. 202; State v. Tally, 74 N. C. 322; but see *infra*, § 1753. See under Texas statute, Edwards v. State, 10 Tex. Ap. 25; Holland v. State, 14 Ibid. 182. See to same effect, Com. v. Bakeman, 131 Mass. 577. It must be distinctly averred that the intercourse was with each other. Maull v. State, 37 Ala. 143.

[1] See Com. v. Thompson, 99 Miss. 446.

[2] State v. Bartlett, 53 Me. 446; Com. v. Elwell, 2 Met. 190; Com. v. Thompson, 99 Mass. 444; Maull v. State, 37 Ala. 160; Spencer v. State, 31 Tex. 64. In Delany v. People, 10 Mich. 241, it was ruled, that as the offence of lascivious cohabitation must be necessarily joint, so the two defendants must necessarily be joined in the indictment. But although this may be so under the Michigan statute, it does not hold at common law. As to Texas statute, see Randle v. State, 12 Tex. Ap. 250.

[3] Searle v. State, 56 Vt. 516; Scott v. Com., 77 Va. 344; State v. Dingee, 17 Iowa, 232; State v. Wilson, 22 Ibid. 364.

[4] State v. Parham, 5 Jones (N. C.), 416. *Supra*, § 1721.

[5] State v. Sanders, 30 Iowa, 582; State v. Donavan, 61 Ibid. 278.

[6] *Infra*, § 1737 *a*.

[7] Com. v. Elwell, 2 Met. 190; Whart. Cr. Pl. & Pr. § 164. *Infra*, § 1752.

[8] *Supra*, §§ 1696 *et seq.* To the effect that confessions are admissible see Com. v. Holt, 121 Mass. 61; Wolverton v. State, 16 Ohio, 173; State v. Hilton, 3 Rich. 434; Cook v. State, 11 Ga. 53; Cameron v. State, 14 Ala. 546; State v. Sanders, 30 Iowa, 582. See Whart. Cr. Ev. § 637. That the proof should be exact, see State v. Bowe, 61 Me. 171.

§ 1733. There has been some difference of opinion as to the extent to which evidence of improper familiarity, other than that charged in the indictment, is admissible. On the one hand, it is clear that in all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts between the parties anterior to that period may be adduced, in connection with, and in explanation of, acts of a similar character occurring within that period,[1] although such former acts would be inadmissible as independent testimony,[2] and if prosecuted criminally, would be barred by the statute of limitations.[3] In point of fact, as evidence of adultery is necessarily circumstantial,[4] it is difficult to see how evidence of prior improper familiarities can be rejected,[5] unless slight and long anterior as to time.[6] On the other hand, evidence of improper conduct by the defendant with other parties than the one charged in the indictment, is inadmissible,[7] and evidence of guilt with the same party *subsequent* to the finding of the indictment has been held inadmissible, unless to corroborate facts proved to have taken place *before*,[8] or to prove a system of adulterous intercourse between the parties.[9] Evi-

Adultery to be inferentially proved.

[1] State v. Kemp, 87 N. C. 538; State v. Pippin, 88 Ibid. 646.

[2] Whart. Crim. Ev. § 35; State v. Wallace, 9 N. H. 515; State v. Marvin, 35 N. H. 22; People v. Jenness, 5 Mich. 305. See State v. Witham, 72 Me. 531.

[3] Whart. Crim. Ev. §§ 33–9; State v. Potter, 52 Vt. 33; Com. v. Pierce, 11 Gray, 447; Lawson v. State, 20 Ala. 66.

[4] State v. Bridgman, 49 Vt. 202; Com. v. Gray, 129 Mass. 474; State v. Poteet, 8 Ired. 23; State v. Waller, 80 N. C. 401; State v. Way, 5 Neb. 283.

[5] Whart. Crim. Ev. §§ 33–9; State v. Potter, 52 Vt. 33; Com. v. Call, 21 Pick. 509; Com. v. Horton, 2 Gray, 354; Com. v. Nichols, 114 Mass. 285; Com. v. Bowers, 121 Ibid. 45; Pollock v. Pollock, 71 N. Y. 137; State v. Waller, 80 N. C. 401; Searls v. People, 13 Ill. 597; Moore v. State, 108 Ibid. 484; Alsabrooks v. State, 52 Ala. 24; Richardson v. State, 34 Tex. 142. Com. v. Thrasher, 11 Gray, 450, holding that evidence of prior adultery is inadmissible, is justly overruled in Thayer v. Thayer, 101 Mass. 111; Com. v. Nichols, 114 Mass. 285. See State v. Wallace, 9 N. H. 515. *Contra*, as to incest, Lovell v. State, 12 Ind. 18.

[6] State v. Crowley, 13 Ala. 172.

[7] State v. Bates, 10 Conn. 372.

[8] State v. Bridgman, 49 Vt. 202; Com. v. Horton, 2 Gray, 354; Com. v. Pierce, 11 Ibid. 447; and the doctrine enlarged in Thayer v. Thayer, 101 Mass. 111; Com. v. Bowers, 121 Ibid. 45; State v. Crowley, 13 Ala. 172. See Whart. Crim. Ev. §§ 33–9. As to competency of evidence of chastity, see Com. v. Gray, 129 Mass. 474.

[9] Boddy v. Boddy, 30 L. J. Pr. & Mat. 23; State v. Bridgman, 49 Vt. 202; Thayer v. Thayer, 101 Mass. 111; Lovell v. State, 12 Ind. 18; Cole v. State, 6 Baxt. 239; Alsabrooks v. State,

dence of a propensity to commit the particular offence is inadmissible.[1] Suspicions of the wife,[2] and rumors in the neighborhood,[3] are inadmissible.

When the offence is with an unmarried woman, evidence is inadmissible to show that she had been delivered of a child which might have been begotten about the time of the offence charged.[4]

The good reputation of the alleged paramour for chastity is admissible for the defence,[5] and such reputation can then be attacked by the prosecution.[6]

When the charge is notorious cohabitation in adultery, proof of a single act is insufficient to convict.[7] When this is the statutory charge, notoriety may become a necessary ingredient of proof.[8]

Confessions admissible.

§ 1734. Where a man and woman are jointly indicted, and tried for living together in adultery, the confessions of the one party are evidence against such party;[9] but not after the relation has ceased, against the alleged paramour.[10] Nor can there be a joint conviction upon one act of adultery confessed by one party, coupled with another act confessed by the other party.[11] And on the general question of such confessions we must keep in mind the rules elsewhere expressed as to the unreliability of confessions as proof of guilt.[12] To prosecutions for adultery these rules are peculiarly applicable. Confessions, in such cases, may be made not merely under a mistake of fact as to the *status* of the parties, but may be self-serving, as where their object is to help out a divorce procedure. A man, to enable a divorce to be procured against him by his wife, "confesses" adultery. He is subsequently

52 Ala. 24; Carotti *v.* State, 42 Miss. 334; State *v.* Way, 5 Neb. 283.

[1] See Whart. Cr. Ev. § 35. In Blackman *v.* State, 36 Ala. 295, the unchaste character of one of defendants was held admissible. But this is not safe law.

[2] State *v.* Crowley, 13 Ala. 172.

[3] Belcher *v.* State, 8 Humph. 63.

[4] Com. *v.* O'Connor, 107 Mass. 219.

[5] Com. *v.* Gray, 129 Mass. 474.

[6] See State *v.* Libby, 44 Me. 469; Frost *v.* Com., 9 B. Mon. 362.

[7] *Supra*, § 1721 *a*; *infra*, § 1747.

[8] *Infra*, § 1747. And see, as analogous case, Collum *v.* State, 10 Tex. Ap. 708.

[9] Lawson *v.* State, 20 Ala. 66. See, however, the cautions given *supra*, § 1696.

[10] Com. *v.* Thompson, 99 Mass. 444; Spencer *v.* State, 31 Tex. 64; Whart. Cr. Ev. §§ 390 *et seq.*

As to whether an infant can be produced in court to prove similarity, see Whart. Cr. Ev. § 313. *Infra*, § 1744.

[11] Com. *v.* Cobb, 14 Gray, 57; Whart. Cr. Pl. & Pr. § 314.

[12] Whart. Cr. Ev. §§ 623 *et seq.* *Supra*, § 1700.

indicted for adultery, and the confession is put in evidence against him. But if the confession, as self-serving, would not be ground for the divorce, it is not, for the same reason, sufficient to sustain a conviction for adultery. The same criticism is applicable to bragging confessions.[1] The miscreants who "confessed" to illicit intercourse with the wife of James II., when Duke of York, were guilty of a conspiracy to slander; but they could not have been convicted of adultery, an offence which they did not commit, a conviction for which would have disgraced not merely themselves but their intended victim. To support convictions in such cases on "confessions" would establish by record slanders which would destroy the character of the person slandered.[2]

Paramour a witness for defence.

§ 1735. The party with whom the defendant is alleged to have committed the offence is a competent witness for either the prosecution or the defence,[3] though such testimony is to be regarded as requiring corroboration as that of an accomplice.[4]

But husband and wife not witnesses at common law as to each other.

§ 1736. Neither husband nor wife can be a witness at common law for or against the other in prosecutions of this class.[5] The effect of statutes on this point is considered in another work.[6]

V. VERDICT.

May be conviction of minor offence.

§ 1737. On an indictment for adultery, there is authority to the effect that there may, if the marriage be disproved, be a conviction of fornication, when the latter offence is locally indictable.[7] But the safer course is to place the two offences in separate counts.

[1] Whart. Cr. Ev. § 627.

[2] See cases cited in Whart. on Ev. 2d ed. § 1220. That in such cases confessions may corroborate marriage, see Cameron *v.* State, 14 Ala. 546.

[3] State *v.* Colby, 51 Vt. 291; People *v.* Knapp, 42 Mich. 267; State *v.* Crowley, 13 Ala. 172; Rutter *v.* State, 4 Tex. Ap. 57.

[4] Merritt *v.* State, 10 Tex. Ap. 402.

[5] Whart. Crim. Ev. §§ 390 *et seq.*; State *v.* Burlingham, 15 Me. 104; Com. *v.* Jailer, 1 Grant (Penn.), 218; State *v.* Armstrong, 4 Minn. 335; State *v.* Berlin, 42 Mo. 572; Thomas *v.* State, 14 Tex. Ap. 70. As to peculiar Iowa statute, see State *v.* Dingee, 17 Iowa, 232.

[6] Whart. Crim. Ev. § 400.

[7] Whart. Cr. Pl. & Pr. §§ 736 *et seq.*; Resp. *v.* Roberts, 2 Dall. 124; 1 Yeates, 6; Dinkey *v.* Com., 19 Penn. St. 126; State *v.* Cowell, 4 Ired. 231; *contra*, State *v.* Pearce, 2 Blackf. 318; State *v.* Hinton, 6 Ala. 864; though see Smitherman *v.* State, 27 Ibid. 23.

§ 1737 *a*. One defendant may be acquitted without involving the acquittal of the other.[1]

VI. ATTEMPTS AND SOLICITATIONS.

Attempt to commit offence indictable.

§ 1738. The law of attempts has been discussed in a prior chapter, to which the reader is referred.[2] Solicitation of another to commit adultery may be an offence at common law in those States where both parties may be convicted of the adulterous act,[3] though, unless there is something more than mere invitation, this may be doubted.[4] But it is otherwise where the statute defining the offence makes the party soliciting incapable of committing the offence.[5] The woman's will is interposed between his intent and the act; and hence, on the principles previously developed,[6] he cannot be convicted of the mere solicitation.

[1] State *v.* Sandas, 30 Iowa, 582; State *v.* Donavan, 61 Ibid. 278; Alonzo *v.* State, 15 Tex. Ap. 378. See, however, State *v.* Parham, 5 Jones (N. C.), 416; State *v.* Mainor, 6 Ired. 340, which last case, for the reasons above given (*supra*, § 1730), cannot be sustained. See, also, Watson *v.* State, 13 Tex. Ap. 76.

[2] *Supra*, §§ 173 *et seq.*

[3] State *v.* Avery, 7 Conn. 267.

[4] *Supra*, § 179.

[5] Smith *v.* Com., 54 Penn. St. 209.

[6] *Supra*, § 179.

CHAPTER XXXIII.

FORNICATION.

I. NATURE OF OFFENCE.

Not a misdemeanor at common law.

§ 1741. It is not proposed to treat, in this place, of the proceedings established by the statutes of the several States in cases of bastardy. They partake essentially of the character of civil process; and though in one or two instances they assume the shape of prosecutions, they cannot be regarded as belonging exclusively to criminal law.[1] Fornication, according to the better view, is not in this country a misdemeanor at common law;[2] and though the prevalent opinion appears to be, that unless the offence partakes of the nature of public and offensive lewdness, it is not at common law indictable,[3] yet the question has been put to rest, in most of the States, by express statutory prescription. The nature of the evidence in cases of sexual intercourse has been already noticed under the head of adultery.[4]

[1] That bastardy cases are quasi criminal, see Van Tassel *v.* State, 59 Wis. 351; Shelton *v.* State, 73 Ala. 5.

[2] See Pollard *v.* Lyon, 91 U. S. 225; State *v.* Way, 6 Vt. 311; State *v.* Cox, N. C. Term R. 165. See *supra*, § 1717.

[3] R. *v.* Pierson, 2 Salk. 382; State *v.* Cooper, 16 Vt. 551; Smith *v.* Minor, Coxe's R. 16; Anderson *v.* Com., 5 Rand. 627; Com. *v.* Isaacs, Ibid. 634; Com. *v.* Jones, 2 Grat. 555; State *v.* Brunson, 2 Bailey, 149; State *v.* Moore, 1 Swan, 136; Brooks *v.* State, 2 Yerger, 482; State *v.* Smith, 32 Tex. 167. See Crouse *v.* State, 16 Ark. 566.

[4] *Supra*, § 1733. For definition, see Hood *v.* State, 56 Ind. 263.

As to the distinction, in respect to weight of evidence, between civil and criminal procedure in this relation, see Robbins *v.* Smith, 47 Conn. 182.

The North German Code has struck

II. INDICTMENT.

§ 1742. As the offence is usually statutory, the indictment must introduce the statutory requisites.[1] The participants, as in adultery, may be jointly indicted.[2]

Indictment must conform to statute.

The fact that the defendants are not married to each other need not, as a general rule, be averred, when the statutory term "fornication" is used;[3] and the precedents in use mostly rest on this view.[4] In Massachusetts, however, and in those States in which fornication has a special penalty when committed with single women, it is necessary to aver that the parties were single and unmarried,[5] though it is otherwise when these conditions are not essential to the offence.[6] Wherever, in other words, fornication is used as a *nomen generalissimum* to cover sexual intercourse with persons both unmarried and married, different penalties being assigned to the two cases, then the indictment must either negative or affirm marriage. But this is not the case where the term is used to designate sexual intercourse by an unmarried person.

III. EVIDENCE.

§ 1744. The prosecution must show as part of its case that the parties were not married to each other.[7]

a line in this respect which is well worthy of notice. Declining to make fornication the subject of general prosecution, it specifies the following instances when unchastity, or attempts at unchastity, are to be punished:—

1. When there is an abuse of a situation of trust or power (*e. g.*, guardians, pastors, teachers, tutors, physicians, superintendents or attendants in hospitals and asylums).

2. When a woman is seduced under promise of marriage.

3. When a girl under sixteen, with or without promise of marriage, is seduced. Berner, Lehrbuch, etc. § 186.

[1] State *v.* Lashley, 84 N. C. 754; State *v.* Johnson, 69 Ind. 85. See Powell *v.* State, 12 Tex. Ap. 238. As to jurisdiction, see McGary *v.* Rivington (Ohio), 2 Am. L. J. 79; 6 Crim. Law Mag. 283.

[2] *Supra*, § 1730. State *v.* Cox, N. C. Term. R. 165.

[3] State *v.* Gooch, 7 Blackf. 468.

[4] Whart. Prec. *in loco*.

[5] Com. *v.* Murphy, 2 Allen, 163. See Hopper *v.* State, 19 Ark. 143.

[6] Wells *v.* State, 9 Tex. Ap. 160.

[7] Territory *v.* Whitcomb, 1 Mont. 359. That the indictment need not aver non-marriage, see State *v.* Stephens, 63 Ind. 542.

Facts of case must be made out.

How illicit intercourse is to be established, has been already discussed.[1] Proof of resemblance of an infant to the alleged father may be corroborated by inspection.[2]

When bastardy is an ingredient in the case, it is no defence that about the time of the alleged impregnation, the woman in question had intercourse with other men.[3]

To a charge of bastardy the marriage of the parties prior to the birth of the child is a defence.[4]

It has been held that the limitation that there is to be no conviction when there is reasonable doubt of guilt, does not apply to bastardy prosecutions, which are *quasi* civil, and are determined by preponderance of proof.[5]

IV. VERDICT.

§ 1745. As already seen, it has been held in some jurisdictions that on an indictment for adultery there can be a conviction of fornication,[6] though this, on principle, is at common law open to doubt, as the offences differ not so much in degree as in kind.

May be conviction of under indictment for adultery.

If case be rape offence merges.

§ 1746. Where the doctrine of merger obtains, the defendant, in a prosecution for fornication, must be acquitted if rape be proved;[7] and independently of the question of merger there is strong authority to the effect that where fornication implies assent in both parties, there can be no conviction unless such assent be proved.[8]

[1] *Supra*, § 1733.

Evidence that the complainant, in a bastardy process, had criminal intercourse with a man, other than the respondent, less than seven and a half months before the birth of her child, is inadmissible, in the absence of evidence that the birth was premature. Ronan *v.* Dugan, 126 Mass. 176.

[2] Whart. Cr. Ev. 9th ed. § 312; but see Keniston *v.* Rowe, 16 Me. 38; Risk *v.* State, 19 Ind. 152; State *v.* Danforth, 48 Iowa, 43; State *v.* Smith, 54 Ibid. 104.

[3] State *v.* Parish, 83 N. C. 613.

[4] Moran *v.* State, 73 Ind. 208.

[5] Semon *v.* People, 42 Mich. 141.

[6] *Supra*, § 1737.

[7] *Supra*, § 1344; Whart. Cr. Pl. & Pr. § 464; Com. *v.* Parr, 5 W. & S. 345, cited *supra*, § 554; State *v.* Lewis, 48 Iowa, 578. *Supra*, §§ 1344, 1724. As to difference between fornication and rape, see People *v.* De Groat, 39 Mich. 124.

[8] See *infra*, § 1751.

CHAPTER XXXIV.

ILLICIT COHABITATION: INCEST: "MISCEGENATION."

I. ILLICIT COHABITATION.

Offence must be continuous and lewd.

§ 1747. Statutes exist in many States making specifically indictable illicit cohabitation. In some aspects (*e. g.*, when the offence is a common scandal) such cohabitation is a nuisance, and may be indicted as such.[1] But there may be cases of "illicit cohabitation," or "living in adultery," or "living in fornication," which are not nuisances, and which distinctively fall within the range of the statutes now before us. In such cases the evidence necessary to support a prosecution must be something more than that of a single act of adultery or fornication,[2] or even of several such acts when disconnected and secret.[3] A settled and recognized continuance in a state of adultery or fornication, though only for a short time, must be shown;[4] and the

[1] See *supra*, § 1446.

[2] Smith *v.* State, 39 Ala. 554; Granberry *v.* State, 61 Miss. 440.

[3] Wright *v.* People, 13 Ill. 507.

[4] Com. *v.* Calef, 10 Mass. 153; Searls *v.* People, 13 Ill. 597; Miner *v.* People, 58 Ibid. 59; State *v.* Gartrell, 14 Ind. 280; State *v.* Marvin, 12 Iowa, 499; McLeland *v.* State, 25 Ga. 477; State *v.* Glaze, 9 Ala. 283; Smith *v.* State, 39 Ibid. 554: Quartemas *v.* State, 48 Ibid. 269; State *v.* Crowner, 56 Mo. 147; Richardson *v.* State, 37 Tex. 346; State *v.* Moore, 1 Swan, 136; People *v.* Gates, 46 Cal. 52. As to Texas statute, see Powell *v.* State, 12 Tex. Ap. 238.

For other cases, see State *v.* Lyerly, 7 Jones (N. C.), 158; Wasden *v.* State, 18 Ga. 264; Maull *v.* State, 37 Ala. 160; State *v.* Byron, 20 Mo. 210; and cases cited *supra*, § 1721 *a*.

Something more than occasional illicit intercourse must be shown. Com. *v.* Catlin, 1 Mass. 8; Searls *v.* People, 13 Ill. 597; Collins *v.* State, 14 Ala. 608; Quartemas *v.* State, 48 Ibid. 269; Carotte *v.* State, 42 Miss. 334; Collum *v.* State, 10 Tex. Ap. 708.

Exposing the person indecently to one woman is "open lascivious behavior." State *v.* Millard, 18 Vt. 574. That there can be no conviction of "living together in fornication" "under an indictment for living together in adultery," has been held in Smitherman *v.* State, 27 Ala. 23. See *supra*, § 1745. Under a statute prohibiting lewdly, etc., "cohabiting *together*," "together" is essential to the offence. Delaney *v.* People, 10 Mich. 241; Maull *v.* State, 37 Ala. 160; Wells *v.* State, 9 Tex. Ap. 100; State *v.* Byron, 20 Mo. 210. "Lewdness," under the statute, does not by itself require the elements of publicity and notoriety. Com. *v.* Lambert, 12 Allen, 177. See Kinard *v.* State, 57 Mass. 132.

[1] Collins *v.* State, 14 Ala. 608.

[2] Hall *v.* State, 53 Ala. 463. See State *v.* Way, 5 Neb. 283.

[3] Wright *v.* State, 5 Blackf. 358; People *v.* Gates, 46 Cal. 52; State *v.* Crowner, 56 Mo. 147. In this case Vories, J., said: "The defendants in this case are charged with living in a state of open and notorious adultery. The offence consists of an open and notorious living or cohabiting together; occasional illicit intercourse will not constitute the offence. The statute was intended to provide against persons who, in defiance of morality and of the good or well-being of society, should openly live together; they must reside publicly in the face of society as if the conjugal relation existed between them; their illicit intercourse must be habitual. Wright *v.* State, 5 Blackf. 358; Searls *v.* People, 13 Ill. 597; State *v.* Gartrell, 14 Ind. 280; State *v.* Marvin, 12 Iowa, 499; Hinson *v.* State, 7 Mo. 244; Dameron *v.* State, 8 Ibid. 494." See Collum *v.* State, 10 Tex. Ap. 708.

[4] Com. *v.* Munson, 127 Mass. 459.

[5] *Supra*, § 1730; Whart. Cr. Pl. & Pr. §§ 220 *et seq.*; State *v.* Osborne, 69 Mo. 143; Delano *v.* State, 66 Ind. 348; Taylor *v.* State, 36 Ark. 84; Edwards *v.* State, 10 Tex. Ap. 25; Collum *v.* State, Ibid. 708; King *v.* People, 7 Col. 224. See, also, State *v.* Lashley, 84 N. C. 754; Edwards *v.* State, 10 Tex. Ap. 25. When the statute requires that the offence should be open and notorious, this must appear in the indictment. State *v.* Johnson, 69 Ind. 85. In "common habitation" means dwelling together. Sullivan *v.* State, 32 Ark. 187.

allegation is sustained by proof of adulterous visits once a week for half a year.[1] But living together adulterously for a single day is "living together in adultery," supposing it is part of an intended adulterous arrangement.[2] And when the statute uses the term "notorious," notoriety must be proved.[3] But the offence is not made out by proof of cohabitation under an honest belief in marriage.[4]

Statutes must be followed in indictment.

§ 1748. Of the indictments for this class of cases, the statutes being so various, it is only possible at present to observe that to them the ordinary rules of statutory indictments must be applied.[5] One distinctive feature may be here

noticed,—that a *continuando*, though proper, is not essential, when a single period of adulterous or lascivious living is the object of prosecution, or when illicit intercourse on a particular day is part of a guilty system.[1]

The question of joinder of defendants is the same as in adultery, and has been already noticed.[2] But it has been held that under statute, where the offence is not necessarily joint, and where there is a severance on trial, one defendant may be acquitted and the other convicted.[3] The indictment may be joint or several where the statute does not make the offence joint.[4]

The sexes of the parties need not be specifically averred,[5] unless required by local statute.[6]

§ 1748 *a*. The evidence, in cases of this class, is of the same character as that by which adultery is established.[7] Unless "reputation" be made by statute an element of the offence, proof of such reputation is inadmissible.[8] Confessions are admissible in such cases, subject to the cautions already expressed. And it has been held admissible for a woman charged with illicit sexual relations to show that her physical condition made the offence improbable.[9]

Evidence inferential.

§ 1748 *b*. It is no defence that the parties were married, if the marriage be not recognized as legal by the law of the prosecuting State.[10]

Void marriage no defence.

[1] State *v*. Glaze, 9 Ala. 283; Hall *v*. State, 53 Ibid. 403; Hinson *v*. State, 7 Mo. 244. See Com. *v*. Wood, 4 Gray, 11.

[2] *Supra*, § 1730. See, as to pleading, State *v*. Foster, 21 W. Va. 767.

[3] State *v*. Caldwell, 8 Baxt. 576; Wasden *v*. State, 18 Ga. 264.

[4] Scott *v*. Com., 77 Va. 344.

[5] State *v*. Lashley, 84 N. C. 754; McLeod *v*. State, 35 Ala. 398; Wells *v*. State, 9 Tex. Ap. 100.

[6] State *v*. Dunn, 26 Ark. 34.

[7] *Supra*, § 1733. See Bush *v*. State, 37 Ark. 215; Peak *v*. State, 10 Humph. 99. That indecent exposure of person may sustain an indictment for "gross lewdness and lascivious behavior," under statute, see Com. *v*. Wardell, 128 Mass. 52.

[8] Buttram *v*. State, 4 Cold. 171. See Belcher *v*. State, 8 Humph. 63.

[9] Toney *v*. State, 60 Ala. 97.

[10] Com. *v*. Munson, 127 Mass. 459; Grisham *v*. State, 2 Yerg. 589; People *v*. Colton, 2 Utah, 457.

II. INCEST.

§ 1749. Incest at common law is the sexual connection between parties lineally related or related collaterally in the first degree. On the principles already stated in respect to adultery, incest is a common law offence in the United States;[1] though, for the reason that the subject is generally absorbed by statute,[2] no decision as to its common law character can be cited.[3]

Is an offence at common law.

§ 1750. In Ohio, *emissio seminis* was once essential to constitute the offence;[4] but this ruling was peculiar to that State, and by statute this is no longer essential. Elsewhere the mere fact of marriage is adequate to sustain the indictment, without proof of carnal knowledge.[5]

Constituents of offence must be made out.

The *lex fori* is the arbiter of the question of relationship.[6]

The relation of step-father and step-daughter, under the Ohio statute, has been ruled not to exist after the termination, by death or divorce, of the marriage relation between the step-father and the step-daughter's mother.[7] To establish such a relationship the marriage of the step-father and mother must be shown by the prosecution.[8]

[1] See *contra*, State *v*. Keesler, 78 N. C. 469; State *v*. Smith, 30 La. An. 846.

[2] U. S. *v*. Hiler, 1 Morris, 330; Com. *v*. Goodhue, 2 Met. 193; People *v*. Harriden, 1 Park C. R. 544; Howard *v*. State, 11 Ohio St. 328; Cook *v*. State, 11 Ga. 53; People *v*. Murray, 14 Cal. 159.

In Ohio sexual intercourse between a brother-in-law and sister-in-law is, under the statute, incest. Stewart *v*. State, 39 Ohio St. 153. As to indictment, see Noble *v*. State, 22 Ibid. 541.

[3] The grounds for the signal punishment of incest are the following:—

1. Physically nature requires, for proper human development, that children should be propagated by parents of separate families.

2. A sexual connection between persons of the same family has in it a *horror naturalis* incompatible with a permanent and peaceful union.

3. If sexual intercourse between children of the same family be not denounced as highly penal, and stigmatized with the severest reprobation, it would be slid into in early youth, and society destroyed in its nursery. See Berner, § 173.

[4] Noble *v*. State, 22 Ohio St. 541.

[5] State *v*. Schaunhurst, 34 Iowa, 547.

[6] Whart. Confl. of L. § 136.

In Georgia sexual relations with a niece are incestuous. Raiford *v*. State, 68 Ga. 672.

[7] Noble *v*. State, 22 Ohio St. 541.

[8] McGrew *v*. State, 13 Tex. Ap. 340.

That a woman who is a victim of force or fraud is not an accomplice, is elsewhere seen. Whart Cr. Ev § 440.

§ 1751. Whether to incest consent of both parties is necessary, has been much discussed. If it be, then, should it appear that the carnal intercourse was effected by force on the man's part, there can be no conviction of incest. This view has been taken by a majority of the Supreme Court of Iowa;[1] and the same view is sanctioned in New York,[2] in Ohio,[3] and in Georgia.[4] That consent is necessary to incest, is also maintained in Michigan.[5] On the other hand, there is high authority to the effect that under an indictment for rape, when there are the proper averments, there can be a conviction of incest, though no consent be shown on the part of the woman, supposing sexual intercourse be shown.[6] The question depends primarily on the construction of the statute defining incest, under which the prosecution is brought. If, however, there be no statutory definition, the better view at common law is that incest, like fornication, assumes assent on the woman's part; and that when force is proved, the prosecution must be for rape and not for incest.[7] But to work an acquittal on the ground of rape, the force must be plainly established, and must consist of something beyond mere authority or influence.[8]

Question when there is a rape.

§ 1752. The *scienter*, when required by statute, is necessary to the indictment.[9] It is sufficient, however, with this, to aver, when required, the relationship of the parties.[10] It is not necessary to aver or prove the marriage by which that relationship was created.[11] When joint guilt is essential to the offence, then joint guilty knowledge must be averred.[12] But if one

Scienter is essential.

[1] State *v.* Thomas, 53 Iowa, 214.

[2] People *v.* Harriden, 1 Park. C. R. 344.

[3] Noble *v.* State, 22 Ohio St. 541.

[4] Raiford *v.* State, 68 Ga. 672.

[5] People *v.* Jenness, 5 Mich. 305; De Groat *v.* People, 39 Ibid. 124.

[6] Com. *v.* Goodhue, 2 Met. 133; Com. *v.* Bakeman, 131 Mass. 577; People *v.* Rowle, 2 Mich. N. P. 209; see *supra*, § 575.

[7] See 25 Alb. L. J. 484.

[8] Raiford *v.* State, 68 Ga. 672. See Hintz *v.* State, 58 Wis. 493.

[9] Williams *v.* State, 2 Ind. 439; Baumer *v.* State, 49 Ibid. 544. But "knowingly" is not necessary unless the statute prescribe the *scienter*. State *v.* Bullinger, 54 Mo. 142. See Hicks *v.* People, 10 Mich. 395. And as to *scienter* generally, see *supra*, § 1731; Whart. Cr. Pl. & Pr. § 164; Morgan *v.* State, 11 Ala. 289. As to indictment in incest, see Hintz *v.* State, 58 Wis. 493.

[10] Williams *v.* State, 2 Ind. 439. See Bergen *v.* People, 17 Ill. 426; Baker *v.* State, 30 Ala. 521.

[11] Noble *v.* State, 22 Ohio St. 541. See State *v.* Schaunhurst, 34 Iowa, 547; People *v.* Jenness, 5 Mich. 305. In Ohio the offence cannot be laid continuously. See Barnhouse *v.* State, 31 Ohio St. 39.

[12] Baumer *v.* State, 49 Ind. 544.

party be cognizant and the other ignorant of the relationship, the former when the offence is several, may be convicted and the latter acquitted.[1] The burden of disproving *scienter* may be, under statute, on defendant.[2]

§ 1753. The defendant's admission of relationship with the person with whom he holds incestuous intercourse is sufficient proof of such relationship;[3] and the proof, also, may be by reputation.[4]

Relationship provable by admission.

III. "MISCEGENATION."

§ 1754. Sexual union between a negro and a white person was, until the late civil war, forbidden in most of the United States,[5] and in several States the prohibition continues. That such statutes, when they consist in imposing a prohibition, do not conflict with the recent amendments to the Federal Constitution is generally agreed;[6] nor do they conflict with the leg-

Offence is statutory.

[1] State *v.* Ellis, 74 Mo. 385. See Powers *v.* State, 44 Ga. 209.

[2] *Supra*, §§ 88-92.

[3] Bergen *v.* People, 17 Ill. 426; People *v.* Jenness, 5 Mich. 305; see People *v.* Harriden, 1 Park C. R. 244. See Whart. Cr. Ev. §§ 623 *et seq.*

[4] State *v.* Bullinger, 54 Mo. 142.

[5] See Bishop on Mar. & Div. c. xvii.; Whart. Confl. of L. § 159.

In State *v.* Gibson, 36 Ind. 404, such statutes are defended on the ground of moral and political right.

[6] Pace *v.* Alabama, 106 U. S. 583; aff. S. C., 69 Ala. 231 (a statute prohibiting adulterous connections); Kinney, *ex parte*, 3 Hughes, 9; Kinney's Case, 30 Grat. 658 (sustaining statute avoiding such marriage); Francois, *ex parte*, 3 Woods C. C. 367 (where the penalty was imposed on a white man marrying a negro); Francois *v.* State, 9 Tex. Ap. 144; Lonas *v.* State, 3 Heisk. 287. In respect to Francois, *ex parte*, 3 Woods, 367, which was decided by Judge Duval, I have been favored with the following note from Mr. Justice Woods dated April 27, 1885:—

"Mr. Justice Bradley and I once held a consultation upon an application made in behalf of Francois for the writ of *habeas corpus* after it had been denied by Judge Duval. We at first thought the writ ought to be allowed, but on further reflection and conference were of opinion that the decision of Judge Duval was right, and that the writ should be refused. I have never formally overruled the decision of Judge Duval."

In Lonas *v.* State, *ut sup.*, Sneed, J., said:—

"Such, also, were the laws of the British colonies in this country, re-enacted after the separation by the thirteen States. In Massachusetts the Colonial Act of 1707, entitled 'An act for the better preventing of a spurious and mixed issue,' was reënacted under the State government in 1786, forbidding the intermarriage of the black and white races, and degrading the

islation under those amendments.[1] It has been held, also, that a marriage of domiciled citizens of a State, in contravention of their domiciliary law, is not validated, so far as concerns such State, by the fact that it was celebrated in a State imposing no such restriction, such marriage being so solemnized in intended evasion of the law of the domiciliary State.[2]

Ignorance of the law in such respect is no defence to indictment under the statutes.[3]

A person with less than one-fourth of negro blood is not, under the statute, a negro.[4]

The proof of marriage, on indictments of this class, has been already discussed.[5]

unhappy issue of such marriage with the stain of bastardy. And long after the abolition of slavery in that State, in the carefully revised Code of 1836, this 'mark of degradation,' says Taney, C. J., 'was again impressed upon the race.' 19 How. 413. And such, indeed, we believe, was the law of every State. The Congress has the same right to regulate this relation in the District of Columbia and in the Territories, that the States have within their own jurisdictions; and this power is at this moment being exercised in Utah, in the suppression of polygamy. We are of opinion that the late amendments to the Constitution of the United States, and the laws enacted for their enforcement, do not interfere with the rights of the States, as enjoyed since the foundation of the government, to interdict improper marriages; and that the act of 1870, c. 39, which forbids the intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation inclusive, and their living together as man and wife, in this State, is a valid and constitutional enactment."

[1] Ibid. Scott *v.* State, 39 Ga. 321; Green *v.* State, 58 Ala. 190; Frasher *v.* State, 3 Tex. Ap. 263.

[2] Kinney, *ex parte*, 3 Hughes, 1; Kinney's Case, 30 Grat. 658. See Whart. Conf. of Laws, § 159, where the question is discussed more fully.

In Kinney, *ex parte*, 3 Hughes, 1, it was held that section 1977 of the United States Revised Statutes, giving to all persons the same right of making and enforcing contracts as is enjoyed by white persons, only extends to business contracts, and does not cover marriage, not being a contract in this sense, or under the purview of the Constitution. It was further held that this rule is not affected by the fact that the ceremony of marriage was performed in that State or in another State, where such marriage was legal, if the parties to it go out of the State of their residence in order to evade her laws, and return to live and cohabit in the State.

[3] Hoover *v.* State, 59 Ala. 57. *Supra*, §§ 84 *et seq.*

[4] McPherson *v.* Com., 28 Grat. 939; Heron *v.* Bridault, 37 Miss. 209.

[5] *Supra*, §§ 1696 *et seq.*; Steward *v.* State, 7 Tex. Ap. 326.

CHAPTER XXXV.

SEDUCTION.

§ 1756. THE statutes relating to seduction are so numerous and divergent that any attempt to draw from them a consistent and uniform definition of the offence would be futile. We must content ourselves, therefore, with a brief discussion of some of its chief statutory ingredients. "Abduction," it should be remembered, has been already discussed.[1] Statutory requisites must be followed.

Under some of the statutes, it is indictable to seduce or inveigle a girl from persons having charge of her.[2] These are defined to be

[1] *Supra*, § 586. The California Penal Code, § 266, does not cover the technical offence of seduction. People *v.* Roderigas, 49 Cal. 9.

The Roman law made penal the seduction of widows as well as virgins. *Stuprum*, which it interdicted, included in its widest sense every *turpitudo*; in a narrower sense, every *coitus illicitus*; in a sense still more contracted, unchastity. Seduction of women of chastity was made highly penal. "Sed eadem lege Julia etiam strupri flagitium, punitur, cum quis sine vi vel virginem vel viduam honeste viventem stupraverit. Poenam autem lex irrogat peccatoribus, si honesti sunt, publicationem partis dimidiae bonorum; si humiles, corporis coërcitionem cum relegatione." 4 Inst. de publ. jud. 4. 18. The canon law, in addition, in case of the seduction of a virgin by an unmarried man, required him to endow and marry her. C. i. x. de adult. 5. 16. At all events, there must be the endowment, if the marriage were refused. Hence the famous maxim, which worked its way into the ethics of subsequent generations, "Duc aut dota."

[2] These statutes are considered, *supra*, § 586. See *infra*, § 1765. Sir J. F. Stephen thus recapitulates the decisions under the English statutes of abduction (Dig. C. L. art. 263):—

"(1) A. and B., two girls under

persons in actual charge, as heads of the family with whom the girl resides, excluding, of course, special and temporary, guardians, such as transient school-mistresses.[1]

sixteen, run away from home together. Neither abducts the other. R. *v.* Meadows, 1 Car. & Kir. 399, as explained by note to R. *v.* Kipps, 4 Cox C. C. 168; and R. *v.* Mankletow, Dears. C. C. 162 (where it was held that persuading a girl of twelve years to leave her father to go with the defendant to America was a "taking").

"(2) A. persuades B., a girl under sixteen, to leave her father's house, and sleep with him for three nights, and then sends her back. A. has abducted B. R. *v.* Timmins, Bell, 276.

"(3) A., a lady, persuades B., a girl under sixteen, to leave her father's house, and come to A.'s house for a short time, for the purpose of going to the play with her. A. has not abducted B. Founded on a *dictum* of Compton, J., in R. *v.* Timmins.

"(4) A., a girl under sixteen, asks B., by whom she had been seduced, to elope with her, which he does. B. commits abduction. R. *v.* Biswell, 2 Cox C. C. 259; and see R. *v.* Robins, 1 C. & K. 456.

"(5) A. induces B. to permit his daughter, C., to go away by falsely pretending that he (A.) will find a place for C. A. abducts C. R. *v.* Hopkins, Car. & Mar. 254.

"(6) A. takes B., a girl under sixteen, out of her father's possession, believing her, upon good grounds, to be eighteen. A. has abducted B. R. *v.* Prince, L. R. 2 C. C. R. 154.

"(7) A. meets B., a girl under sixteen, in the street, gets her to stay with him some hours, during which interval he seduces her, takes her back to the place where he found her, and there leaves her. She returns home. A. was not aware at the time that B. had a father or mother living. A. has not abducted B. R. *v.* Hibbert, L. R. 1 C. C. R. 184." This case can be explained on the ground that the girl was never actually out of the parent's possession. See R. *v.* Burrell, L. & C. 354.

The following is condensed from Roscoe's Cr. Ev. pp. 262 *et seq.* :—

"Even under the old statute of Hen. VII., which did not contain the words 'or detain,' detaining a person who originally came with her own consent, was considered to be within the statute. R. *v.* Brown, 1 Ventr. 243; Hawk. P. C. b. 1, c. 41, s. 7; 1 East P. C. 454; 1 Russ. by Greav. 703. See *supra*, § 586.

"In 24 & 25 Vict. c. 100, s. 55, which applies to girls under sixteen years of age, the words are, 'whosoever shall take or cause to be taken out of the possession and against the will of her father or mother,' etc. Here also any violation of the girl's will is unnecessary. Thus it is said, by Herbert, C. J., that the statute of 4 & 5 P. & M., which was to the same effect, was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises, or gifts, and married in a secret way to their disparagement. Hicks *v.* Gore, 3 Mod. 84. So upon the same statute it was held that it is no excuse that the defendant, being related to the girl's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover to induce the

[1] R. *v.* Meadows, 1 C. & K. 399. See State *v.* Ruhl, 8 Iowa, 447.

"Taking" includes receiving the girl, as she elopes not merely from her guardian's residence,[1] but from their constructive posses-

girl secretly to elope and marry him, if it appear that it was against the consent of the father. R. *v.* Twisleton, 1 Lev. 257; 1 Sid. 387; 2 Keb. 432; Hawk. P. C. b. 1, c. 41, s. 10; 1 Russ. by Greav. 712. If the same latitude of construction were applied to s. 53, which relates to women of any age, it might be rather dangerous. It has been argued that though by the statute a taking by force is not necessary, still that a person cannot in any sense be said to be *taken* who goes willingly, and that the word *take* in itself imports the use of some coercion. But this view has not been adopted; thus where A. went in the night to the house of B. and placed a ladder against the window, and held it for F., the daughter of B., to descend, which she did, and then eloped with A.; F. being a girl fifteen years old; this was held to be a 'taking' of F. out of the possession of her father within the statute, although F. had herself proposed to A. to bring the ladder and elope with him. R. *v.* Robins, 1 C. & K. 456. So in R. *v.* Mankletow, 1 Dears. C. C. R. 159; 22 L. J. M. C. 115; R. *v.* Booth, 12 Cox C. C. 231. In R. *v.* Handley, 1 F. & F. 648, Wightman, J., said, 'a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's home. If, however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of any offence under the statute.' See, too, R. *v.* Robb, 4 F. & F. 59.

"A man is not, it seems, bound to return a girl under sixteen to her father's custody, when she has left home without any inducement, and came to him. If, however, he has ever held out any inducement to her to leave, and if, when she has left, he avails himself of her having left to induce her to continue out of her father's custody, this is within the statute, whatever his wishes may have been as to the particular time of her leaving. R. *v.* Olifier, 10 Cox C. C. 402. See *supra*, § 586.

"In R. *v.* Green, 3 F. & F. 274, the prisoners found the girl in the street by herself and invited her to go with them, giving her drink which made her dizzy. Green then had intercourse with her in an empty house, where he kept her with him all night. Martin, B., directed an acquittal, on the ground that the girl was not taken out of the possession of any one. It must, however, be observed, that in this case no evidence appears to have been given as to the purpose for which the girl had left home. In R. *v.* Olifier, 10 Cox C. C. 402, Bramwell, B., ruled that when a girl leaves her father of her own accord, without any inducement on the man's part, the man is not bound to restore her to her father. But it seems there must be no intention to return on her part, for if there be an intention to return the girl is still in the constructive custody of her father. Per Willes, J., R. *v.* Mycock, 12 Cox C. C. 28.

"The burden is on the defendant to prove that the father consented. R. *v.* Handley, 1 F. & F. 648."

[1] R. *v.* Robb, 4 F. & F. 59; R. *v.* Robins, 1 C. & K. 456; R. *v.* Kipps, 4 Cox C. C. 167; R. *v.* Mankletow, 6 Ibid. 143; Dears. C. C. 159, modifying R. *v.* Meadows, 1 C. & K. 399.

sion.[1] It need only be for a few hours, if there be any immoral use made of the time.[2] At the same time, if the girl be left by her parents in the street without any visible tutelage exercised over her, the seducing her away be not such a "taking" as to satisfy the statutes.[3] And if she be taken under an honest claim of right, the statute, as in analogous cases in larceny, does not apply.[4]

Prior chaste character essential.

§ 1757. To the offence of seduction, under most statutes, "previous chaste character" in the person alleged to have been seduced is necessary; and such "previous chaste character" (or whatever may be the statutory prerequisite), must be averred in the indictment as a qualification of the prosecutrix.[5] Character in such statutes has been defined to be, not external reputation for chastity, but actual personal possession of chastity.[6] But however this may be, there has been some difference of opinion as to where the burden of proof as to this qualification is imposed. In some States it is held that such chaste character may be inferred from all the circumstances of the case when not expressly testified to by the prosecution.[7] In other States, such

[1] See cases cited note 1, p. 513; R. v. Olifier, 10 Cox C. C. 402.

[2] R. v. Baillie, 8 Cox C. C. 238; R. v. Timmins, Bell C. C. 276; 8 Cox C. C. 401. As to how far "going" is "inveigling," or "taking," see Carpenter v. People, 8 Barb. 603; People v. Parshall, 6 Parker C. R. 129.

[3] R. v. Burrell, L. & C. 354; 9 Cox C. C. 368; R. v. Green, 3 F. & F. 274; R. v. Hibbert, 11 Cox C. C. 246; L. R. 1 C. C. 184.

[4] R. v. Tinkler, 1 F. & F. 513. *Supra*, § 887; *infra*, § 1759.

[5] State v. Stogdell, 13 Ind. 565; People v. Roderigas, 49 Cal. 9.

[6] See State v. Painter, 50 Iowa, 317. See, however, Bowers v. State, 29 Ohio St. 542, to the effect that in Ohio the statute includes all women whose *reputation* for chastity is good.

[7] Safford v. People, 1 Parker C. R. 474; West v. State, 1 Wis. 209; Cook v. People, 2 Thomp. & C. 404; People v. Roderigas, 49 Cal. 9. Under Michigan statute, see People v. Brewer, 27 Mich. 134, *infra*. In Iowa, it is said that chaste character is presumed and need not be proved. State v. Higdon, 32 Iowa, 262; State v. Wells, 48 Ibid. 671. In Georgia the term is "virtuous," which is supposed to imply a purity something above mere physical chastity. Wood v. State, 48 Ga. 192. In Alabama, it is said that chastity will be presumed, but that when the question goes to the jury it must be proved beyond reasonable doubt. Wilson v. State, 73 Ala. 618.

The question of the admissibility of reputation as evidence depends on the particular statute. (See, as to analogous cases, *supra*, §§ 1451 *et seq.*) When the condition is "chaste character," it has been construed to mean, not "reputation," but actual chastity, which can be attacked by the defendant putting in evidence prior acts of unchastity by the prosecutrix (Kenyon v. People, 26 N. Y. 203; People v.

character must be substantively shown by the prosecution as part of its case.[1] The defence, on the other hand, may prove single acts of unchastity on the part of the woman, or lewd and wanton acts, or loose conversation, though not amounting to unchastity;[2] or, following the analogy of rape, may show general bad character for chastity, at least as corroborative proof.[3] But if, since prior acts of unchastity, she has reformed, she regains the protection of the statute. For it would be inhuman and perilous to assume that women, once fallen, but reformed, are to be afterwards exposed, without redress, to a seducer's arts. The policy of the law in such cases is to reclaim and guard.[4] Proof,

Clark, 33 Mich. 112; see State v. Shean, 32 Iowa, 88); but not the prosecutrix's bad reputation (Kenyon v. People, 26 N. Y. 203; People v. Brewer, 27 Mich. 134).

[1] Zabriskie v. State, 43 N. J. L. 640. In this case the statute required the prosecutrix to be of "good repute." A similar view was taken in Oliver v. Com., 101 Penn. St. 218, in which case Sterrett, J., said: "If the general reputation of the prosecutrix, for chastity, in the neighborhood in which she lived, was good—and there is nothing in the case to indicate anything to the contrary—it was the duty of the Commonwealth to call witnesses and prove the fact affirmatively, as every ingredient of the offence was required to be proved, instead of asking the jury to infer the fact from casual expressions used by some of the witnesses in the course of their testimony on other branches of the case."

In People v. Squires, 49 Mich. 487, it was held that chastity was always presumed, but that when prior unchastity has been shown, chastity at the time of the offence must be shown by prosecution.

In Polk v. State, 41 Ark. 483, it was held that, while chastity was presumed it could be rebutted by proof of acts of incontinence. As the presumption of innocence on the part of the defendant at least counterbalances the presumption of innocence of the prosecutrix, and as the condition of chastity is one of the primary ingredients of the prosecution's case, the burden of proving such character falls properly on the prosecution. Whart. Cr. Ev. §§ 320 *et seq.*; Com. v. Whitaker, 131 Mass. 224; *supra*, § 1757.

[2] People v. McArdle, 5 Parker C. R. 180; State v. Shean, 32 Iowa, 88; State v. Bell, 49 Ibid. 440. See Kenyon v. People, 26 N. Y. 203; S. C., 5 Parker C. R. 254. *Contra*, under Ohio statute, Bowers v. State, 29 Ohio St. 542. See, under Michigan Statute, People v. Brewer, 27 Mich. 134; People v. Clark, 33 Mich. 112. As to proof of such acts, see State v. Painter, 50 Iowa, 317.

[3] Bowers v. State, 29 Ohio St. 542; though see, *contra*, Kenyon v. People, *supra*; State v. Clark, 9 Or. 466.

[4] Carpenter v. People, 8 Barb. 603; Kenyon v. People, 26 N. Y. 203; Boyce v. People, 55 Ibid. 644; Com. v. McCarty, 4 Penn. L. J. 136; 2 Clark (Pa.) 351; Boak v. State, 5 Iowa, 430; State v. Carron, 18 Ibid. 372; State v. Sutherland, 30 Ibid. 570; State v. Dunn, 53 Ibid. 526; State v. Timmins, 4 Minn. 325; People v. Millspaugh, 11 Mich. 278; Wilson v. State, 73 Ala. 618. *Supra*, § 568.

also, of unchastity must be limited to a period before the alleged seduction.[1] Hence, proof of acts of immorality *subsequent* to the alleged seduction cannot be received.[2] Rebutting evidence, to prove modesty and general chastity, may in all cases be received.[3] The question of character is of course for the jury.[4] The prosecutrix may be cross-examined as to her chastity when this is material to the issue.[5] It has been held, also, that after a conviction of this class a second prosecution cannot be maintained against the same defendant for a subsequent seduction.[6]

Promise of marriage must be proved.

§ 1758. The "promise of marriage," which under the statutes is an ingredient of the offence, must be a promise in the nature of a deceit.[7] It need not be technically valid, and it is no defence that the defendant was married, and could not make such a promise.[8] If, however, the girl

[1] Ibid. State *v.* Wells, 48 Iowa, 671; State *v.* Deitrick, 1 McMul. 338; Mann *v.* State, 34 Ga. 1.

In People *v.* Brewer, 27 Mich. 134, we have the following from Cooley, J.:—

"The last error we shall notice is, that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumptions of law should be in accordance with the general fact; and whenever it shall be true of any country, that the women, as a general fact, are not chaste, the foundations of civil society will be wholly broken up. Fortunately, in our own country, an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it. Crozier *v.* People, 1 Park. C. R. 457; People *v.* Kenyon, 5 Ibid. C. R. 254; Kenyon *v.* People, 26 N. Y. 204; Andre *v.* State, 5 Iowa, 389; People *v.* Millspaugh, 11 Mich. 278. The case of West *v.* State, 1 Wis. 207, which seems to hold otherwise, was decided upon the phraseology of the Wisconson statute, which was thought to make the 'previous chaste character' of the person seduced an ingredient in the offence, to be made out by proofs. Our statute is very simple, and merely provides that 'if any man shall seduce and debauch any unmarried woman he shall be punished,'" etc.

[2] Boyce *v.* People, 55 N. Y. 54; State *v.* Deitrick, 1 McMul. 338.

[3] State *v.* Shean, 32 Iowa, 88.

[4] State *v.* Carron, 18 Iowa, 372.

That it is error in the court to invade the province of the jury in this respect, see State *v.* Bell, 49 Iowa, 440.

[5] State *v.* Sutherland, 30 Iowa, 570; but see Whart. Cr. Ev. § 463. Comp. Armstrong *v.* People, 70 N. Y. 38.

[6] People *v.* Cook, 2 Thomp. & C. 404.

[7] See People *v.* Clark, 33 Mich. 112; Lewis *v.* People, 37 Ibid. 518. That it is sufficient to say "by means of promise of marriage," see Stinehouse *v.* State, 47 Ind. 17.

[8] People *v.* Alger, 1 Parker C. R. 333; Crozier *v.* People, Ibid. 453; Safford *v.* People, Ibid. 474.

knew of such marriage, and was old enough to understand its bearings, the promise is not one on which she can sustain a prosecution.[1] If the promise were the consideration of the seduction, it sustains the prosecution; otherwise not.[2] It is, however, no defence that there was an engagement of marriage at the time subsisting, if the seduction were in consideration of the engagement,[3] though it might be otherwise where the woman, being already engaged, yielded without any reliance on a renewal of the promise.[4] Deceit is the gravamen of the case.[5] It is not necessary that the defendant should have been of full age, capable of making a binding promise.[6]

Consent no defence.

§ 1759. Consent of the woman is part of the case of the prosecution,[7] and therefore such consent is no defence. The consent, however, as we have seen, must be, in order to make out a case for the prosecution, not a prompt unconditional acquiescence, but a surrender based on a promise of marriage, and preceded by a "seduction" which, from its nature implies prior persuasion and solicitation.[8] Under the English statute, also, already noticed,[9] as it is one of the points in the prosecution's case that the girl consented, consent, if seduction be proved, is no defence.[10] Under the English and other statutes, however, making the taking away from parents or persons in charge a part of the case, it is a defence to prove that the parent or guardian consented

[1] Ibid. Callahan *v.* State, 63 Ind. 198; Wood *v.* State, 48 Ga. 192. And see further, under Georgia statute, Wilson *v.* State, 58 Ibid. 328.

[2] Kenyon *v.* People, 26 N. Y. 203. In Boyce *v.* People, 55 Ibid. 644, it was said that where the seduction was accomplished under a conditional promise of marriage, the fact that after consenting the woman endeavored to induce the defendant to desist at a time when it was too late to withdraw without his permission, promising never to ask him to marry if he would, is no defence. A promise to marry on condition of pregnancy has been held to be within the statute. People *v.* Hustis, 39 Hun, 58.

[3] Wilson *v.* State, 58 Ga. 328.

[4] See Bowers *v.* State, 29 Ohio St. 542; People *v.* Clark, 33 Mich. 112.

[5] State *v.* Crawford, 34 Iowa, 40.

[6] Kenyon *v.* People, *ut sup.* 5 Park C. R. 254.

[7] See *infra*, § 1764 *a*.

[8] See *supra*, § 142. People *v.* Clark, 33 Mich. 112; Lewis *v.* People, 37 Ibid. 518; State *v.* Higdon, 32 Iowa, 308; Tucker *v.* State, 8 Lea, 633; People *v.* Cook, 61 Cal. 478.

[9] *Supra*, § 586.

[10] R. *v.* Mankletow, Dears. C. C. 159; 6 Cox C. C. 143; R. *v.* Kipps, 4 Ibid. 167. Yet under 9 Geo. IV. if without any moral influence applied to the girl's will, she volunteers to elope, this is a defence. R. *v.* Handley, 1 F. & F. 648; R. *v.* Olifier, 10 Cox C. C. 402.

to the act, the burden of proving this being on the defendant.[1] But such consent is invalid if obtained by fraud.[2]

Subsequent marriage a defence.

§ 1760. A marriage of the parties, subsequent to the seduction, though followed by the desertion of the husband, is a defence to an indictment for the seduction.[3]

Ignorance and infancy no defence.

§ 1761. Under some of the statutes it is essential that the girl seduced should have been under a specified age. Under others, she must have been of prior chaste character. Will proof of an honest belief by the defendant that she was above the limited age be a defence? It has properly been decided that such belief is no defence; and that it is even inadmissible for the defendant to show that he was told by the girl herself that she was above the limited age,[4] or that her appearance was that of a person of greater age.[5] So on the same reasoning a belief that she was unchaste is no defence.[6] As has been seen, the defendant's infancy is no defence.[7]

Indictment must follow statute.

§ 1762. The indictment must follow the distinctive local statute under which it is drawn.[8] The special circumstances need not be detailed.[9] The age of the woman need not be specified.[10]

Prosecutrix as a witness must be corroborated.

§ 1763. While under the statutes the prosecutrix is a competent witness, her testimony, in most jurisdictions, is insufficient without corroboration; though in some States such corroboration is required only to the promise of marriage. The corroboration when required by statute, must be

[1] R. v. Burrell, L. & C. 354; 9 Cox C. C. 368. Such consent may be implied from the parents bringing up the girl to a loose life. R. v. Primelt, 1 F. & F. 50. See *supra*, § 586. *Infra*, § 1765.

[2] R. v. Hopkins, C. & M. 254. *Supra*, § 150.

[3] Com. v. Eichar, 4 Clark (Pa.), 326; 1 Am. L. J. 551.

[4] R. v. Booth, 12 Cox C. C. 231; R. v. Robins, 1 C. & K. 456; State v. Ruhl, 8 Iowa, 447. See *supra*, § 88. In State v. Ruhl, it was said, *obiter*, that if the motive were illegal, the specification as to age was irrelevant. But see on this point Whart. Cr. Ev. § 149.

[5] R. v. Mycock, 12 Cox C. C. 28.

[6] See *supra*, § 88.

[7] Kenyon v. People, cited *supra*, § 1758.

[8] See, State v. Stogdel, 13 Ibid. 565; Stinehouse v. State, 47 Ibid. 17; see State v. Curran, 51 Iowa, 112; West v. State, 1 Wis. 209; Wilson v. State, 73 Ala. 618.

[9] State v. Conkright, 58 Iowa, 338.

[10] Polk v. State, 41 Ark. 483.

aliunde,[1] and must go to matters of substance material to the issue.[2] The law in this respect is not altered by the admission of defendants as witnesses in their own behalf.[3]

May be conviction of minor offence.

§ 1764. When the statute permits, the defendant may be convicted of fornication, under an indictment for seduction.[4] And the acquittal of seduction under such a statute is a bar to an indictment for fornication.[5] In any view counts for seduction and fornication can be joined.[6] On an indictment for abduction, if there be proper averments, there may be a conviction of assault.[7]

Merger in rape.

§ 1764 *a*. It has been held that at common law, if rape be proved, the offence merges;[8] though this position is now open to much dispute.[9] But in any view, unless actual and overwhelming force be proved, this defence cannot be set up.[10]

[1] Kenyon v. People, 26 N. Y. 203; Armstrong v. People, 70 Ibid. 644; Com. v. Walton, 2 Brewst. 487; Com. v. McCarty, 2 Clark (Pa.), 351; Rice v. Com., 100 Penn. St. 28; Cunningham v. State, 73 Ala. 51; Wilson v. State, Ibid. 618; State v. Kingsley, 39 Iowa, 439; State v. Wells, 48 Ibid. 671; State v. Painter, 50 Ibid. 317; State v. Curran, 51 Ibid. 112. As to construction of testimony of witness, see State v. Haven, 43 Ibid. 181.

As already seen, an infant cannot be brought into court to prove resemblance to the putative father. State v. Danforth, 48 Iowa, 43; citing Keniston v. Rowe, 16 Me. 38; Risk v. State, 19 Ind. 152. See Whart. Crim. Ev. § 313.

Where, on the trial of an indictment under the New York act, the prosecutrix testifies to the promise, intercourse, and other facts essential to constitute the offence, and other testimony tending to support her on such points is given, whether or not she is sufficiently supported to justify a conviction is a question for the jury. Crandall v. People, 2 Lansing, 309; Boyce v. People, 55 N. Y. 644. As to cross-examination, see Armstrong v. People, 70 N. Y. 138.

[2] Zabriskie v. State, 43 N. J. L. 640; Rice v. Com., 100 Penn. St. 28; State v. Smith, 54 Iowa, 743; see State v. Gates, 27 Minn. 52. In Rice v. Com., 102 Penn. St. 408, it was held that mere social attentions do not constitute such corroboration.

[3] Rice v. Com., 100 Penn. St. 28.

[4] Hopper v. State, 54 Ga. 389. And so of adultery in Georgia. Wood v. State, 48 Ibid. 192; and see Whart. Cr. Pl. & Pr. §§ 736 *et seq.*; Nicholson v. Com., 91 Penn. St. 390; Rice v. Com., 102 Penn. St. 408.

[5] See State v. Bierce, 27 Conn. 319; Dinkey v. Com., 17 Penn. St. 126; Nicholson v. Com., *ut supra*.

[6] Nicholson v. Com., 91 Penn. St. 390.

[7] R. v. Barrett, 9 C. & P. 387.

[8] State v. Lewis, 48 Iowa, 578; Croghan v. State, 22 Wis. 444; Whart. Cr. Pl. & Pr. § 404.

[9] *Supra*, §§ 578, 1344, 1746.

[10] People v. Royal, 53 Cal. 62.

§ 1765. In some States statutes have been adopted making it indictable to entice unmarried women from their homes for the purpose of prostitution. In such prosecutions it is not necessary to show that there was a final and permanent departure from the parent's home. The fact of prostitution is to be inferred from all the circumstances of the case.[1] The burden is on the prosecution to prove the chastity of the woman, when this is a statutory prerequisite to the prosecution.[2]

"Enticing" for prostitution a distinct offence.

The federal statute prohibiting importation of women for prostitution applies to importation from all foreign lands.[3]

[1] Slocum *v.* People, 90 Ill. 274; see People *v.* Carrier, 46 Mich. 442.

Under New York statute, see Beyer *v.* People, 86 N. Y. 369; Schnicker *v.* People, 88 Ibid. 192.

Under the Tennessee statute for taking a female from her parents for the purpose of prostitution, the girl's consent is no defence. Tucker *v.* State, 8 Lea, 633. See State *v.* Feasel, 74 Mo. 524. And as to English statute, see *supra*, § 1759.

Under the California statute, where the word used is "take," it is enough if improper solicitations are proved to have been employed. People *v.* Marshall, 59 Cal. 386; People *v.* Milne, 60 Ibid. 71; People *v.* Cook, 61 Ibid. 478.

When the term "for the purpose of prostitution" is used in the statute, it is to be treated as equivalent to "making a prostitute." See State *v.* Stoyell, 8 Me. 24; Com. *v.* Cook, 12 Metc. 93; Carpenter *v.* People, 8 Barb. 603. See Slocum *v.* People, 90 Ill. 274. That the indictment must aver, under such a statute, "for the purpose of prostitution" see Osborn *v.* State, 52 Ind. 526. That the meaning of prostitution is a question of law, see State *v.* Bierce, 27 Conn. 319.

[2] Com. *v.* Whitaker, 131 Mass. 224. *Supra*, § 1757.

[3] Com. *v.* Johnson, 19 Blatch. 257.

CHAPTER XXXVI.

DUELLING.

I. REQUISITES OF OFFENCE.

§ 1767. A DUEL is a concerted fight between two persons, with deadly weapons, the object of which is claimed to be the satisfaction of wounded honor.[1] To the Romans and Greeks it was unknown, though with them, as with the Jews, the usage existed of committing the settlement of national or tribal quarrels to two champions who were to decide the question in a single fight. To such encounters, as well as to the fights of voluntary champions in public games, the ordinary laws of homicide did not apply: "Quia gloriae causa et virtutis, non iniuriae causa videtur damnum datum." But this was because such contests were engaged in for public purposes and under public

Duel is a concerted deadly fight for the satisfaction of honor.

[1] The English Draft Code of 1879 contains the following:—

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment with hard labor, who challenges, or knowingly carries any challenge, to or endeavors by any means to provoke any person to fight a duel, or endeavors to provoke any person to challenge any other person to fight a duel."

sanction. There can be no question that if two individuals, to redress private wrongs or insults, had coolly agreed to fight with deadly weapons, the death of either party, had it resulted, would have been considered murder.

§ 1768. Duels, in their modern sense, took their origin from the chivalric idea inherent in feudalism; an idea which treated knightly honor as a quality so delicate and precious that an insult to it could only be satisfied by an appeal to arms. Naturally, therefore, the feudal jurisprudence treated duelling with indulgence; and hence when we search the old English common law, the only utterances on this point that we can find are ambiguous or apologetic. The canon law, however, spoke with unequivocal sternness. To that law there was no distinction between gentle and simple, between knight and serf; and the condemnation it pronounced on the serf who killed another serf in a vulgar but premeditated fight, it pronounced on the knight who killed another knight in a duel conducted according to all the rules of chivalry. "Detestabilis duellorum usus, fabricante diabolo introductus, et cruenta corporum morte animarum etiam perniciem lucretur."[1] Gradually this principle worked itself from the English ecclesiastical to the English common law courts, till the doctrine was reached, that to send a challenge is a misdemeanor at common law, even though the challenge be declined;[2] and, as already expressed, that killing in a duel is murder, and that all persons engaged in preparing the duel, if assisting at the death, are principals, if absent, accessaries before the fact.[3]

Sending challenge a misdemeanor at common law.

§ 1769. But this view, as already seen,[4] it has been found impracticable to carry into uniform practice, even where death results, and where the party who strikes the fatal blow is defendant. Still greater is the difficulty when the seconds are on trial, or when the result was not fatal.

By statute specific penalties inflicted.

[1] Acta conc. Trid. 1562; Decret. de reform. cap. xix. This is but a condensation of the old canon law.

[2] R. *v.* Langley, 2 Ld. Raymond, 1029; R. *v.* Phillips, 6 East, 464; R. *v.* Young, 8 C. & P. 644. See Duel Cases, 2 How. St. Tr. 1033, 1047; Smith *v.* State, 1 Stew. 506; State *v.* Perkins, 6 Blackf. 20.

[3] See *supra*, § 215. The curious reader, who seeks to examine the history of the law in this connection, will find materials in Quintus, Diss. de Duello, etc., Groning. 1830; Gneist, der Zweikampf, 1848; Pujos, Essai sur la Repression du Duel, Paris, 1863; Sabine's Notes on Duels and Duelling, 1860.

[4] *Supra*, § 482.

Hence a series of statutes have been passed, assigning specific and graduated punishments to those sending challenges, and those concerned in arranging or abetting duels. It is with these statutes we have at present to do, touching only on certain generic features which are common to all.

§ 1770. We must distinguish between the duel and the rencontre, which is a sudden fight, springing up when the parties are in hot blood, and when there is no time to cool between the provocation and the summons to fight and the fight itself. Hence the statutes against challenges, construed strictly, do not apply to fights demanded in hot blood by a party or his friends. Such demands are governed by the rules of the common law, as defined in riotous homicide, or homicide in sudden quarrels.[1] And if no physical injuries ensue, the participants are indictable for affrays or attempts.

The combat must be premeditated.

§ 1771. Challenges to fight with weapons not deadly, *e. g.*, with fists, do not come under the duelling statutes, though indictable at common law as attempts, or as breaches of the public peace;[2] and so where a challenge is intended as a joke, or where the weapons to be used are intended by the challenging party to be harmless, and are so known to the other parties.[3] Yet if the principals intend to use deadly weapons, it is no defence that the pistols are by a subsequent trick of the seconds, unknown to the principals, loaded only with blank cartridges.[4] But it is not requisite, to constitute the offence, that any special weapons should be used. Hence under this head may be classed what a German expositor[5] styles the "Amerikanische Duell," *i. e.*, a drawing lots as to which of two parties shall die, as a satisfaction to the wounded honor of one of them.

Deadly weapons must be intended.

So far as concerns the challenge, it is no matter in what terms it is couched. If it be an invitation to fight with deadly weapons, the case is covered by the statute, no matter how artful may be the disguise.[6]

[1] *Supra*, §§ 396, 455.

[2] Com. *v.* Whitehead, 2 Bost. Law Rep. 148; State *v.* Farrier, 1 Hawks, 487; State *v.* Taylor, 3 Brev. 243. See Aulger *v.* People, 34 Ill. 486; Com. *v.* Tibbs, 1 Dana, 524.

[3] Com. *v.* Hart, 6 J. J. Marsh. 119.

[4] See *supra*, §§ 173 *et seq.*

[5] Holzendorff's Encyc. ii. 721.

[6] *Infra*, § 1777; State *v.* Perkins, 6 Blackf. 20; Com. *v.* Hart, 6 J. J. Marsh. 119; Com. *v.* Tibbs, 1 Dana, 524; Com.

§ 1772. Suppose, in a foundering boat, a passenger proposes that lots should be drawn as to who should be cast overboard, in order to lighten the boat? This would not be a challenge under the duelling statutes, and it might be claimed to be excusable at common law.[1] But the term "honor," even when used in statutes, must not be construed too scantily. Wherever one man, except under legal necessity, challenges another to single combat with deadly weapons, to redress any injury, real or fancied, to self, there the case is met.

Challenge must be for satisfaction to honor.

§ 1773. A duellist, desiring himself to escape the penalties of the statutes, who succeeds by skilful insults in provoking another to challenge him, may be responsible at common law. It would be a gross injustice in such a case to punish the challenger, who is really the assailed party, and to let the challenged party, who is really the assailant, go free. Under the statutes, the latter may not be reached;[2] but the common law here, as elsewhere, penetrates to the merits, and holds that he who thus designedly provokes a challenge is guilty of an indictable offence.[3]

Persons provoking challenge are indictable at common law.

v. Pope, 3 Ibid. 418; State *v.* Farrier, 1 Hawks, 487; State *v.* Taylor, 3 Brev. 243; Herriott *v.* State, 1 McMull. 126; Ivey *v.* State, 12 Ala. 276.

[1] *Supra*, § 95.

[2] Com. *v.* Tibbs, 1 Dana, 524.

[3] *Supra*, § 179; 1 Gabbett Crim. Law, 66; 1 Hawk. P. C. ss. 18, 19; 1 Deacon Crim. Law, 219; Boothby Crim. Law (ed. 1854), 60. See R. *v.* Rice, 3 East, 581; R. *v.* Phillips, 6 Ibid. 464; R. *v.* Cuddy, 1 C. & K. 210; R. *v.* Young, 8 C. & P. 644; State *v.* Farrier, 1 Hawks. 487; State *v.* Taylor, 1 Const. Rep. 107; 3 Brev. 243. That all concerned are liable, see cases just cited, and see Com. *v.* Lambert, 9 Leigh. 603; Cullen *v.* Com., 24 Grat. 624.

"Challenges to break the peace by fighting," says Mr. Talfourd, in his edition of Dickinson's Quarter Sessions (p. 325), "are indictable as misdemeanors, as well in those who send, as those who knowingly carry, them. Upon the same principle, employing words or writings for the purpose of provoking another to send a challenge, where the tendency is direct and manifest, is equally indictable, even though the provocation should fail in its object. And no previous misconduct on the part of the individual challenged or provoked will form a defence against such indictment, so as to entitle the defendant to an acquittal, although it will weigh with the court in determining the sentence. Where, indeed, a party challenged applies to the Court of Queen's Bench for a criminal information, that extraordinary remedy will not be granted, if he shall appear to have given provocation to his adversary, but he will be left to indict at the assizes or session. The punishment, on conviction, is fine or imprisonment, or both, at the discretion of the court."

§ 1774. Where a challenge is given in one State to fight a duel in another State, the offence of challenging is continuous, and may be tried in either jurisdiction;[1] though if the challenge be in writing, it may be expedient, in the jurisdiction of consummation, to charge the offence as an oral renewal. Clearly a challenge to fight in another State is penally cognizable in the State in which the challenge is issued.[2] Nor is it necessary to prove that the challenge ever reached its destination.[3]

No defence that duel is to be fought extra-territorially.

§ 1774 *a*. All who are concerned in a duel are responsible under the limitations heretofore stated as applying to principal and accessary.[4]

All concerned are responsible.

II. INDICTMENT.

§ 1775. A written letter, if merely the inducement or introduction to an oral communication, conveying a challenge, need not be set forth. Thus where T., in a letter to N., used expressions implying a challenge, and by a postscript referred N., the challenged party, to one H. (the bearer of the letter), if any further arrangements were necessary, it was held that the letter was only evidence of the challenge, and need not be specially pleaded; and that N. might give testimony of the conversation between H., the bearer of the letter, and himself.[5] Even when a statute makes sending a challenge indictable, it has been held not necessary to set out a copy of the challenge;[6] and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, no way altering the sense, it has been said that such variance after verdict is cured.[7] To set forth the substance, when the challenge is partly oral, is enough.[8]

Challenge need not be specially pleaded.

[1] See *supra*, § 288.

[2] R. *v.* Williams, 2 Camp. 506; State *v.* Taylor, 3 Brev. 243; 1 Tr. Const. Rep. 107; Harris *v.* State, 58 Ga. 332; State *v.* Farrier, 1 Hawks, 487. See Ivey *v.* State, 12 Ala. 276.

[3] R. *v.* Williams, *supra*.

[4] *Supra*, §§ 215, 482; R. *v.* Taylor, L. R. 2 C. C. 147; Com. *v.* Lambert, 9 Leigh, 603. As to surgeons, see Cullen *v.* Com., 24 Grat. 624.

[5] State *v.* Taylor, *ut supra*.

[6] Brown *v.* Com., 2 Va. Cas. 516.

[7] State *v.* Farrier, 1 Hawks, 487. See Heffren *v.* Com., 4 Met. (Ky.) 5; Ivey *v.* State, 12 Ala. 276; Com. *v.* Tibbs, 1 Dana, 524.

[8] Ivey *v.* State, 12 Ala. 276.

§ 1776. Where a statute makes it a misdemeanor to challenge another, the indictment must charge that the defendant challenged; it is not enough that he wrote, sent, and offered a paper he intended as a challenge.[1]

Statute must be followed.

Expressing a readiness to accept a challenge does not amount to challenging under the statute.[2]

III. EVIDENCE.

§ 1777. No set phrase is necessary to constitute a challenge to fight with deadly weapons,[3] nor is a writing necessary.[4]

Challenge may be inferred from facts.

The note or letter sent by one party to the other, and parol testimony in explanation, are admissible as evidence.[5]

The jury is to decide, under advice of the court, whether, from all the circumstances, there has been a challenge within the statute.[6]

Admissions of seconds are evidence.

§ 1778. Concert being proved, it need scarcely be added that the admissions of a second are evidence against the principal; and *vice versa*.[7]

[1] State *v.* Gibbons, 1 South, 40.

[2] Com. *v.* Tibbs, 1 Dana, 524.

An indictment under the Massachusetts Stat. 1849, c. 49, § 1, is sufficient, which alleges that the defendant, at a time and place named, "by and in pursuance of a previous appointment and arrangement made to meet and engage in a fight with another person, to wit, with one J. S., did meet and engage in a fight with the said J. S.," without further charging what previous appointment or arrangement was made, or when or where, or by whom, or further setting out the defendant's acts. Com. *v.* Welsh, 7 Gray, 324.

[3] See for cases *supra*, § 1771.

[4] State *v.* Perkins, 6 Blackf. 20. *Supra*, § 1775.

[5] *Supra*, § 1775; R. *v.* England, 2 Leach, 767.

[6] Com. *v.* Hart, 6 J. J. Marsh, 119; State *v.* Strickland, 2 N. & McC. 181; Herriott *v.* State, 1 McMull. 126; Gordon *v.* State, 4 Mo. 375.

[7] State *v.* Dupont, 2 McCord, 334; Whart. Crim. Ev. § 698.

PART IV.

OFFENCES AGAINST GOVERNMENT.

CHAPTER XXXVII.

TREASON.

I. TREASON AGAINST THE UNITED STATES.

CONSTITUTION AND STATUTES.

§ 1782. "TREASON against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.[1] No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[2]

Treason. Definition and proof.

"Every person owing allegiance[3] to the United States, who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."[4]

§ 1783. "Every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be levied and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States."[5]

Punishment.

[1] A rebel, being a citizen of the United States, cannot be viewed as an enemy under the Constitution of the United States; and hence a conviction of treason, in promoting a rebellion, cannot, it has been held, be sustained under that branch of the constitutional definition which includes "adhering to their enemies, giving them aid and comfort." But such a rebel may be convicted under the phrase relating to "levying war." U. S. *v.* Greathouse, 2 Abb. U. S. 364 (U. S. Cir. Ct. Cal. 1863; Field and Hoffman, JJ.). See *infra*, § 1795.

[2] Const. U. S. art. 3, § 3, cl. 1.

[3] As to allegiance, see *supra*, § 282; Sprague, J., 23 Law Rep. 795; U. S. *v.* Villato, 2 Dall. 370.

[4] Rev. Stat. § 5331.

Members of Congress guilty of treason are liable to arrest. Const. art. 1, § 6.

[5] Rev. Stat. § 5332.

The questions of confiscation, under this statute, are discussed in Miller *v.*

§ 1784. "Every person owing allegiance to the United States, having knowledge of the commission of any treason against them, who conceals, and does not as soon as may be disclose and make known the same to the President, or to some judge of the United States, or to the governor, or to some judge or justice of a particular State, is guilty of misprision of treason, and shall be imprisioned not more than seven years, and fined not more than one thousand dollars."[1]

Misprision.

§ 1785. "If two or more persons in any State or territory conspire to overthrow, put down, or to destroy by force, the government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States, contrary to the authority thereof; each of them shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars, or by imprisonment with or without hard labor, for a period not less than six months nor greater than six years, or by both such fine and imprisonment."[2]

Seditious conspiracy.

§ 1786. "Every person who recruits soldiers or sailors within the United States, to engage in armed hostility against the same, or who opens within the United States a recruiting station for the enlistment of such soldiers or sailors, to serve in any manner in armed hostility against the United States, shall be fined a sum not less than two hundred dollars nor more than one thousand dollars, and imprisoned not less than one year nor more than five years."[3]

Enlisting persons to serve against the United States.

§ 1787. "Every soldier or sailor enlisted or engaged within the United States, with intent to serve in armed hostility against the same, shall be punished by a fine of one hundred dollars, and by imprisonment not less than one nor more than three years."[4]

Punishment of those so enlisting.

U. S., 11 Wall. 268; Semmes *v.* U. S., 91 U. S. 21; Wallack *v.* Van Riswick, 92 Ibid. 202; Windsor *v.* McVeigh, 93 Ibid. 274.

[1] Rev. Stat. § 5333.

As to misprision, see U. S. *v.* Wiltberger, 5 Wheat. 76; Confiscation Cases, 1 Woods, 221; U. S. *v.* Tract of Land, Ibid. 475.

[2] Rev. Stat. § 5336.

See Rev. Stat. §§ 5518, 5520; Lange, *ex parte*, 18 Wall. 163. For revenue cases under this statute, see *supra*, § 1372.

[3] Rev. Stat. § 5337.

[4] Rev. Stat. § 5338.

§ 1788. "Every person who incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States, or the laws thereof, or gives aid or comfort thereto, shall be punished by imprisonment of not more than ten years, or by a fine of notmore than ten thousand dollars, or by both of said punishments, and shall moreover be incapable of holding any office under the United States."[1]

Aiding in rebellion.

§ 1789. The Act of January 30, 1799, § 1,[2] makes it an indictable offence for a citizen of the United States to correspond with foreign governments, with intent to influence their controversies with the United States, or to defeat the measures of the government of the United States, and to aid and abet such correspondence. This, however, is not to prohibit application for redress of injuries.[3]

Corresponding with foreign governments.

§ 1790. By the definition of treason in the Constitution, it is limited, as will be perceived, in the first place, to the levying of war against the United States, and secondly, to adhering to the enemies of the United States, giving them aid and comfort.[4]

Treason consists in levying war or in adhering to enemies.

1. *Levying War.*

§ 1791. "The term," said Marshall, C. J., in Burr's Case, "is not the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was

Term to be accepted according to its prior judicial meaning.

[1] Rev. Stat. 1878, § 5334.

This section repeals the prior acts on the same topic, only so far as concerns the punishment imposed; and after its passage, the death penalty cannot be inflicted on those convicted of engaging in rebellion. "The defendants are therefore, in fact, on trial, for treason; and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the State." Field and Hoffman, JJ. Chapman's Case, San Francisco, 1863.

[2] Bright. Dig. 203, and found in a condensed shape in Rev. Stat. U. S. § 5335.

[3] This statute has been discussed in a prior chapter. *Supra*, §§ 274, 284, n.

[4] 2 Federalist, No. 43; 4 Tucker's Black. App. 12; Charge of Judge Wilson, 7 Carey's Am. Museum, 40; 3 Story's Const. Law, § 1794; Charge on Law of Treason, 1 Story R. 614.

not employed by the framers of our Constitution in the sense which has been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in their ascertained meaning, unless the contrary is proved by the context. It is said this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in the instruments of the present day the definitions and the dicta of these authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to much respect."[1]

Yet there is a limitation in these expressions which does not at first sight appear. The old meaning of terms, when used in a new constitution or statute, is to be received when "compatible with the words of the statute." If the statute itself, in its context, make that allowable which by the old terms was penal, then the old judicial definitions are to be accepted only so far as they apply to that portion of the subject which remains penal. Hence, from the old English definition of "levying war," we must strike out all that relates to offences directed against the sovereign individually; and all, as will presently be seen, that relates to the resistance to laws so far as such resistance is not aimed at the overthrow of the government. On the other hand, the old limitations requiring military array are no longer requisite, since it may be as much treason for a few persons to attempt to destroy by dynamite public buildings with their occupants as to bombard such buildings in battle.[2]

[1] 2 Burr's Trial, 401; 4 Cranch, 470. See U. S. *v.* Fries, C. C., April, 1800—Pamph.; Whart. St. Tr. 656.

[2] In R. *v.* Gallagher, London Law Times, June 16, 1883, p. 133, Lord Coleridge, C. J., said: "There must be something which came within the fair construction of the words 'levying war' to make out the indictment against the prisoners. They must be proved to have been guilty of something which, without violence of lan-

§ 1792. To levy war, war is essential; but if there be an overt act of war, then all parties contributing to the common design, of which such overt act is part execution, are responsible as principals.

All concerned in making war are principals.

"Taken most literally," said Marshall, C. J., in the Burr trial, "the words 'levying of war' are perhaps of the same import with the words raising or creating war; but as those who join after the commencement are equally the objects of punishment, there would be probably a general admission that the terms also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term would be settled by a course of decisions; and it would be affirming boldly to say, that those only who actually constitute a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on an open war against the United States, and subvert-

guage would come within the words 'levying war.' The 'levying of war' were words general and descriptive. It was obvious that war might be levied in very different ways and by very different means in different ages of the world. And the judges had never attempted to say that there could not be a levying of war in any other way than in the way brought before them in earlier times. They had never professed or attempted to give any exhaustive definition, or say that there were certain modes in which the words of the statute should be interpreted or that 'these were the only fashions of making war.' He was of opinion that it was enough to say in the present case, if the jury should be of opinion that the prisoners or any of them had agreed among themselves that some one of them should destroy the property of the Crown, or destroy or endanger the lives of Her Majesty's subjects by explosive materials such as it was suggested had been made use of, and if they were further of opinion that such acts had been made out, then the prisoners were guilty of treason-felony within the meaning of the Act. He agreed that they were thrown back to the words of the earlier statute, but they must receive a reasonable interpretation. As he had suggested in the course of the argument, if three men with these explosive materials did the same acts with the same objects as it required 3000 men to do in an earlier period, when it was a levying of war, it seemed to him that the acts of the three men to-day were equally a levying of war."

ing their government; the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object and leaguing himself with the rebels, supplied that army with provisions; or by a recruiting officer, holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him."[1] And at common law in treason all accessaries before the fact are principals.[2]

§ 1793. All conspirators in treason, therefore, are responsible as principals,[3] and hence are generally responsible for every overt act. But there must be an overt act of war, to constitute such a levying war as to involve the parties in the guilt of principals. A mere counselling of an armed resistance to government, when war has not ensued, in execution of such counsel, cannot be regarded as treason.[4] To this extent, therefore, must we regard the doctrine that in treason all are principals, and that such persons are, therefore, guilty of treason, as not sanctioned by the Constitution of the United States.[5] Hence mere counsellors of armed resistance to the government are not principals in treason, unless a war results; and even in case of war ensuing, while they may be guilty of a seditious conspiracy for instigating it, they are not guilty of treason, unless the war stand in direct causal connection with their counsels.[6] This position, so far as concerns the United States courts, is settled by the fact that the federal legislature has made such conspiracies a distinct offence with a mitigated penalty. When, however, war results, all conspiring to commit any overt act are guilty of treason, whether present or absent at the overt act.[7]

But there must be an overt act of war.

§ 1794. It is now settled that the number of persons assembled is not material; and that a few may complete the offence as well as

[1] 2 Burr's Trial, 401; 4 Cranch. 470. See *supra*, §§ 283–7; Fost. 218; 1 Hale, 144; Vaughan's Case, 580; 5 St. Tr. 17–39; 2 Salk. 634.

[2] *Supra*, § 224.

[3] 2 Burr's Tr. *ut supra*; *supra*, §§ 224, 287; Whart. Confl. of L. §§ 902–30.

[4] See remarks of Sprague, J., 23 Boston Law Rep. 705.

[5] *Supra*, § 224. This is clearly the effect of the argument of Marshall, C. J., in Burr's Case.

[6] *Supra*, § 152.

[7] Whart. Confl. of L. §§ 902–30; Serg. on Const. c. 32; Bollman, *ex parte*, 4 Cranch, 75; U. S. *v.* Greathouse, 2 Abb. U. S. 364; People *v.* Lynch, 11 Johns. 553. See, on this point, Act of March 2, 1867. *Supra*, § 1356.

a thousand,[1] when the means adopted by the few (*e. g.*, dynamite applied to public buildings occupied by officers of state) are intended to break up the government, and are such as, if successful, to paralyze for a time its action.[2] But mere sudden unpremeditated violence, by a few individuals, or even by a riotous mob, is not "war," though it may amount to a seditious conspiracy under the statute.[3]

Number engaged not material.

§ 1795. Levying of war, according to the old distinction, is direct when the war is levied directly against the government with intent to overthrow it;[4] such for instance, as attacking the government's forces, holding against it any of its forts[5] or ships, or assaulting the same, or delivering them up to rebels through treachery.[6]

Direct levying of war is an attack on the government's army or forts.

§ 1796. Constructive levying of war, by the old English common law, is where war is levied for the purpose of producing changes of a public and general nature by an armed force:[7] as where the object is by force to obtain the repeal of a statute; to obtain the redress of any public grievance, real or pretended;[8] to throw down all inclosures, pull down all bawdy-houses, open all prisons, or attempt any general work of destruction; to expel all strangers, or to enhance the price of wages generally.[9] In this country this view, so far as concerns resistance to statutes, was at first accepted; and it was held that, while to conspire to resist or oppose the execution of any statute of the United States by force is a high misdemeanor, if the parties proceed to carry such an intention into execution by force, they are guilty of treason in levying war.[10] It was also held that to march in arms, with a force

Constructive is where it is intended to effect change in government by force.

[1] 3 Inst. 9.

[2] R. *v.* Gallagher, cited *supra*, § 1791.

[3] *Supra*, § 1785; *infra*, § 1797. See R. *v.* School, 26 U. Can. Q. B. 212.

[4] 1 Hale, 131, 132; Sprague, J., 23 Law Rep. 705; R. *v.* Meany, 10 Cox C. C. 506. See R. *v.* Davitt, 11 Ibid. 676; R. *v.* Lynch, 26 U. Can. Q. B. 208.

[5] U. S. *v.* Greiner, 24 Law Rep. 92; 4 Phila. 396.

[6] 3 Inst. 10; Fost. 219; 1 Hale, 325, 326. See Norfolk's Case, 1 How. St. Tr. 957; Messenger's Case, 6 Ibid. 879; Gordon's Case; 21 Ibid. 485, 644; 2 Doug. 590; Hardy's Case, 24 How. St. Tr. 199; Watson's Case, 32 Ibid. 431; O'Brien's Case, 1 Town. St. Tr. 469.

[7] Foster, 211.

[8] 1 Hawk. c. 17, s. 25; 1 Hale, 153; Foster, 211; 3 Inst. 9, 10; R. *v.* Lord G. Gordon, 2 Dougl. 590.

[9] Foster, 214; 1 Hale, 132; R. *v.* Bradshaw, Poph. 122; R. *v.* Messenger, Kel. 70, 79.

[10] U. S. *v.* Fries, C. C. Ap. 1800—Pamph.; Whart. St. Tr. 656; U. S. *v.* Mitchell, 2 Dall. 348; Whart. St. Tr. 182; Sprague, J., 23 Law Rep. 705. Yet the Act of March 2, 1867, treats such executed conspiracy as a misdemeanor.

marshalled and arrayed, committing acts of violence and devastation, in order to compel the resignation of a public officer, and thereby render ineffective an act of Congress, is high treason.[1] In 1851, however, in prosecutions for resisting the Fugitive Slave Law, this doctrine was much narrowed; and it was virtually held that to make the armed resistance to a public law treason, the intention must be to overthrow the government of the United States.[2] And this view is required by the terms of the Constitution. Breaking down inclosures, or driving off obnoxious persons of a particular class, or resisting a particular municipal statute, may be acts of flagrant guilt, but no one of them is itself levying war against the State.[3]

[1] U. S. *v.* Vigol, 2 Dall. 346; U. S. *v.* Mitchell, Ibid. 348; Whart. St. Tr. 182. In this case the indictment was for a participation in the excise insurrection in Western Pennsylvania in 1794. The following is part of the charge of Patterson, J.:—

"The first question to be considered is, what was the general object of the insurrection. If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offence in legal estimation is high treason; it is an usurpation of the authority of the government; it is high treason by levying war."

[2] U. S. *v.* Hanway, 2 Wall. Jr. 144; and charges of Grier and Kane, JJ., as published in the 6th ed. of this work, §§ 2726 *et seq.*; and in 5 Clark Penn. L. J. Rep. 55. To the same effect is the argument of Judge Brackenridge (Brack. Misc. 495) and Judge Story (1 Story R. 614). *Infra*, § 1815. See U. S. *v.* Hoxie, 1 Paine, 265; 1 B. R. Curtis's Life. 174. Whether such offence is riot see *supra*, § 1537.

[3] The federal statutes of 1861–2, though greatly deficient in perspicuity, must be construed as making armed resistance to particular laws not treason, but a high misdemeanor, punishable by fine and imprisonment as therein prescribed. Whether these statutes were meant as substitutes for the Act of 1790, or as supplements, they do not on their face show. The probability is that they were drawn in haste to meet particular emergencies of the civil war. It was felt that to hold all persons engaged in countenancing the rebellion to be guilty of treason, and, upon prosecution and conviction, to sentence them to be hung, would, by making the crime national, prevent it from being punishable. Hence to the death penalty was attached an alternative of fine and imprisonment; and then certain forms of modified treason were detached from the general category, and made subject to a lighter punishment. As adding to this confusion may be noticed the Act of March 2, 1867, which deals with conspiracies against the government as continuing to be conspiracies (*i. e.* misdemeanors), even though followed by overt acts. In such cases, the act permits the venue to be laid in any jurisdiction where an

§ 1797. It is in any view now agreed that an armed movement for the purpose of throwing down the inclosures of a particular manor, park, or common; or of carrying on a mere quarrel between private persons,[1] or of delivering one or more particular persons out of prison; or, by the demonstration of force, of obtaining a mitigation of the punishment of such prisoners;[2] or of holding a house by force against the sheriff and *posse comitatus*,[3] is not treason.[4] The offence must be a levying war with the intent to overthrow the government as such, not merely to resist a particular statute, or to repel a particular officer.[5]

But war to effect private ends not treason.

If in the distinction just taken there be a material modification of the old English common law, this is to be attributed, not merely to a more humane criminal policy, but to a more enlightened conception of sovereignty. In the old law every administrative act was the act of the sovereign himself. He was supposed to issue every law that was uttered, whether it were a law for the maintenance of his own distinctive authority, or a law for the collection of revenue, or a law for the suppression of vagrants, or a law for the preservation of game. He was regarded as officially present, not merely at the head of his armies, and at the sessions of his courts, where he was spoken of in the old forms as sitting personally, but he was viewed as incarnate in his constables and his revenue officers. Whoever resisted any law, no matter how little it concerned the distinctive maintenance of sovereignty, resisted the sovereign and was guilty of treason. Whoever attacked a constable or a tax collector

overt act was performed, and makes such conspirator responsible for such act when it results naturally from the conspiracy. All that can now be said on this topic is, that when two or more statutes cover the same subject matter, the last in date is to be followed.

[1] Fost. 210; 1 Hale, 131, 133, 149.

[2] 1 Hale, 134; R. *v.* Frost, 9 C. & P. 129.

[3] 1 Hale, 146; Rawle on Constitution, 305.

[4] Ibid. See also cases of Philadelphia rioters, Wharton on Hom. App.; *infra*, § 1815; *supra*, § 1537.

"The expression, to 'levy war against the queen,' does not include any insurrection against any private person for the purpose of inflicting upon him any private wrong, even if such insurrection is conducted in a warlike manner." Steph. Dig. C. L. art. 53.

[5] See § 1798. Sir J. F. Stephen's Dig. C. L. App. to art. 53, tends to the same conclusion, citing Luder's Considerations on the Law of High Treason.

attacked the sovereign, and was also guilty of treason. But, independently of the fact that offences, widely differing in motive as well as in mischief, were thus arbitrarily grouped and subjected alike to the most agonizing and far-reaching penalties known to the law, it began to be felt that in a constitutional government, in which legislation is directed to a vast number of topics in no way bound up with the existence of sovereignty as such, and in which legislative functions are vested in local subordinate authorities, there are many laws in which the idea of sovereignty as such is in no sense embodied. No one, for instance, would seriously contend that a resistance, however forcible, to laws passed by local subordinate authorities is to be regarded as prompted by a determination to wage war upon the sovereign; or that the action of a party of sportsmen in forcibly resisting a law limiting the shooting of game, or of a party of revellers in assaulting a policeman, is an offence of the same heinousness, and fraught with the same perils to the State, as is an armed attempt to overthrow the common supreme government of the land. And even as to general laws, it cannot but be felt that there is an increasing tendency to such a classification of legislation as will separate statutes distinctively relating to government from statutes relating to matters as to which there may be a wide and even a violent difference of opinion without any breach of loyalty to the government as such. Peculiarly is this the case in those jurisdictions in which the common law has been codified. In such jurisdictions many principles of purely private right, with which the sovereign has nothing to do except as arbiter, have been embodied in statutes; and to attempt a forcible resistance to these statutes would, if the old English rule be carried out, be treason. Yet this is no more treason on principle than it would be treason for a party, without process of law, violently to assert an unfounded claim upon another. To do so may be a riot, but it is not a treasonable act; for an attempt to abate a supposed wrong, or to recover a supposed right, is as consistent with the recognition of a *de facto* sovereign as is the attempt to abate such wrong or to recover such right by process of law. That parties should intervene forcibly to arrest the building of a railroad which they hold to be a nuisance may be a grave offence, though whether it be so is to be determined by the sovereign acting through his

courts, and this principle they may at the time admit.[1] That parties should resist forcibly an oppressive municipal or state ordinance which they claim to be unconstitutional may be also a grave offence; but this, too, may be in submission to the common Constitution of the land. It is here that we strike the definition of loyalty to the United States, and in this way determine what is the disloyalty which is essential treason. Loyalty to the United States is loyalty to the Constitution of the United States. Hence to assault the President or other high officer, while an indictable offence, is not treason, unless it be part of a plan to overthrow the constitutional government of the land; nor, unless this plan be formed, and the offence charged be one of its overt acts, is it treason to resist by force the execution of a revenue law, or of a quarantine law, or, as has been seen, of a law for the surrender of fugitives. But it is treason to attempt by force the overthrow of the Constitution; and, consequently, it is treason to attempt by force the overthrow of the authority of any one of the three great departments in which the functions of sovereignty are by the Constitution vested. Hence it would be treason against the United States to attempt by force to overthrow the federal executive, or the federal legislature, or the federal judiciary. But it would not be treason to commit a personal injury on any particular executive, or legislator, or judge, or to resist a decree of court, or a statute, or an executive mandate, not essential to the preservation of sovereignty.[2]

Not necessary to treason that battle should be fought.

§ 1798. If the other constituents of treason exist, it is enough if an armed force be put in motion. It is not necessary that a battle should be actually fought. We have seen that mere counselling armed resistance to government is not indictable as treason, though undoubtedly indictable as sedition. It has also been seen that the doctrine of constructive treason, so far as it makes armed resistance to execution of a special statute, without the design of overthrowing the government, treason, is now abandoned in the United States, and is made a specific offence under distinct legislation. Treason by levying war, therefore, is now to be viewed as limited to putting in operation an armed force with the intent to overthrow the government. But while this is the case, it is not necessary to constitute treason that the armed force

[1] See *supra*, §§ 1426, 1540.

[2] Hence the prosecution in Guiteau's case was properly for murder.

should be led to actual battle. Recruiting soldiers or sailors to serve against the government, being now made an independent misdemeanor, may be no longer prosecuted as treason. But if the soldiers so recruited be organized into an army—if sailors so enlisted be placed on board an armed vessel, fitted with stores and ammunition—then it is not necessary that a battle should be fought or even attempted, when the object is to aid an existing rebellion. It is not necessary, also, in case of a naval attempt, that the vessel should even sail. It is enough if the vessel be prepared for hostile action against the government, or that the army be put in order, ready to march.[1]

Belligerent insurgents not indictable for treason.

§ 1799. It has been already stated that when a sovereign recognizes any portion of his insurgent subjects as belligerents, he cannot prosecute such subjects for treason, so far as concerns acts done by them in due course of war. When belligerency is admitted, his remedy is war according to the rules of civilized military law; and prisoners taken in such a contest are to have the immunities of prisoners of war.[2] Yet a sovereign may recognize certain parts of his territory in a state of belligerent insurrection, and as to other parts refuse such recognition. If such be the case, and if an insurgent subject intrude upon the territory not in insurrection, and there commit illegal acts, there such illegal acts may be prosecuted as treason in the civil courts.[3] And belligerent rights are not to be extended beyond the field to which they are limited. Thus, letters of marque issued by the late Confederate government were held to constitute no defence, in the United States courts, to an indictment for an act of treason; the reason given being that the government of the United States had not then recognized the Confederate government, or its authority to issue letters of marque; though this conclusion is open to grave doubt.[4] And when war ceases, and the recognition of belligerent

[1] See U. S. *v.* Greathouse, 2 Abb. U. S. 364; 4 Sawyer, 457.

[2] See §§ 283–7; though see *contra*, Hammond *v.* State, 3 Cold. (Tenn.) 129. Compare also the course of the United States government in reference to the Modocs, in 1873. See *supra*, § 890.

[3] U. S. *v.* Greathouse, *ut supra*.

[4] U. S. *v.* Greathouse, 2 Abb. U. S. 364; 4 Sawyer, 457. The defendant, however, in this case took advantage of the amnesty; and the question received no final adjudication. See argument of Nelson, J., on trial of Savannah Pirates, p. 371. But compare, *contra*, articles in Atlantic Monthly, July and August, 1872, by Mr. Bolles, solicitor of the navy department, giving the

rights to insurgents is withdrawn, then such rights can no longer be set up by a defendant charged with treason committed subsequent to such withdrawal. He is no longer to be tried by the rules of war. Military prosecutions, so far as he is concerned, can no longer be instituted against him. He can only be proceeded against by indictment in the usual mode.[1]

Belligerent rights do not protect illegitimate warfare.

§ 1800. Belligerent rights, also, when pleaded in the civil courts as a defence, cannot be set up to protect acts which are outside of legitimate warfare. A civil court cannot convict, it is true, an insurgent for acts done by him as a member of an army recognized by the State as belligerent. But should such insurgent, departing from the usages of civilized warfare, engage in private plunder or other outrages, or should he at sea attempt piracy, then his belligerent rights are no defence. "Jede gewaltthätige Handlung aber," says Berner, one of the most authoritative of jurists,[2] after affirming unequivocally the exemption of belligerent insurgents from liability to the civil courts for military acts, "welche die Grenzen des Kriegsrechtes überschreitet, ist als gemeines Verbrechen aufzufassen." In other words, outrages by belligerent insurgents which overstep the limits of military law, are to be treated as ordinary crimes. This was the rule adopted by the German governments after the insurrection of 1848. It is substantially that which may be extracted from the rulings of our own courts in relation to the late civil war.

2. *Adhering to the Enemies of the United States; giving them Aid and Comfort.*

Clause does not cover aid or sympathy given to a rebellion.

§ 1801. Although rebels engaged in an armed insurrection against the United States are guilty of treason in levying war against the government, yet they cannot be convicted of "adhering to the enemies" of the United States, unless they unite with and sustain a hostile foreign power. A citizen of the United States engaged in rebellion is a subject still, and not an "enemy," in the sense in which the term is used in the Constitution. For this view there are two reasons:

reasons for not prosecuting Semmes. That the authority of the Confederate government, as such, aside from the recognition of belligerency, was no defence, see Jefferson Davis's Case, Chase, 15; Shortridge *v.* Macon, Ibid. 136.

[1] See Milligan, *ex parte*, 4 Wall, 2.

[2] Lehrbuch, etc., 1871, p. 513.

First, to treat subjects as "enemies" (*i. e.*, powers warring *ab extra* on the State), is to recognize their independence. Secondly, accepting the term "enemy" in the Constitution as judicially construed in the English courts, we must confine the term to foreign hostile States. To this it may be added that to treat individual rebels as "enemies" of the United States, and to make any aid or comfort to such individuals treason, would be, in case of widespread revolts, to destroy the distinctive heinousness of true treason, by involving in it, not merely those who levy war on the State, but the whole community which they may temporarily control or influence.[1]

From the Roman law some instruction on this point may be drawn. The *crimen majestatis* was complete when a citizen stirred up a foreign war against Rome;[2] or when he gave aid or information to a foreign power waging war against the republic.[3] An inspection of the authorities will show that the "*hostis*" whom it involved a "*crimen maiestatis*" to aid or comfort was a foreign sovereign. To join

[1] See U. S. *v.* Greathouse, 2 Abb. U. S. 364; 4 Sawyer, 457. Charge of Field and Hoffman, JJ., in U. S. *v.* Chapman, Pamph. 1863; *supra*, § 1788. See *supra*, § 284. To same effect is Judge B. R. Curtis's pamphlet on Executive Power; Curtis's Life, i. 566. *Cf.* charge of Smalley, J., 23 Law Rep. 597.

In Carlisle *v.* U. S., 16 Wall. 147, Judge Field, who gave the opinion of the court, speaks of the plaintiffs as giving "aid and comfort to the rebellion," and as thus losing a right to sue before the Court of Claims. But this was not an indictment for treason, but simply a civil suit, construing a special act of Congress. See Padelford's Case, 9 Wall. 531; Klein's Case, 13 Ibid. 138; Armstrong's Case, Ibid. 154; U. S. *v.* Pryor, 3 Wash. C. C. 234.

Sir J. F. Stephen, on the other hand (Dig. Cr. Law, art. 54), holds that "every one commits high treason who, either in the realm or without it, actively assists a public enemy at war with the queen. Rebels may be public enemies within the meaning of this article."

[2] Paull *v.* 29. 1: "Cuius opere, consilio, adversus imperatorem vel rempublicam arma mota sunt." L. 1. § 1, D. ad. leg. Jul. mai.: "quove quis contra rempublicam arma ferat." L. 3. eod.: "L. XII. Tabb. *iubet eum qui hostem conciaverit—capite puniri.*" L. 4. D. eod.: "*Utve ex amicis hostes populi Romani fiant, cuiusve dolo malo factum erit, quo rex exterae nationis populo Romano minus obtemperet.*" And again: L. Alam. xxv. "*Si homo aliquis gentem extraneam intra provinciam invitaverit.*"

[3] L. 1. D. h. t.: "quive hostibus populi Romani nuntium litterasve miserit, signumve dederit feceritve dolo malo, quo hostes populi Romani consilio iuventur contra rempublicam." L. 4. eod.: "Cuius dolo malo factum dicetur, quo minus hostes in potestatem populi Romani veniant, cuiusve opere dolo malo hostes populi Romani commeatu, armis, telis, equis, pecunia aliave qua re adiuti erunt."

in an insurrection fell within the *crimen maiestatis*, but this was by distinct provisions couched in language showing that the distinction between a foreign enemy and an insurgent was regarded as fundamental. The insurgent, for instance, was treated by the Lex Julia as a subject who assailed the integrity of the empire, but he was not a *hostis* or foreign enemy. He was a rebellious child, but he was a child still; and the empire haughtily refused to treat him as in any sense an independent power. "Maiestatis autem crimen illud est," says Ulpian, when commenting on the Lex Julia, "quod adversus populum Romanum vel adversus securitatem eius committitur." To recognize disaffected subjects as a foreign enemy would be to recognize the dismemberment of the State. Hence, subjects aiding in a rebellion were prosecuted under one line of laws; subjects aiding foreign sovereigns under another line of laws. This distinction the modern Roman law has deepened. "Hochverrath" is, by the German codes, an offence by itself, and includes what in the American constitutions is called levying war against the State. "Landesverrath" is another offence, and includes what in the American constitutions is called aiding the enemies of the State. But aiding rebels cannot be called "Landesverrath," for the State cannot recognize rebels as foreign enemies without losing its right to prosecute them civilly for treason. To prosecute them civilly for treason they must be, in some sense, its subjects; erring subjects, guilty subjects, but subjects whom it refuses to view as having so far thrown off their allegiance as to relieve them from the duties of loyalty to the sovereign, or the sovereign from holding them under municipal shelter and control.

Otherwise as to aid given by a subject to a hostile foreign State.

§ 1802. When, however, the attack is from a foreign State, then all voluntary assistance yielded by a citizen to such State warring against the United States, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this clause of the Constitution. Therefore, if the citizens of the United States join foreign powers in acts of hostility against this country;[1] or deliver up its castles, forts, or ships of war to its enemies through treachery, or in combination with them; or join the enemy's forces,

[1] Fost. 219; 3 Inst. 10; 1 Hale. 168.

although no acts of hostility be committed by them;[1] or raise troops for the enemy;[2] or supply them with money, arms, or intelligence,[3] although such money, intelligence, etc., be intercepted and never reach them; or deliver up prisoners and deserters to the enemy;[4] all these are cases of adhering to the enemies of the United States, and the parties are guilty of high treason under the Federal Constitution. But the adhesion to the enemy must be real and appreciable.[5]

Obedience to *de facto* government is a defence.

§ 1803. In England "no person who attends upon the king and sovereign lord of this land for the time being, in his person, and does him true and faithful service of allegiance in the same, or is in other places by his commandment in his wars, within this land or without, is for any such act guilty of treason (even if the king *de facto* should not be king *de jure*")."[6] This principle, *mutatis mutandis*, must be recognized as binding in the United States, the statute being part of the common law accepted by us. And this view is strengthened by the fact that no prosecutions were pressed, at the close of the late civil war, against parties for hostile acts committed in obedience to the *de facto* authorities of the Southern States. And, independently of this statute, it is settled that acts compelled by a government *de facto* cannot be afterwards punished by a government *de jure*, when the government *de facto* is deposed.[7]

Coercion a defence.

§1803 *a*. No matter what may be the shape compulsion takes, if it affect the person and be yielded to *bonâ fide*, it is a legitimate defence.[8] But mere danger to property, when such danger does not touch the person, is not such compulsion.[9] According to the Court of Claims, neither serving in a home guard,[10] nor serving in a fire patrol liable to be called into

[1] Fost. 218; R. *v.* Vaughan, 2 Salk. 634; 5 St. Tr. 17.

[2] R. *v.* Harding, 2 Vent. 315.

[3] Fost. 217; Smalley, J., 23 Law Rep. 597; U. S. *v.* Pryor, 3 Wash. C. C. 234.

[4] R. *v.* Gregg, 10 St. Tr. Ap. 77; Fost. 198, 217, 218; R. *v.* Hensey, 1 Burr. 642; 2 Ken. 366; R. *v.* Lord Preston, 4 St. Tr. 409, 455; U. S. *v.* Pryor, *supra*.

[5] Res. *v.* Malin, 1 Dall. 32; *supra*, § 186.

[6] Steph. Dig. Cr. L. art. 55; citing 11 Hen. 7, c. 1.

[7] See Res. *v.* McCarty, 2 Dall. 98; U. S. *v.* Thomas, 15 Wall. 337; *supra*, §§ 94, 95.

[8] R. *v.* Gordon, 1 East P. C. 71; Resp. *v.* Chapman, 1 Dall. 53; Miller *v.* Resp. 2 Ibid. 1; Res. *v.* McCarty, Ibid. 98; U. S. *v.* Greiner, 24 Law Rep. 92; 4 Phila. 396. See *supra*, §§ 94, 95.

[9] R. *v.* McGrowther, 1 East P. C. 71.

[10] Miller's Case, 4 Ct. of Cl. 288; Ayer's Case, Ibid. 429.

military service ;[1] nor paying duties on goods running the blockade ;[2] nor subscribing to the confederation ;[3] when done under compulsion, or in the extreme urgency of the times, amounts to "giving aid and comfort to the rebellion." It is otherwise with investing in the stock of companies engaged in blockade running.[4] Nor is it a defence to an indictment for attempting forcibly to seize provisions outside of the enemy's lines, for the enemy's use, that the defendant promised, under compulsion, to do so when a prisoner.[5]

Home government may punish for political offences abroad.

§ 1804. A sovereign has, by the rules of international jurisprudence, the right to punish his subjects for political offences assailing his sovereignty committed by them abroad; and jurisdiction of this kind has been expressly assumed by the United States.[6]

And so for intra-territorial offences committed by aliens.

§ 1805. An alien, as has been already noticed, owes a local allegiance to the country of his temporary sojourn, so that he may be indicted for treason either in levying war against the local sovereign, or in aiding such sovereign's enemies.[7] And by this rule he may be indicted, under the Constitution of the United States, for treason in

[1] Quinby's Case, 4 Ct. of Cl. 417.

[2] Ibid.

[3] Paddleford's Case, 4 Ct. of Cl. 316.

[4] Bate's Case, 4 Ct. of Cl. 569.

[5] U. S. *v.* Pryor, 3 Wash. C. C. 234.

[6] *Supra*, §§ 281–2.

On this topic will be found some interesting observations of Woodward, J., in Com. *v.* Kunzmann, 41 Penn. St. 429. See 6 Crim. Law Rev. 155.

[7] *Supra*, §§ 281–2; R. *v.* McCafferty, 10 Cox C. C. 603; Guinet's Case, Whart. St. Tr. 93; U. S. *v.* Villato, 2 Dall. 370; Quarrier, *ex parte*, 2 W. Va. 569; Carlisle *v.* U. S., 16 Wall., 147. "By allegiance," says Judge Field, in the Supreme Court of the United States, in October, 1872, "is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, while domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

"This obligation of temporary allegiance by an alien resident in a friendly country, is everywhere recognized by publicists and statesmen. In the case of Thrasher, a citizen of the United States, resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President, in answer to a resolution of the House of Representatives, in which he said: 'Every foreigner born residing in a country owes to that country allegiance and obedience to its laws, so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized States. And nowhere a more established doctrine than in this country.' And again: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be *punished for treason* or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.'" (Webster's Works, vol. 6, p. 526.) Carlisle *v.* U. S., 16 Wall. 147.

aiding even the sovereign of his allegiance in war against his local sovereign.[1] When the offence consists in furnishing in a foreign land, by persons owing allegiance to such foreign land, materials to carry on a treasonable insurrection in our own land, then such persons, so owing allegiance abroad, are not indictable for treason here.[2] Suppose, however, the alien reside in the country of a rebellion, and give aid and comfort to the rebellion, not himself engaging in an armed insurrection, is such alien indictable for treason? According to the view hereinbefore expressed, since a "rebel," under the Constitution of the United States, cannot be a foreign enemy, we must hold that an alien cannot be indicted for giving such aid and comfort. But in civil issues, when a claim is made against the government for damages, under the special United States statutes organizing the Court of Claims, an alien who gives such aid and comfort cannot be a plaintiff in that court.

3. *Indictment.*

Overt acts must be laid in indictment.

§ 1806. It is not sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying overt acts of levying war.[3] The indictment need do no more than to specify the substance of the words of writings, when these are laid as overt acts.[4] But it has been held

[1] R. *v.* Delamotte, 1 East P. C. 53; Guinet's Case, Whart. St. Tr. 93; U. S. *v.* Villato, 2 Dall. 370; Carlisle *v.* U. S. 16 Wall. 147. *Supra*, § 281.

[2] Whart. Confl. of L. §§ 906–9.

[3] 2 Burr's Trial, 400. See Mulcahy *v.* R., L. R. 3 H. L. 306.

[4] R. *v.* Francia, 6 St. Tr. 58, 73; R. *v.* Preston, 4 Ibid. 409; R. *v.* Watson, 2 Stark. (N. P.) 116.

sufficient to lay that the defendant sent intelligence to the enemy, without setting forth the particular letter or its contents.[1]

Overt acts that are improperly laid, or are not proved, can, after verdict, be discharged as surplusage.[2]

"*Traitorously*" is essential to the offence, but need not be repeated at each overt act.[3]

4. *Evidence.*

§ 1807. Before introducing proof of overt acts, it is proper to show a confederacy in which the defendant participated.[4] But the confederacy may be inferred from a series of mutual dependent overt acts and attempts.[5]

Confederacy must be proved.

§ 1808. To sustain a conviction there must be, under the Constitution, "the testimony of two witnesses to the same overt act," or "a confession in open court." There is a marked distinction on this point between the English law and our own. By the Constitution there must be some one particular act proved by two witnesses. In England, it is enough if two distinct though cognate covert acts, in two distinct counties, be proved each by one witness.[6] And one witness to the whole case will suffice in prosecutions which work no corruption of blood.[7] But in the United States one witness, with corroborating circumstances, is sufficient to justify the finding of a bill.[8]

Must be two witnesses to same overt act.

§ 1809. Extra-judicial confessions and declarations may be received as corroboration, when an overt act has been proved by two witnesses;[9] and so may unpublished writings by the defendant.[10] Such writings, when expressive and in pursuance of the common design, are evidence against all the conspirators.[1]

Confessions admissible as corroboration.

[1] Resp. *v.* Carlisle, 1 Dall. 35.

[2] Mulcahy *v.* R., L. R. 3 H. L. 306. *Supra*, §§ 1381–4. Whart. Cr. Ev. § 131.

[3] Whart. Cr. Pl. & Pr. § 257.

[4] R. *v.* Brittain, 3 Cox C. C. 77; though see, as to order of proof in conspiracy, *supra*, § 1401.

[5] R. *v.* Frost, 9 C. & P. 129; R. *v.* McCafferty, 1 Ir. R. C. L. 363; 10 Cox C. C. 603. *Supra*, § 1398.

[6] R. *v.* Jellias, 1 East P. C. 130.

[7] R. *v.* Gahagan, 1 Leach C. C. 42; 1 East P. C. 129.

[8] Marshall, C. J., Burr's Trial, 196; Kane, J., U. S. *v.* Hanway, 2 Wall. Jr. 139; *contra*, Iredell, J., Fries's Case, Whart. St. Tr. 480. See R. *v.* McCafferty, 1 Ir. R. C. L. 365; 10 Cox C. C. 603. Whart. Cr. Ev. § 380.

[9] Fries's Trial, 171; Whart. Cr. Ev. § 386.

[10] R. *v.* Lord Preston, 4 St. Tr. 409–440; R. *v.* Layer, 6 Ibid. 272, 280; R. *v.* Hensey, 1 Burr. 642, 644; Resp. *v.* Carlisle, 1 Dall. 35; Resp. *v.* Malin, Ibid. 33; Resp. *v.* Roberts, Ibid. 39; Whart. Cr. Ev. § 386.

§ 1810. The subject of venue has been already fully discussed.[2] It used to be thought that only a county or district where an overt act was committed had jurisdiction, and that unless the defendant was in such place at the time of the overt act, he could not be there tried. This, however, is now abandoned;[3] and a conspirator can be tried in any place where his co-conspirators perform an overt act. To this effect is the act of Congress of March 2, 1867.[4]

Place of overt act has jurisdiction.

§ 1811. A person who has a constitutional or legal right to assert must do so by course of law. If he appeal to war for this purpose, and be unsuccessful, he must abide the consequences; for his belief that he was right is no defence to an indictment for such illegal act.[5]

No defence that the defendant believed he was exercising a constitutional right

II. TREASON AGAINST THE PARTICULAR STATES.

§ 1812. Treason is undoubtedly a common law offence in each State, aside from constitutional and statutory provisions,[6] and is recognized as having a substantive and independent existence in that clause of the federal Constitution which provides, that if a person accused of treason in any State shall flee from justice, and shall take refuge in another

Such treason is an offence at common law.

[1] R. *v.* Stone, 6 T. R. 527; 1 East P. C. 79, 99.

[2] *Supra*, § 287; Whart. Cr. Ev. § 111.

[3] See Ibid.

[4] See *supra*, § 1356.

[5] *Supra*, § 88; *infra*, § 1835. "It may be," said Durfee, C. J., in the Dorr trial, cited in the 6th ed. of this work, § 2777, "that he (the defendant) really believed himself the governor of the State, and that he acted throughout under that delusion. However this may go to extenuate the offence, it does not take from it its legal guilt. It is no defence to an indictment for the violation of any law, for the defendant to come into court and say, 'I thought that I was exercising a constitutional right, and I claim an acquittal on the ground of mistake.' Were it so, there would be an end to all law and to all government. Courts and juries would have nothing to do but sit in judgment upon indictments in order to acquit or excuse. The accused has only to prove that he has been systematic in committing crime, and that he thought that he had a right to commit it, and, according to this doctrine, you must acquit." See, also, U. S. *v.* Robinson, U. S. Circuit Court, Kansas, 1859, reported in the 6th ed. of this work, vol. iii. p. 319.

[6] Resp. *v.* Chapman, 1 Dall. 53; People *v.* Lynch, 11 Johns. 549; Charge on treason, 1 Story R. 614. See *supra*, §§ 265, 266.

State, he may, on a proper requisition, be delivered up by the executive of the State to which he has fled.

§ 1813. During, and immediately after the Revolution, convictions for treason against a State were frequent. In Massachusetts, at the time of Shay's rebellion, there were sixteen capital convictions for the crime, though none of the offenders were executed, and very few subjected to any great length of imprisonment. In Pennsylvania five persons have actually suffered death for the offence; all, however, before the close of the Revolution. In 1787, before the Constitution went in operation, proceedings for treason were instituted in the then new State of Franklin (afterwards Tennessee) against John Sevier, its former governor; and these proceedings were followed by a conviction and pardon.[1] It never was doubted that prior to the federal Constitution, and during the confederation, each colony could prosecute for treason against itself.

Does not necessarily include treason against the United States.

§ 1814. The offence of adhering and giving aid to the enemies of the United States, it has been declared in New York, is not treason against the People of New York, under the Constitution, and is not cognizable, therefore, in the State court.[2] But the constitutions or statutes of several of the States expressly declare treason against the United States to be cognizable in the State as treason against the State.

But does include all common law treason against the government except such as is distinctively aimed at the federal authority.

§ 1815. Every interpretative or constructive levying of war, however general, as is maintained by Judge Tucker, in his valuable notes on treason,[3] must be and remain an offence against the State, unless the object of levying war be manifestly for some matter of general concern to the United States; and this view was adopted by Judge Story, in charging a grand jury during the Rhode Island disturbance in 1842.[4] It is not enough, it was maintained, that the offence is of a public nature, or of a great and general concern to the citizens of the Commonwealth; but it must be of a general or public nature and concern as it respects the United States and their jurisdiction, to confer jurisdiction on the United States. Were an armed multitude, it was said,

[1] See Shaler's Kentucky, 96; Ramsey's Tennessee, 282.

[2] People v. Lynch, 11 Johns. 549.

[3] 4 Tucker's Black. App. 21.

[4] 1 Story R. 614.

arrayed in order of battle, to enter the city of Richmond, destroy all public records of the State, and commit every other possible outrage, aggravated by every atrocious circumstance imaginable, if their intention in so doing should neither be to subvert the Constitution of the United States, nor to effect any object in relation to the federal government, such conduct, though, in the strictest sense, it might amount to treason against the State of Virginia, could never be treason against the United States.[1] And Judge King, when charging a grand jury in Philadelphia, at the time of the Kensington riots, asserted State jurisdiction of treason still more emphatically. "Where," he said, "the object of a riotous assembly is to prevent by force and violence the execution of any statute of this Commonwealth, or by force and violence to coerce its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by law; as burning down all churches or meeting-houses of a particular sect, under color of reforming a public grievance, or to release all prisoners in the public jails, and the like, and the rioters proceed to execute by force their predetermined objects and intents, they are guilty of high treason in levying war against the Commonwealth of Pennsylvania." In holding treason to include resistance to particular statutes, or attacks upon specific classes of society in a body, this eminent judge here expresses views in conflict with those maintained in a prior section.[2] But supposing the offence to be directed against the State government, and to amount to a levying of war, or to an adhering to the enemies of such State, then it is treason against the State and not against the United States.

Otherwise when United States interposes.

§ 1816. Where, however, as in case of insurrection or rebellion, any State makes application to the United States for such aid as the Constitution guarantees in such cases, if the opposition should extend to the authority thus interposed, the offence becomes treason against the United States.[3]

Is not absorbed in treason against the United States.

§ 1817. Whether express treason against a State, as distinguished from constructive treason, is not also treason against the United States; and whether, if such be the case, it can be punished in a State court, has been the subject of some difference of opinion. "From the nature of the

[1] 4 Tucker's Black. App. 21.

[2] 4 Tucker's Black. App. 22. *Supra*, §§ 265, 266.

[3] *Supra*, § 1796.

federal Union," said Mr. Edward Livingston, in his introductory report to the Legislature of Louisiana, "a levy of war against one member of the Union is a levy of war against the whole; therefore, it is concluded that treason against the State being treason against the United States, it is to be punished by their laws and in their courts."[1] On this reasoning, the levying war against Rhode Island, which was punished after the Dorr rebellion in a State court as a State offence, was, if not merged in treason against the Union, at least properly and exclusively cognizable in the federal courts; and such is the position advanced with much subtlety by an ingenious writer in the American Law Magazine.[2] But, as will presently be more fully seen, this view cannot be maintained.

Covers cases of armed attempts to overthrow State government.

§ 1818. The course of practice adopted at the time of the formation of the federal Constitution, and pursued to the present day, is to recognize levying war against a State as forming a State offence, cognizable in a State court, and punishable by State authority. Thus in Lynch's case, the Supreme Court of New York, while holding open waging of war against the federal government not to be cognizable in a State court, declared that treason against the State "might be committed by an open and armed opposition to the laws of the State, or a combination and forcible attempt to overturn or usurp the government."[3] Such is the law laid down by Durfee, C. J., in Dorr's Case,[4] and such is the opinion of Judge Tucker, in his Appendix to Blackstone;[5] of Judge Sergeant, in his Treatise on Constitutional Law;[6] of the late learned Mr. Rawle, in his Essay on the Constitution;[7] and of Judge King, in the opinion above quoted. And the assertion of such jurisdiction in the constitutions or penal codes of by far the greater number of the particular States leaves the question practically beyond doubt.

[1] Introductory Report, etc., to Criminal Code, 148.

[2] 4 Am. Law Mag. 318.

[3] People *v.* Lynch, 11 Johns. 549. See 1 Kent's Com. *403, note.

[4] See Pitman's Dorr Trial, and extracts from the same, published in the 6th edition of this work, § 2772. See, also, as illustrations of treason against a State, Res. *v.* Carlisle, 1 Dall. 35; Hammond *v.* State, 3 Coldw. 129; Quarrier, *ex parte*, 2 W. Va. 569.

[5] See *supra*, §§ 1794 *et seq.*

[6] Sergeant's Constitutional Law, 382.

[7] Rawle on the Constitution, 305. I have discussed this topic at large in Whart. Com. Am. Law, §§ 359 *et seq.*

Analogies from foreign jurisprudence.

§ 1819. From England, in this connection, we can receive no light. The British government is a centralization. Wherever the British flag waves, there the British crown nominally, and the British parliament actually, are supreme. Our government, on the other hand, is a confederation of sovereign States; a confederation, it is true, that cedes to the federal government supremacy within an orbit specifically assigned to it, but which leaves all other powers undisturbed to the States. The late civil war settled that no State has a right to withdraw from this confederation, and it led to an amendment to the Constitution conferring on the federal government certain additional powers tending to the securer extension of citizenship to the negro race. But the late civil war left untouched those important clauses of the Constitution which reserve to the several States the residuum of sovereignty after the powers of the general government are carved out. Hence it is that we are to look to the federal systems of Europe for analogies in respect to this branch of the law. Of these systems the old Germanic Empire; the German Bund of 1830; the North German Confederation; the North German Empire; the Swiss Eidgenossenschaft, present illustrations of greater or less pertinency. But whether, in confederate systems, the bonds of confederacy are loose or close, the result in this respect is the same. Treason to the sovereign of the particular State is, as an offence, as definite and as readily cognizable as is treason to the sovereign of the confederation. By the famous resolution of August 18, 1836, the North German Bund resolved that attempted subversions of its Constitution should be regarded as treason; though it was conceded on all sides that treason to the particular States making up that confederation remained a substantive offence; and no one, in the subsequent prosecutions for treason instituted by Prussia, thought of setting up as a defence that treason to the particular State was absorbed in treason to the federal head. Far closer is the fusion of the States composing the present North German Confederacy; but treasons to the sovereigns of Prussia and of Saxony, so far as such treason is aimed at them in their capacities as heads of their particular States, continue to be cognizable in the Prussian and Saxon courts. Each of the Swiss cantons is accustomed to prosecute for political crimes aimed at it individually; yet the Swiss cantons have enacted that it is also treason to aim at the

subversion of the Eidgenossenschaft or Confederate League. The principle is as follows: Wherever a particular State in a confederacy has reserved to it the right of prosecuting, in its own name and as against its own peace and dignity, offences committed within its borders; there it has the juridical right to maintain its integrity by prosecuting for treason subjects who attack its political existence. If we apply this test, there can be no question that the right to prosecute for treason against themselves is reserved to the particular States of the American Union. Each of these, not only by its own constitution and laws, but in accordance with repeated recognitions of the federal Supreme Court, prosecutes, as against its own peace and dignity, all offences except those aimed specifically at the delegated powers of the federal government.

§ 1820. The law as to pleading and evidence in cases of treason has been stated in the sections relating to treason against the United States. Whether there may be accessaries in such cases has been already discussed.[1]

[1] *Supra*, §§ 224, 1792.

CHAPTER XXXVIII.

OFFENCES AGAINST THE POST-OFFICE.[1]

I. OBSTRUCTION OF MAIL.

§ 1822. Whoever, whether intentionally or negligently, obstructs the due transmission or delivery of the mail, is indictable under the federal statute.[2] And indirect as well as direct obstruction is indictable under the statute,[3] though it is necessary to constitute the offence that the mail should be *in transitu*.[4] It is no defence that the obstruction was in service of a warrant in a civil suit in a State court.[5]

Such obstruction indictable by statute.

[1] Under the Revised Statutes the following postal offences are made indictable:—
Inclosing letters with printed matter, § 3887.
Detaining letters, § 3890.
Destroying letters, etc., § 3892.
Posting obscene book, etc., § 3893.
Counterfeiting stamps, etc., § 5413.
Embezzling letter, §§ 5467–8 *et seq.*, 5471.
Robbing carrier, § 5472.
As to breaking into post-office, see U. S. *v.* Campbell, 9 Sawy. 20.

[2] U. S. *v.* Claypool, 14 Fed. Rep. 127; U. S. *v.* Kane, 19 Ibid. 42; 9 Saw. 614.

[3] U. S. *v.* Clark, 13 Philad. 476; U. S. *v.* McCracken, 3 Hughes, 544; U. S. *v.* Barney, Ibid. 545.

[4] U. S. *v.* McCracken, *supra*.

[5] U. S. *v.* Harvey, 1 Brunf. (U. S.) 540.

II. ROBBERY OF MAIL.

§ 1823. The offence of robbing the mail, under the federal statute,[1] is constituted by robbing the carrier of the mail, or other person intrusted therewith, by stopping him on the highway, and demanding the surrender of the mail, and at the same time showing weapons calculated to take his life, or by otherwise putting him in fear of his life, and obtaining possession of the mail, or portions thereof, by the means aforesaid, against the will of the carrier.[2]

Robbery of the mail is where a mail carrier is robbed by force.

§ 1824. All persons present at the commission of the robbery, consenting thereto, aiding, assisting, or abetting therein, or doing any act which is a constituent of the offence, are principals.[3]

All concerned are principals.

[1] Rev. Stat. § 5472.

[2] U. S. *v.* Hare, 2 Wheeler C. C. 300; 1 Cr. C. C. 82. The same law was recognized by Washington, J., in U. S. *v.* Wood, 3 Wash. C. C. 440, and in U. S. *v.* Bernard, Trenton, 1819. See, also, U. S. *v.* Aminhisor, 2 Wheeler C. C. xliv; U. S. *v.* Wood, 1 Brunf. (U. S.) 456.

The defendant was indicted under the act of Congress for advising, procuring, and assisting a mail carrier to rob the mail; and was found guilty. Upon this finding, the judges of the Circuit Court of North Carolina were divided in opinion on the question whether an indictment, founded on the statute for advising, etc., a mail carrier to rob the mail, ought to set forth or aver that the said carrier did, in fact, commit the offence of robbing the mail. The answer to this, it was said by the Supreme Court, as an abstract proposition, "must be in the affirmative. But if the question intended to be put is, whether there must be a distinctive substantive averment of that fact, it is not necessary. The indictment, in this case, sufficiently sets out that the offence has been committed by the mail carrier." U. S. *v.* Mills, 7 Peters, 138.

Upon an indictment for robbing the mail, and putting the person having the custody of it in jeopardy, under the 19th section of the Act of April 30, 1810, c. 262, a sword, etc., in the hands of the robber, by terror of which the robbery is effected, is, within the act, a dangerous weapon, putting the life in jeopardy; though it be not drawn or pointed at the carrier. So a pistol in his hands, by means of which the robbery is effected, is a dangerous weapon; and it is not necessary to prove that it was charged; it is presumed to be so until the contrary is proved. U. S. *v.* Wood, 3 Wash. C. C. 440.

It is not necessary to a conviction, under the 22d section of the act above given, that the carrier of the mail should have taken the oath prescribed by the second section of the Act of 1825, or that the whole mail be taken. U. S. *v.* Wilson, 1 Bald. C. C. 78.

[3] Ibid.

§ 1825. The word "rob," in the statute, is used in the common law sense.[1]

"Rob" is used at common law.

§ 1826. "Jeopardy," as used in the statute, means a well-grounded apprehension of danger to life, in case of refusal to yield to threats of violence.[2]

And so of "jeopardy."

§ 1826 *a*. Under the statute making the unlawful opening or detention of mail matter indictable, is included merchandise transmitted by mail.[3]

Opening and detention of letters indictable.

III. EMBEZZLEMENT FROM MAIL.[4]

§ 1827. To constitute the offence of embezzlement from the mail, the letter must have been obtained from the post-office, or from a letter carrier; after a voluntary delivery to a third person, the letter is no longer under the protection of the laws of the United States; and the act of fraudulently obtaining it from such third person is not punishable under the statute.[5] Whether the intent necessary to embezzlement existed, the jury must determine from the evidence.[6]

Letter must have been obtained from post-office.

Where a letter is delivered to a private messenger, the letter cannot be charged to have been "posted" or "mailed." Hence, an errand boy sent by his master for letters, and embezzling one after receiving it, cannot be convicted under the statute.[7]

As a general rule, the detention of a letter which came law-

[1] Ibid.

[2] Ibid.

[3] U. S. *v.* Blackman, 17 Fed. Rep. 837; 5 McCr. 438.

[4] See Rev. St. §§ 4046, 5467–8, 5473–7.

As to meaning of "secrete" in statute, see R. *v.* Sharpe, 1 Moody, 125; R. *v.* Wynn, 1 Den. C. C. 365; T. & M. 32; 2 C. & K. 859; State *v.* Williams, 30 Me. 484; and see *supra*, § 896. That taking from a postal car is within the statute, see U. S. *v.* Falkenheimer, 21 Fed. Rep. 624.

As to embezzlement of money order funds see U. S. *v.* Gilbert, 17 Int. Rev. Rec. 54.

[5] U. S. *v.* Parsons, 2 Blatch. 104; U. S. *v.* Mulvaney, 4 Parker C. R. 164. That the offence is not felony, see U. S. *v.* Lancaster, 2 McLean, 431; *supra*, §§ 183, 220.

[6] U. S. *v.* Sander, 6 McLean, 598; U. S. *v.* Mills, 7 Peters, 138. As to embezzlement generally see *supra*, §§ 1009 *et seq.*

[7] U. S. *v.* Driscoll, 1 Low. 303; U. S. *v.* Parsons, 2 Blatch. 104; U. S. *v.* Sander, 6 McLean, 598. See U. S. *v.* Pond, 2 Curtis C. C. 265.

fully into the party's possession is not embezzlement under this statute.[1]

It is not necessary that a letter, to be within the protection of the act, should be sealed.[2]

If a clerk in the post-office steal a letter containing money from its appropriated place of deposit, he is guilty of stealing it from the post-office, although it be not removed beyond the building containing the post-office.[3]

Under § 5467 of the Revised Statutes a letter carrier may be convicted of having embezzled a letter which was intended to be conveyed by mail, and contained an article of value, which letter had been intrusted to him, and had come into his possession as a carrier.[4] A letter carrier is subjected to the penalties of the statute even when at the time performing under the post-master's direction duties not in his immediate line;[5] and so is any mail agent, no matter how slight or unremunerative his duties.[6] But a servant employed in cleaning boots and tying bundles in the post-office, is not a person employed in the post-office under the English statute.[7]

Valuables of all kinds, *e. g.*, gold dust, money,—are subjects of larceny under the statutes.[8]

Decoy letter within statute.

§ 1828. A letter containing money, deposited in the mail for the purpose of ascertaining whether its contents would be stolen on a particular route, and actually sent on a post route, is a letter intended to be sent by post within the meaning of the Post-office Act.[9] In England such a letter must have been actually posted.[10] Under our statute it is sufficient if

[1] U. S. *v.* Thoma, 2 N. J. Law J. 181; 19 Alb. L. J. 482, citing U. S. *v.* Parsons, 2 Blatch. 104; U. S. *v.* Sander, 6 McLean, 598; U. S. *v.* Driscoll, 1 Low. 303.

[2] U. S. *v.* Pond. 2 Curt. C. C. 265.

[3] U. S. *v.* Marselis, 2 Blatch. 108. See U. S. *v.* Nott, *infra*.

[4] U. S. *v.* Pelletrean, 14 Blatch. 126.

[5] R. *v.* Bickerstaff, 2 C. & K. 761; see U. S. *v.* Parsons, 2 Blatch. 104; see Jarnum *v.* U. S., 1 Col. 309.

[6] U. S. *v.* Hamilton, 11 Biss. 85.

[7] R. *v.* Pearson, 4 C. & P. 572.

[8] U. S. *v.* Randall, Deady, 555; U. S. *v.* Marselis, 2 Blatch. 108; U. S. *v.* Keene, cited *infra*, § 1830.

[9] U. S. *v.* Foye, 1 Curtis C. C. 364; 4 Stat. at Large, 102. See *supra*, § 149. *Infra*, § 1831. S. P. R. *v.* Young, 1 Den. C. C. 194; 2 C. & K. 466, overruling R. *v.* Gardner, 1 C. & K. 628.

[10] R. *v.* Rathbone, C. & M. 220; 2 Moody, 242; see R. *v.* Salisbury, 5 C. & P. 155. *Supra*, § 1017.

the letter were delivered to the carrier,[1] or placed in a postal box.[2]

Letter must be traced into defendant's hands.

§1828 *a*. On a charge of stealing letters out of the mail by a postmaster or other official, it has been held that the proper course is to call as witnesses the postmasters through whose offices the letters passed or were distributed.[3] When such witnesses are not called, although there may be proof of the mailing of the letters, and that they were never received, this is held insufficient for the conviction of any postmaster on the route.[4] But such strictness of proof being in many cases impracticable, the better view is to permit the prosecution to rely on the presumption of regularity of the mails, which, if corroborated by extrinsic evidence of guilt connecting the defendant with the particular letter, may sustain a conviction.[5]

Sufficient if indictment conform to statute.

§ 1829. An indictment which charges the defendant with unlawfully abstracting a letter containing bank notes from the mail, is good, if it allege that the letter containing bank notes was put into the post-office to be conveyed by post, and came into possession of defendant, as a driver of the mail stage.[6]

It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster, nor to describe particularly the bank notes, inclosed in the letter. But if either the letter or the notes be described in the indictment, they must be proved as laid.[7] It is sufficient to charge only the embezzlement of the letter.[8]

It is enough to state that the letter came to the hands of the postmaster, in the words of the statute, without showing where it was mailed, or on what route it was conveyed.[9] But it must be averred that the letter was intended to be conveyed by post.[10]

To convict a person who is employed in the department of stealing a letter, such employment must be distinctly alleged and proved.[11]

[1] U. S. *v.* Pelletreau, 14 Blatch. 126.

[2] U. S. *v.* Marselis, *supra*.

[3] U. S. *v.* Emerson, 6 McLean, 406.

[4] U. S. *v.* Emerson, *ut supra*.

[5] See Whart. Cr. Ev. §§ 835 *et seq.*

[6] U. S. *v.* Martin, 2 McLean, 256.

[7] U. S. *v.* Lancaster, 2 McLean, 431; U. S. *v.* Patterson, 6 Ibid. 466. See U. S. *v.* Sander, Ibid. 598.

[8] U. S. *v.* Taylor, 1 Hughes, 514.

[9] Ibid.

[10] U. S. *v.* Okie, 5 Blatch. 516.

[11] U. S. *v.* Nott, 1 McLean, 499. See R. *v.* Pearson, 4 C. & P. 572; U. S. *v.* Belew, 2 Brock. 280.

It is enough, however, to aver that the defendant was a person employed in one of the departments of the post-office establishment of the United States.[1]

The description of the termini, between which the letter was intended to be sent by post, cannot be rejected as surplusage, but must be proved as laid.[2]

It is necessary to lay the property stolen in some person other than the prisoner.[3] It is otherwise as to treasury notes under Rev. Stat. § 5467.[4]

It is held that a letter carrier may be indicted in a State court for larceny of a letter at common law.[5]

IV. RECEIVING EMBEZZLED MONEY, ETC.

§ 1830. It is an offence under the statute to receive or buy any article that has been stolen from the mail, knowing it to have been so stolen.[6] To show that the article has been stolen, the conviction of the individuals who stole it is sufficient, if the article be identified.[7]

Offence analogous to receiving stolen goods.

When an individual is found in possession of property stolen from the mail, and fails to show how he acquired it, or gives inconsistent or contradictory accounts how he came by it, this, according to the rule expressed elsewhere may be an inference of guilt.[8]

V. POSTING INDECENT MATTER.

§ 1831. By the Revised Statutes of the United States (§ 3893. See Acts March 3, 1873, July 12, 1876), it is provided "that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing, designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by

Such matter excluded from the mails, and posting it indictable.

[1] U. S. *v.* Patterson, 6 McLean, 466.
[2] U. S. *v.* Foye, 1 Curtis C. C. 364.
[3] Ibid.
[4] U. S. *v.* Baugh, 1 Fed. Rep. 784; 4 Hughes, 501.
[5] *Supra*, §§ 267, 959.
[6] U. S. *v.* Keene, 5 McLean, 509.
[7] Ibid.
[8] Ibid.; Whart. Crim. Ev. § 758.

what means, either of the things before mentioned, may be obtained or made . . . . shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, *etc.* . . . . shall be deemed guilty of a misdemeanor," *etc.*

This statute has been held constitutional.[1] In respect to its construction the following points have been settled:—

(1) The first clause, prohibiting the mailing of obscene literature, applies to the mailing of obscene letters,[2] whether printed or written,[3] as well as of obscene books and pamphlets meant for general circulation.[4] The test of obscenity, as has been already stated, is the tendency to scandalize and corrupt by indecent pictures or words bearing on sexual relations.[5] In framing the indictment the rules prevail which are laid down in respect to the pleading of obscene publications in indictments for libel.[6]

(2) Under the clause[7] which provides that no article or thing "designed or intended for the prevention of conception or procuring of abortion" shall be carried in the mail, and declares guilty of a misdemeanor any person who knowingly deposits, for mailing or delivery, any such article or thing, the defendant, it has been ruled by Benedict, J., cannot show, in defence, that the article deposited in the mail would not, in fact, have any tendency to prevent conception or procure abortion, and that its harmless character was known to him when he deposited it, it being sufficient that the article, when deposited, was put up in a form, and described in a manner calculated to insure its use to prevent conception or procure abortion, by any one desiring to accomplish that result and into

[1] U. S. *v.* Bott, 11 Blatch. 346; U. S. *v.* Bennett, Ibid. 338; U. S. *v.* Hayward, Clifford, J., 1879. See Mr. Calhoun's speech on the Incendiary Publication bill, Calhoun's Works, ii. 509; Whart. Com. Am. Law, § 446.
[2] U. S. *v.* Gaylord, 17 Fed. Rep. 438; U. S. *v.* Hanover, Ibid. 444.
[3] U. S. *v.* Morris, 17 Rep. 293, overruling U. S. *v.* Loftus, 8 Sawy. 194; see U. S. *v.* Britton, 17 Fed. Rep. 731; U. S. *v.* Chesman, 19 Ibid. 497.
[4] U. S. *v.* Chesman, 19 Fed. Rep. 497. See U. S. *v.* Foote, 13 Blatch. 418.
[5] *Supra*, § 1606; U. S. *v.* Bennett, cited *supra*, § 1606.
[6] Ibid. *Supra*, §§ 1609, 1662; U. S. *v.* Kaltmeyer, 16 Fed. Rep. 760; 5 McCr. 260; U. S. *v.* Bates, 11 Biss. 70.
[7] Act of June 8, 1872 (17 U. S. Stat. at Large, 302), as amended by § 2 of the Act of March 3, 1873 (Ibid. 599, Rev. Stat. § 3893).

whose hands it might fall.[1] It was further held that on the trial of an indictment founded on the same section, which declares it to be a misdemeanor to knowingly deposit in the mail, for mailing or delivery, any advertisement or notice giving information where or of whom any such article or thing may be obtained, if it be shown such a notice was deposited, it is immaterial whether, in fact, the article or thing was at the place designated. Nor is it a defence that the defendant was inveigled to mail the package by a decoy.[2]

It has been determined, however, by Judge Dillon, in the construction of the clause prohibiting the mailing of letters, etc. —"giving information" as to the production of abortion, that a sealed letter, written by the defendant and addressed to a person who, in fact, has no existence, and which *on its face* imparts no information of the prohibited character, and which is brought within the statute only by the fictitious letter of inquiry of a detective, is not a "giving of information" within the meaning of the statute. The distinction between the ruling of Judge Dillon and that of Judge Benedict, as above given, may be sustained on the

[1] See to this point *supra*, §§ 119, 185; S. P. Bates *v.* U. S., 11 Biss. 70. See U. S. *v.* Foote, 13 Blatch. 418.

[2] Bott *v.* U. S., 11 Blatch. 346, where it was said by Benedict, J.:—

"If this view of the law be correct, evidence tending to show the harmless character of the powders, and, also, evidence that the powders were known to the defendant to have been ordered of him by a man, and for the purpose of obtaining evidence on which to base a prosecution, and were made harmless in order to dupe, was properly excluded. If such facts were shown, it would still be true, that the defendant deposited in the mail powders which have been found to be put up in a form, and described in a manner, calculated to insure their use, for the prevention of conception, by any one desiring to accomplish that result, and into whose hands they might fall.

"A similar question arises under the indictment against Whitehead, which charges the deposit of an advertisement or notice giving information where and of whom certain of the articles made contraband by the statute could be obtained. The evidence showed the deposit of a notice stating that certain articles contraband by the statute could be obtained at a designated place. This being shown, whether in point of fact the information in the notice was true, and whether such articles were at the place designated, is of no consequence." The main point ruled is that the offence of posting indecent matter is one against the public, in which it is enough if the thing posted be apparently of the character prohibited.

As to attempts to commit offences with inadequate means, see *supra*, § 183. That it is no defence that the defendant was led to the act by a decoy, in cases of offences against the public, see *supra*, § 149.

ground that the clause "giving of information," in the statute, does not qualify the transmission of drugs, as it does that of books or writings.[1]

§ 1831 *a*. Under the federal statute, making it an offence to use the post office for fraudulent purposes, it is an indictable offence to send out circulars for the purpose of fraudulently obtaining money and stamps in reply;[2] and for the purpose of putting into operation a scheme to utter counterfeit money.[3] But the statute does not cover cases of mailing of letters intending to effect isolated frauds.[4]

So of fraudulent matter.

"The act was designed to strike at common schemes of fraud, whereby, through the post office, circulars, etc., are distributed, generally to entrap and defraud the unwary, and not the supervision of commercial correspondence between a debtor and creditor." [5]

The mailing of lottery circulars is indictable by the revised statutes; nor is it any defence that the circular was sent in answer to a decoy.[6]

The statutes do not cover sending to the post-office. There must be an actual mailing or posting.[7]

[1] U. S. *v.* Whittier, 5 Dill. 35, citing R. *v.* McDaniel, Foster, 121, 2 East P. C. 665; and see *supra*, § 149.

[2] U. S. *v.* Stickle, 15 Fed. Rep. 798; U. S. *v.* Fleming, 18 Ibid. 907.

[3] U. S. *v.* Jones, 20 Blatch. 235.

[4] U. S. *v.* Owens, 17 Fed. Rep. 72; 5 McCr. 307.

[5] U. S. *v.* Owens, *ut sup.*

[6] U. S. *v.* Moore, 19 Fed. Rep. 39.

[7] U. S. *v.* Dauphin, 20 Fed. Rep. 625. See U. S. *v.* Chesman, 19 Ibid. 497.

CHAPTER XXXIX.

ABUSE OF ELECTIVE FRANCHISE.

Offence equivalent to fraudulent usurpation of sovereignty.

§ 1832. In a country based on popular elections, abuse, by force or fraud, of the elective franchise, is an offence against government; and is to be punished on the same principle as by the English common law and the Roman common law are punishable forcible or fraudulent usurpations of executive sovereignty.[1] The common law offence, however,

[1] *Infra*, § 1858. See Com. *v.* McHale, 97 Penn. St. 397; and an article in 2 Crim. Law Mag. 1 (July, 1881), on Crimes against the Elective Franchise. That Congress may constitutionally enact statutes for the regulation of elections for federal officers, though at the same elections State officers may

in the United States, has given way to statutes imposing specific penalties on misconduct of this class; statutes which are multitudinous and diverse, and which have received adjudications difficult to classify, from this very diversity of subject matter. Premising that most of the questions that thus arise have been already incidentally noticed, the distinctive points which meet us most frequently may be thus divided:—

I. ILLEGAL VOTING.

Illegal voting and attempt at such voting indictable at common law.

§ 1832 *a*. Apart from statutory prescriptions, illegal voting is indictable at common law;[1] and consequently the attempt to vote illegally is also so indictable.[2] Whether under statutes the *scienter* must be proved will be considered in another section.[3] At common law such proof is generally necessary, though the question of intent is irrelevant.[4]

Proof to be the best obtainable.

§ 1832 *b*. The proof, on an indictment against a voter for illegal voting, must be the best obtainable.[5] The poll list has been held admissible to prove that the defendant voted;[6] though this on principle should not be the case unless the testimony of the officers of the election cannot be obtained, or unless as corroborative of such testimony.[7]

be elected, but that they cannot regulate elections for State officers exclusively, except so far as to preclude race discrimination, see U. S. *v.* Reese, 92 U. S. 214; Siebold, *ex parte*, 100 U. S. 100; Yarbrough, *ex parte*, 110 U. S. 651. As to prosecutions for the invasion of civil rights, see *supra*, § 1356 *a*; U. S. *v.* Bader, 4 Woods, 189; 16 Fed. Rep. 116; U. S. *v.* Wright, 6 Ibid. 112; U. S. *v.* Munford, 16 Ibid. 223.

In some jurisdictions the sale of liquor, near where an election is being held, is indictable by statute. State *v.* Cody, 47 Conn. 44; State *v.* Stamey, 71 N. C. 202; Hoskey *v.* State, 9 Tex. Ap. 202. See *supra*, § 1512 *c*.

[1] *Supra*, § 84; R. *v.* Price, 3 P. & D. 421; 11 A. & E. 727; U. S. *v.* Burley, 14 Blatch. 91; Com. *v.* Silsbee, 9 Mass. 417; Com. *v.* McHale, 97 Penn. St. 397; though see State *v.* Liston, 9 Humph. 603; Gordon *v.* State, 52 Ala. 308.

[2] *Infra*, § 1847; *supra*, §§ 173 *et seq.*; Com. *v.* Jones, 10 Phila. 211. See R. *v.* Hague, 12 W. R. 310; McCr. Election Law, § 468.

[3] *Infra*, § 1835.

[4] State *v.* Perkins, 42 Vt. 399; State *v.* Welch, 21 Minn. 22. See Steinwehr *v.* State, 5 Sneed, 586.

[5] Whart. Cr. Ev. §§ 220 *et seq.*

[6] Wilson *v.* State, 52 Ala. 599; Hunter *v.* State, 55 Ibid. 76.

[7] Whart. Cr. Ev. §§ 526 *et seq.* That parol proof is admissible as to aliens voting on forged naturalization papers, see McCr. Elect. Laws, § 21; State *v.* Stumpf, 23 Wis. 630. That parol proof is receivable to solve latent ambigui-

§ 1833. Illegal voting at a voidable election would be indictable as an attempt, if such election were *primâ facie* valid;[1] though it would be otherwise if the election were absolutely void.[2] But mere curable irregularities do not purge the act of its criminality.[3]

No defence that election was voidable.

§ 1834. The voting, and the falsely swearing to the voter's qualifications, are distinct offences; and the one cannot be held to merge in the other.[4]

No merger in perjury.

§ 1835. When illegal voting is made a misdemeanor by statute, irrespective of intent, it is no defence that the defendant believed himself entitled to vote.[5] And even where the statute contains the conditions "knowingly and fraudulently,"[6] it is no defence that the defendant acted under advice of others, if such advice were in point of law wrong.[7] So, no

Ignorance of disqualification no defence.

ties in ballots, see People *v.* Seaman, 8 Cow. 409. As to conflict between ballots and returns, see McCr. Elect. Laws, § 278. That a voter cannot be made to disclose the contents of his ballot, see McCr. Elect. Laws, § 142; People *v.* Pease, 27 N. Y. 81; People *v.* Cicote, 16 Mich. 283. It has been held that this privilege does not shelter *illegal* voters. McDaniel's Case, 3 Penn. L. J. 310; Brightly's Elect. Cas. 248. But this can only be so when such voters would not be exposed by their answer to criminal prosecution. That burden is on the prosecution, see McCr. Elect. Laws, § 464. As to proving contents of ballots, see Ibid. §§ 194–6, 293.

In Tennessee, it is said that handing in a ticket to the proper officer is voting, though the ticket be not placed in the box. Steinwehr *v.* State, 5 Sneed, 856. But in Alabama it is held that voting is not complete until the ticket is in the box. Blackwell *v.* Thompson, 2 St. & P. 348.

[1] See *supra*, §§ 181–185. See, however, R. *v.* Bent, 1 Den. C. C. 157.

[2] State *v.* Williams, 35 Me. 561.

[3] State *v.* Bailey, 21 Me. 62; State *v.* Cohoon, 12 Ired. 178. See *supra*, §§ 1263, 1282; Biddle *v.* Willard, 10 Ind. 62. For offences of this class, see U. S. Rev. Stat. §§ 5506 *et seq.*

[4] Steinwehr *v.* State, 5 Sneed, 586; State *v.* Minnick, 15 Iowa, 123; State *v.* Sheely, Ibid. 404.

[5] U. S. *v.* Anthony, 11 Blatch. 200; Minor *v.* Happersett, 53 Mo. 58; and see *supra*, § 84.

As to what constitutes citizenship, see Slaughter-house Cases, 16 Wall. 36; Corfield *v.* Coryell, 4 Wash. C. C. R. 371; Ward *v.* Maryland, 12 Wall. 418, 430; Paul *v.* Virginia, 8 Ibid. 168; Bradwell *v.* State, 16 Ibid. 130; Crandall *v.* Nevada, 6 Ibid. 35, 44.

[6] That in such case the indictment should aver "knowingly," see Davenport, *in re*, 18 Blatch. C. C. 336.

As to *scienter* in election cases, see R. *v.* Owens, 2 E. & E. 86; R. *v.* Coates, 2 E. & B. 253; Buckminster *v.* Reynolds, 13 C. B. (N. S.) 62; R. *v.* Tewksbury, L. R. 3 Q. B. 629; U. S. *v.* O'Neill, 2 Sawy. 481; Hamilton *v.* People, 57 Barb. 625.

[7] U. S. *v.* Anthony, 11 Blatch. 200. *Supra*, § 84 (see criticism in 2 Green Crim. L. Rep. 215); McGuire *v.* State, 7 Humph. 54; State *v.* Hart, 6 Jones, (N. C.) 389; State *v.* Boyett, 10 Ired. 336.

matter how honest be the belief of a person that he is entitled to vote twice, at two distinct places, he is rightfully convicted, if he so vote, under a statute which makes the naked act indictable, irrespective of guilty knowledge.[1] For by statute, as well as by common law, the electoral franchise, as has just been said, is an office; and a person usurping such office, no matter how honestly, is liable to penal prosecution, unless the statute expressly excepts cases of "honest intent."[2] If "honest intent" and "mistake of law" will excuse a person illegally voting for President of the United States, "honest intent" and "ignorance of the law" will excuse a person

[1] In State *v.* Boyett, 10 Ired. 336, where the statute contained the qualification "knowingly and fraudulently," it was held that it was no defence that the defendant voted honestly under the advice of friends; and in State *v.* Hart, 6 Jones (N. C.), 389; it was held that a mistaken opinion by the officers of election not communicated to the defendant would not protect him; see R. *v.* Price, 11 A. & E. 727; 3 P. & D. 421.

Where the statute imposes the punishment on those who "knowingly vote" without qualification, this makes penal voting, knowing the disqualification, but mistaking the law. McGuire *v.* State, 7 Humph. 54.

In the following cases ignorance and honesty have been held a defence:—

Com. *v.* Bradford, 9 Metc. 268 (where the statute had the words "knowing himself not to be a qualified voter"); Com. *v.* Aglar, Thach. C. C. 412; Bright. Elec. Cas. 412; Com. *v.* Wallace, Thach. C. C. 592; Bright. Elec. Cas. 703 (under statute imposing penalty on a person who "knowing himself" to be not qualified should "wilfully" vote, etc.); Com. *v.* Macomber, 7 R. I. 349 (under a statute, also, which made "fraudulently" a condition of the offence); Gordon *v.* State, 52 Ala. 308; Carter *v.* State, 55 Ibid. 181 (where it was held that it is a defence that a minor, who voted illegally, believed honestly and non-negligently he was of full age, the statute, however, making it requisite to the offence that it should have been committed "fraudulently"). See Com. *v.* Silsbee, 9 Mass. 417, where double voting was held a misdemeanor at common law.

In State *v.* Perkins, 42 Vt. 399; State *v.* Welch, 21 Minn. 22; under statutes not conditioned by terms exacting *scienter* or fraudulent intent, illegal voting at two distinct polls, though under an honest mistake of right, was held indictable. See Hamilton *v.* People, 57 Barb. 625, where it was held that the indictment, under the New York statute, should not aver *scienter*. It was also held that it was no defence that the defendant (though disfranchised as a felon) believed he was entitled to vote.

In State *v.* Williams, 25 Me. 561, it was held that there could be no conviction unless the elections were both of them in accordance with law.

On the other hand, in California, drunkenness has been held a defence to "repeating" (People *v.* Harris, 29 Cal. 678); a decision which may lead "repeaters" to get drunk before they "repeat." The statute does not appear to prescribe a *scienter*.

[2] See *supra*, §§ 84, 1812.

usurping the office of President of the United States. Usurpation, therefore, would cease to be penal when it becomes fanatical.[1]

II. INDICTMENT AGAINST VOTER.

Indictment must aver election.

§ 1836. Following the analogies of perjury, we can well understand why the old English precedents, in cases of illegality at elections, should set out all the preliminary procedure under which the election was held.[2] But as in perjury, the practice in this country, except in one or two jurisdictions, has been to dispense with such great particularity,[3] so we may apply the same liberality to the construction of indictments for offences at elections, especially when such are held under general laws. To this point, indeed, there is direct authority, showing that it is enough to allege that the offence was committed at a general election lawfully held according to law, stating when and where the election was held and what it was for.[4] But this much is essential.[5] And it is essential, also, that the day of the offence should be specifically averred.[6]

[1] In R. *v.* Bent, 1 Den. C. C. 157, it was held that to falsely personate a voter at a *municipal* election is not indictable at common law; *sed quære.*

As to disfranchised voter voting, see McCr. Elect. Law, § 18.

[2] This seems to have been held requisite as late as R. *v.* Bowler, C. & M. 559; 6 Jur. 287; and other cases of false swearing at elections; which, however, are not strictly in point—the element of perjury being distinctively indictable. See Cole on Crim. Inform. 2d Part, 187.

[3] See *supra*, § 1294.

[4] State *v.* Bailey, 21 Me. 62; State *v.* Boyington, 56 Me. 512; State *v.* Marshall, 45 N. H. 281; State *v.* Hardy, 47 Ibid. 538; Com. *v.* Shaw, 7 Met. 52; S. C., Whart. Prec. 1019, where indictment is given; Com. *v.* Silsbee, 9 Mass. 417; Com. *v.* Stockbridge, 11 Ibid. 278; Lane *v.* State, 39 Ohio St. 312; Tipton *v.* State, 27 Ind. 492; Gallagher *v.* State, 10 Tex. Ap. 469. It is not necessary even to aver who were the officers to be elected, if the election were general. State *v.* Minnick, 15 Iowa, 123.

[5] Carter *v.* State, 55 Ala. 181.

[6] State *v.* Day, 74 Me. 220.

That the purpose of the election need not be averred see further, State *v.* Lockbaum, 38 Conn. 400; *supra*, § 1836. That the officers of the election need not be named, see State *v.* Douglass, 7 Iowa, 413; *supra*, § 1836; State *v.* Minnick, 15 Iowa, 123. That it is not necessary to aver in detail the authority by which the election was summoned, see State *v.* Bailey, 21 Me. 62; State *v.* Marshall, 45 N. H. 281; Com. *v.* Desmond, 122 Mass. 12, and cases cited in prior notes to this section; nor that the election was by a meeting of the electors, Com. *v.* Shaw, 7 Metc. (Mass.) 52. That the place of the election must be specified, see U. S. *v.* Johnson, 2 Sawy. 482; Com. *v.* Desmond, 122 Mass. 12; State *v.* Fitzpatrick, 4 R. I. 469; Gallagher *v.* State, 10 Tex. Ap. 469. That the designation of the person voted for is unnecessary, see State *v.* Minnick, 15 Iowa, 123; Wilson *v.* State, 52 Ala. 299.

Must specify disability.

§ 1837. Where the indictment is for voting when disqualified, under a statute which enumerates certain causes of disqualification, the defendant should be specially averred to be within such disqualifying clauses.[1] The same rule applies to unlawfully counselling a disqualified person to vote.[2] But at common law, and under statutes which do not discriminate between disqualifications, it is enough to aver generally that the defendant was disqualified and incompetent.[3]

Double voting to be specified.

§ 1838. Where a statute makes simply casting two votes indictable, it is sufficient to allege the casting of two votes.[4] But where voting *in two places* is made indictable, the indictment must designate the places.[5] It is no defence that the first vote was illegal.[6]

Statutory terms must be used.

§ 1838 *a*. The act of illegal voting must be averred in the statutory terms, with such predicates (*e. g.*, "corruptly," "illegally," "unlawfully") as the statute may prescribe;[7] though synonymes, such as "unlawfully" and "illegally," may be regarded as convertible.[8]

Where the statute qualifies the offence by requiring a particular intent, this intent must be averred.[9] Thus in England, where "wilfully" making a false answer, etc., is indictable, the term "wilfully" must be used.[10]

[1] Whart. Cr. Pl. & Pr. §§ 238 *et seq.*; People *v.* Wilber, 4 Parker C. R. 19; State *v.* Moore, 3 Dutch. 105 (Brightly's Elect. Cas. 705); Pearce *v.* State, 1 Sneed, 637; Quin *v.* State, 35 Ind. 485; Gordon *v.* State, 52 Ala. 308. See R. *v.* Hill, 2 Ld. Raym. 1415; R. *v.* Jarvis, 1 Burr. 148; R. *v.* Wheatman, 1 Doug. 331; U. S. *v.* Hendric, 2 Sawyer, 476; U. S. *v.* Johnson, Ibid. 482. See, however, U. S. *v.* Ballard, 13 Int. Rev. Rec. 195.

[2] State *v.* Tweed, 3 Dutch. 111. See U. S. *v.* Hirschfield, 13 Blatch. 330.

[3] Com. *v.* Shaw, 7 Met. 52; Whart. Prec. 1019; State *v.* Macomber, 7 R. I. 349; State *v.* Douglass, 7 Iowa, 413; State *v.* Bruce, 5 Oreg. 68. See State *v.* Boyington, 56 Me. 512; State *v.* Lockbaum, 33 Conn. 400; U. S. *v.* Quin, 12 Int. Rev. Rec. 151.

That an averment specifying the condition which creates disability (*e. g.*, an averment of minority or of conviction of infamy) will sustain a conviction, see U. S. *v.* O'Neill, 2 Sawy. 481 (Deady, J.).

[4] See form and observations in Whart. Prec. 1021.

[5] State *v.* Fitzpatrick, 4 R. I. 269. See State *v.* Macomber, 7 Ibid. 349.

[6] State *v.* Perkins, 42 Vt. 399.

[7] R. *v.* Bowler, C. & M. 559; R. *v.* Bent, 1 Den. C. C. 157; State *v.* Moore, 3 Dutch. 105. See U. S. *v.* Walkinds, 7 Sawy. 85 (Deady, J.).

[8] See Whart. Cr. Pl. & Pr. § 269; State *v.* Hayworth, 3 Sneed, 64, where it was held that "knowingly" was implied in "illegally," "knowingly" not being in the statute.

[9] See, as to fraudulent registration, U. S. *v.* Hirschfield, 13 Blatchford, 330.

[10] R. *v.* Bent, 1 Den. C. C. 157. But see State *v.* Hayworth, 3 Sneed, 34.

III. INDICTMENT AGAINST OFFICERS.

§ 1838 *b*. The general responsibility of officers is heretofor independently considered.[1] At present it must be sufficient to notice the following points:—

Usurpation of office indictable.

It is indictable for a person to usurp an office to which he has no claim;[2] and in some jurisdictions such usurpation is made a statutory offence.[3] But when there is a contested election, and treason or false personation, or violent expulsion of an officer avowedly legitimate is not set up, *title* to office cannot be tried by means of a criminal prosecution any more than can title to goods.[4]

Defendants cannot be joined.

§ 1839. As already seen, in indictments against officers of elections, defendants occupying different officers, charged with different duties, cannot be joined.[5]

Indictment may be single.

§ 1840. A single officer may be charged with an unlawful act in receiving a disqualified vote, without stating how the defendant's co-officers acted.[6]

Fraud or breach of duty must be specially averred and proved.

§ 1841. Special acts of fraud, when officers of elections are indicted for fraud in discharge of their duties, must be shown. It is not enough to aver a mere conclusion of law, that the defendants "did commit wilful fraud in the discharge of their duties."[7]

Deputy marshal restricted by statute.

§ 1841 *a*. It has been held that when a deputy marshal is appointed under the act of Congress establishing supervisors of elections, the deputy marshal has no right to enter the room of the judges of an election, against their

[1] *Supra*, §§ 1568 *et seq*. See, on this topic, Hall *v*. People, 90 N. Y. 498. As to tampering with return sheet, see Com. *v*. Monatt, 14 Phila. 366.

[2] Scarlett's Case, 12 Co. 98.

[3] See Com. *v*. Connolly, 97 Mass. 478; Lansing *v*. People, 57 Ill. 241.

In Wayman *v*. Com., 14 Bush, 466, it was held that the lawfulness of an election is no part of the description of the offence of usurping the office of judge of election.

[4] *Supra*, §§ 884, 1152; Kreidler *v*. State, 24 Ohio St. 22; Com. *v*. Adams, Met. Ky. 6.

[5] Com. *v*. Miller, 2 Parsons, 480; Brightly's Elect. Cas. 711; and see State *v*. Welch, 21 Minn. 22; Wilson *v*. State, 52 Ala. 299; State *v*. Boyington, 56 Me. 512.

[6] Com. *v*. Gray, 2 Duvall, 373.

[7] Com. *v*. Miller, 2 Parsons, 480; Brightly's Elect. Cas. 711—a ruling clearly sustained by the analogy of pleading in the statutes of false pretences. *Supra*, § 1221; and see *supra*, § 1569; Whart. Cr. Pl. & Pr. § 154.

orders, during the progress of an election, unless a disturbance of the peace is there threatened, or actual fraud is attempted, or the supervisor is in actual need of protection;[1] but that if there be actual disturbance of the peace, or other actual violence committed or threatened, or if the supervisor be in actual need of protection, or fraud be attempted in the said room, then the deputy marshal may enter the room for the purpose of discharging the duties imposed on him by the statute.[2]

As has been seen, federal statutes regulating State elections have been pronounced constitutional so far as concerns elections of members of Congress and of federal electors.[3]

Duty must be specified.

§ 1842. That in the indictment the particular duty of the defendant must be specified results from the necessities of the case. Otherwise the defendant would have no notice of the duties he is charged with violating.[4]

Office to be averred.

§ 1843. It is sufficient, as already seen, to aver that the defendants as officers of election were duly charged with their particular offices,[5] or that they "were" officers of the election, etc.[6]

And so *scienter*.

§ 1844. When guilty knowledge is necessary to constitute the offence, then the *scienter* must be averred.[7]

IV. EVIDENCE.

Sufficient to prove officer was acting as such.

§ 1845. The principle is well established, as has been stated, that it is sufficient to prove that an alleged officer, in an indictment against him for misconduct, was at the time of the offence acting in the office averred.[8] This rule applies to election officers.[9]

[1] As to constitutional powers of Congress in this relation, see *supra*, § 1832, note.

[2] Gitman, *ex parte*, 3 Hughes, 548.

As to functions of deputy marshals, see further, U. S. *v*. Conway, 18 Blatch. C. C. 566; Geissler, *ex parte*, 9 Biss. C. C. 492; Spooner, *in re*, 9 Abb. (N. Y.) N. Ca. 481. As to supervisors, see Hilt, *in re*, Ibid. 484; and see, generally, Brightly's Election Cases, 592.

[3] Siebold, *ex parte*, 100 U. S. 371. See Clark *v*. U. S., Ibid. 399; U. S. *v*. Gale, 109 U. S. 65; and cases cited *supra*, § 1832, note.

[4] Com. *v*. Rupp, 9 Watts, 114. *Supra*, § 1569.

[5] See *supra*, §§ 1568, 1570, 1578, 1589; Edge *v*. Com., 7 Barr, 275; State *v*. Randles, 7 Humph. 9.

[6] Com. *v*. Shaw, 7 Metc. (Mass.) 52; and cases *infra*, § 1845.

[7] *Supra*, § 999; Whart. Cr. Pl. & Pr. § 164; State *v*. Daniels, 44 N. H. 383.

[8] *Supra*, § 1589; McCr. Law of Elect. § 456.

[9] Com. *v*. Shaw, 7 Met. 52.

§ 1846. Where there is discretion given the officer, there is no criminal responsibility for a wrong act done honestly in belief that it was right.[1] Fraudulent or unlawful intent must be ordinarily proved in order to impose liability.[2] Hence officers of elections, being more or less charged with discretionary power, are not indictable for non-negligent mistakes of law or fact.[3]

When there is discretion no responsibility for errors of judgment.

V. ATTEMPT.

§ 1847. Wherever the consummated offence is a misdemeanor, the attempt to commit it is indictable at common law.[4]

Attempt indictable at common law.

VI. BRIBERY BY CANDIDATES.

§ 1848. At common law it is an indictable offence for a candidate for public office to bribe or attempt to bribe an elector.[5] It has been held bribery in this sense to give[6] or to offer money for a vote,[7] or for refraining from voting.[8] All concerned in the act are principals;[9] and the attempt is indictable as such at common law.[10]

Such bribery indictable.

[1] *Supra*, § 87 *et seq.*; State *v.* Smith, 18 N. H. 91; State *v.* Daniels, 44 Ibid. 383; State *v.* McDonald, 4 Harring. 555. For form of indictment, see People *v.* Pease, 30 Barb. 588; Com. *v.* Gray, 2 Duvall, 373.

[2] U. S. *v.* Wright, 16 Fed. Rep. 112. See, as to indictment, U. S. *v.* Bader, 10 Ibid. 116; 4 Woods, 189; U. S. *v.* Cahill, 3 McCrary, 200; State *v.* Day, 74 Me. 220; People *v.* Boas, 29 Hun, 377.

[3] See State *v.* Smith, 18 N. H. 91; Com. *v.* Sheriff, 7 Phila. 84; Com. *v.* Lee, 1 Brewst. 273; State *v.* McDonald, 4 Harring. 556; State *v.* Porter, Ibid. 656; State *v.* Daniels, 44 N. H. 383; Byrne *v.* State, 12 Wis. 519. See McCr. Law of Elect. § 463.

[4] *Supra*, § 1832 *a*; Com. *v.* Jones, 10 Phila. 211; 2 Crim. Law Mag. 466. See *supra*, §§ 173 *et seq.*

[5] *Infra*, § 1858; R. *v.* Pitt, 3 Burr. 1335; R. *v.* Pollman, 2 Camp. 229; State *v.* Jackson, 73 Me. 91; Nichols *v.* Mudgett, 32 Vt. 546; State *v.* Ellis, 33 N. J. L. 102; Com. *v.* Shaver, 3 W. & S. 338; Com. *v.* Walter, 86 Penn. St. 15; Russell *v.* Com., 3 Bush, 469. See U. S. *v.* Worrall, Whart. St. Tr. 189; and other cases cited *infra*, § 1858.

[6] R. *v.* Pitt, *ut sup.*; Com. *v.* Shafer, *ut sup.*

[7] Walsh *v.* People, 65 Ill. 58.

[8] R. *v.* Isherwood, 2 Ld. Keny. 202.

[9] R. *v.* Pitt, *ut sup.*; U. S. *v.* Worrall, *ut sup.* See McCr. Elect. Law, § 149.

[10] Walsh *v.* People, 65 Ill. 68; Hutchinson *v.* State, 36 Tex. 294.

By a provision in the Constitution of Pennsylvania (adopted by statute in other States), "Any person who shall, while a candidate for office, be guilty of bribery, fraud, or wilful violation of any election law, shall be forever disqualified from holding an office of trust or profit in this Commonwealth; and any person convicted of wilful violation of the election laws shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely for a term of four years." Const. art. 8. By the Act of 1874, legal expenses were defined. It has been held under this provision, and under the statute defining legal expenses, that a violation of the law is sufficiently charged by alleging that money was paid by the defendant to another, for purposes other than those prescribed, "but for corrupt and illegal purposes in procuring his (the defendant's) election." Com. *v.* Walter, 86 Penn. St. 15. As to what gratuities constitute bribery, see Richardson *v.* Webster, 3 C. & P. 128; Jackson *v.* Walker, 5 Hill (N. Y.), 27; Duke *v.* Asbee, 11 Ired. (L.) 112. It has also been held that an offer by a candidate for office to accept less than the legal fees if elected invalidates the election it influences. State *v.* Purdy, 36 Wis. 213; and other cases cited 2 Crim. Law Mag. 452. As to bribery generally, see *infra*, § 1858.

VII. VIOLENCE TO VOTERS.

§ 1848 *a*. Violence to voters, interfering with their peaceable exercise of the right of franchise, is to be regarded in the same light as violent resistance to officers of justice when in discharge of their duties, and as violent obstruction of public justice; and hence when the object was to prevent the free exercise of the right of franchise, is indictable at common law.[1] That the offence at common law has not been cases of mere breaches of the peace at the polls, see State *v.* Fletcher, 22 Fed. Rep. 776.

Violent interference with voting indictable.

In Yarbrough, *ex parte*, 110 U. S. 651, the indictment charged that the defendants conspired to intimidate A. B., a citizen of African descent, in the exercise of his right to vote for a member of Congress, and that in the execution of that conspiracy they beat, bruised, wounded, and otherwise maltreated him (second count), and that they did this on account of his race, color, and previous condition of servitude, by going in disguise and assaulting him on the public highway, and on his own premises. This was held to be a sufficient description of the offence covered by §§ 5508, 5520, R. S. In all cases, it was said, where the former slave-holding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people whether they be men or women. See Neal *v.* Delaware, 103 U. S. 370.

[1] *Supra*, §§ 650–2, 1832; U. S. *v.* Souders, 2 Abb. (U. S.) 456. That a conspiracy to pervert an election is indictable at common law, see *supra*, §§ 1356 *a*; 1372, 1375. As to "civil rights" prosecutions, see *supra*, § 1356 *a*. That the federal statute does not cover

the subject of independent adjudication may be explained by the fact that in most jurisdictions statutes have been adopted by which the common law offence has been absorbed. It is not practicable to do more at this place than notice the federal legislation for the protection of negro suffrage. This legislation, so far as it prohibits violent interference with negro voting, has been held constitutional by the Supreme Court of the United States.[1]

VIII. BETTING AT ELECTIONS.

Betting indictable by statute.

§ 1848 *b*. That wagering contracts are invalid at common law there is little question;[2] but unless made so by statute, such transactions are not indictable.[3] In many jurisdictions, however, statutes exist making betting on elections an indictable offence, and under such statutes all bargains conditioned on the result of elections are indictable,[4] irrespective of the *scienter*.[5] But the election on which the bet is made must be either undetermined when the bet is made,[6] or, when the election is over, the result must be still unknown.[7] The indictment has been held sufficient if it follow the statute,[8] though the better opinion is that, unless otherwise directed by statute, it must specify the bet, the election, and the sum at stake.[9] It has been held, however, that it is not necessary to specify the person with whom the bet was made.[10] Betting, in other relations, has been elsewhere considered.[11]

[1] Whart. Com. Am. Law, §§ 585 *et seq*.

[2] See distinctions taken in Whart. on Cont. §§ 452 *et seq*. As to conspiracy to cheat by betting, see *supra*, § 1371.

[3] Com. *v*. Avery, 14 Bush, 625.

[4] Parsons *v*. State, 2 Carter, 499; Com. *v*. Kirk, 4 B. Mon. 1; Com. *v*. Shouse, 16 Ibid. 325; Ramsay *v*. State, 5 Sneed, 652.

[5] *Supra*, § 88. See McCr. Elect. Law, § 149.

[6] State *v*. Mahan, 2 Ala. 340; Hizer *v*. State, 12 Ind. 339; State *v*. Winchall, 60 Ibid. 300.

[7] Miller *v*. State, 33 Miss. 356.

[8] Sherban *v*. State, 8 Watts, 212.

[9] Wagner *v*. State, 63 Ind. 250; Lewellen *v*. State, 18 Tex. 538. A variance, however, as to amount, if within statutory limit, does not vitiate. Com. *v*. McAtee, 8 Dana, 28.

[10] State *v*. Smith, 24 Mo. 256.

[11] *Supra*, §§ 1465 *a*, 1467 *a*.

CHAPTER XL.

FORESTALLING, REGRATING, AND ENGROSSING.

By the Roman law, offences are made penal, § 1849.
And so by statute 5 & 6 Edw. VI., § 1850.
At common law indictable to oppress community by absorbing staple, § 1851.

By the Roman law offences are made penal.

§ 1849 THESE offences are taken from the Roman law. The Roman title is *Dardanariatus*, and consists in the artificial production of dearness and scarcity in any market staple (*ne dardanarii ullius mercis sint*),[1] but especially of grain. Popular feeling was then, as it has been often since, aroused against the monopolizers or hoarders of food. The Ædiles were vested with jurisdiction to repress such offences; and Plautus[2] illustrates the process of prosecution before them in a passage where the Parasite calls for proceedings against those, *qui consilium iniere* (something like our own conspiracies to raise prices) *quo nos victu et vita prohibeant*. So Livy[3] tells us of a fine imposed upon *frumentarii ob annonam compressam*. The proceedings allowed in such cases took definite shape in the famous *Lex Julia de annona*, which declared the usurious hoarding of grain to be a public crime. In the exposition of this law[4] we are told that *lege Jul. de ann. poena statuitur adversus eum qui contra annonam fecerit societatemve coierit, quo annona carior fiat;* and by the first section a penalty is imposed on interference with transportation, or in any way preventing the free carriage of grain,—*eadem lege continetur, ne quis navem nautamve retineat aut dolo malo faciat, quo magis detineatur*. Still sharper edicts followed, of which Ulpian[5] mentions one: *ne aut ab his; qui coemtas merces supprimunt* (purchasers) *aut a locupletioribus* (hoarders of their own produce) *annona oneretur*. Zeno issued a special statute against monopo-

[1] L. 6. pr. D. extraord. crim. 47. 11.

[2] Chap. iii. 1. 32. sqq.

[3] XXXVIII. 35.

[4] L. 2. D. h. t. 48. 12.

[5] L. 6. pr. D. extraord. crim.

lizers, who, to create an artificial scarcity, buy up all a necessary staple in order subsequently to sell at their own price. Such offenders, on conviction, were to be sentenced to confiscation of goods, and to banishment.[1]

§ 1850. The *Lex Julia de annona* was reproduced by the statute 5 & 6 Edward VI. c. 14. By this statute *forestalling* is defined to be the buying or contracting for merchandise or victual coming to market, or dissuading persons from bringing their goods or provisions there; or inducing them to raise their prices. "*Regrating*," by the same statute, "is the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place. . . . . Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victual, with intent to sell them again."[2] This statute was brought with them by the English colonists who settled in North America, and though in its details, *e. g.*, in prohibiting purchase by middle-men in the same market, it is now obsolete, and although so far as it interferes with the right of the merchant to buy in the cheapest market and sell in the dearest, it is in conflict with a sound and healthy system of political economy,[3] it is in one point a recognition of common law principle which it is important here specifically to enunciate.

And so by statute 5 & 6 Ed. VI.

§ 1851. While we must regard the provisions of the Roman and English statutes against middle-men and commission merchants as obsolete; and while in England the statute of 5 & 6 Edward VI. has been repealed by 12 Geo. III. c. 71, yet, entirely apart from these statutes, we must hold it to be indictable, on general principles of common law, to engross and absorb any particular necessary staple or constituent of life so as to impoverish and distress the mass of the

At common law indictable to oppress community by absorbing staple.

[1] L. un. C. de monop. (4. 59.). For a fuller history of the law on this point, see Rein's Criminalrecht der Römer, p. 829,—a work to which I am much indebted for aid in this and other departments.

[2] 4 Black. Com. (Wend. ed.) 155.

[3] Mr. Story (Sales, p. 647) says: "These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end." This remark is sustained by Mr. Benjamin, in his work on Sales, § 515.

The question, in its civil relations, is considered in Whart. on Contracts, §§ 453 *et seq.* The policy of laws of this class is discussed by me in 3 Crim. Law Mag. 1 (Jan. 1882).

community for the purpose of extorting, by terror or other coercive means, prices greatly above the real value. Questions of this kind have usually come before the courts on indictments for conspiracy; for it is by conspiracies that extortions of this kind are generally wrought. But on an indictment against an individual for buying up all the grain or other necessary staple so as to produce a famine in the market, and thus to obtain grossly extortionate prices, wrung through a sense of misery from the community, the offence may be held indictable at common law.[1] For not merely is the extortion to be taken into account, but the terror as to the future, and the misery at the present, which are thus inflicted on the community at large.[2] But to sustain such a prosecution, the commodity must be a necessity, it must be absorbed by the monopolizer, and the prices must be unjustifiably extortionate.[3]

[1] See fully *supra*, § 1366; and see, to same effect, R. *v.* Waddington, 1 East, 143, 167; and R. *v.* Rushby, 2 Ch. C. L. 536; see Whart. Prec. 1007, and note thereto.

The history of the law in this respect is given in 3 Steph. Hist. Crim. Law, 199 *et seq.* By Stat. 7 & 8 Vict. 24, the common law offences of "badgering, engrossing, forestalling, and regrating," were abolished.

Lord Campbell (Lives of Ch. Just. IV. 84, Am. ed.) criticizes, with much acuteness, Lord Kenyon's rulings in Waddington's case; and there can be no question that these rulings were largely influenced by Lord Kenyon's political prejudices as a tory holding to the paternal theory of government. I have discussed these and kindred cases in detail in an article on Political Economy and Criminal Law, in the Crim. Law Mag. for Jan. 1882.

[2] See 1 Russ. on Cr. 168, 169.

[3] R. *v.* Webb, 14 East, 406; Pratt *v.* Hutchinson, 15 Ibid. 511; Pettamberdass *v.* Thackvorseydass, 7 Moore P. C. 239.

CHAPTER XLI.

CHAMPERTY AND MAINTENANCE.

Champerty indictable at common law, § 1853. | Otherwise with maintenance, § 1854.

Champerty indictable at common law.

§ 1853. CHAMPERTY is a contract by which parties, one or more of them claimants of a particular property, agree to divide it in case of success in a suit which they are to combine in pressing.[1] Champerty, as the name (*Campi partitio*) indicates, is a relic of the old Roman law, and exhibits the distaste of that law to all combinations of individuals which might be regarded as in any way unduly promoting litigation, or by the numbers and influence of those engaged, intimidating those concerned in the administration of public justice. That a combination of individuals, not themselves interested in the result, to carry on for gain a litigation, is indictable at common law, has been more than once intimated in American courts. No doubt if the object, as the idea of champerty necessarily involves, be a division of profits accruing from the raking up of old claims for purposes purely speculative, the peace of the community and the security of titles require that enterprises of this kind should be the subject of penal condemnation. No man has a right to speculate in law process; and the law itself naturally steps in to punish, as if for contempt, those who would abuse it by turning it into an instrument, not of benignity but of extortion.

§ 1854. Maintenance is the officious pecuniary contribution of aid to a litigant in any legal proceeding by a volunteer stranger.[2] In

[1] Whart. on Cont. § 421; Steph. Dig. C. L. art. 141. Buying or selling a pretended title is buying or selling lands, of which the title is known to be in dispute, below the value which they would have if the title was not in dispute, and to the intent that the buyer may carry on the suit in place of the seller. Ibid.

For a discussion of the modern rule as to champerty, see 19 Alb. L. J. 468.

[2] Steph. Dig. C. L. art. 141. See Steph. Hist. Cr. L. 228.

maintenance no personal profit is expected or stipulated. The object is simply, from motives, on their face, of kindness to a suitor, or of personal enthusiasm for the vindication of a particular principal, to aid a party in pressing his suit. That this is not now considered indictable in England is evident from the fact that societies for the aid of the alleged Sir Roger Tichborne, in his claim on the Tichborne estates, and for the prosecution of a series of ecclesiastical offenders, have been conducted with conspicuous and unchecked zeal in England, while in the United States we have seen organized, without judicial censure, numerous vigilance and other public committees to prosecute certain offenders.[1]

Otherwise with maintenance.

[1] The soliciting aid in the Tichborne case was ruled not to be a contempt of court in R. *v.* Skipworth, 12 Cox C. C. 371. See Whart. Cr. Pl. & Pr. § 957. That aid to carry on a prosecution is not maintenance, see Com. *v.* Dupuy, Bright. 44; S. C., 4 Clark, 1. As to barratry, see *supra*, § 1444.

Champerty and maintenance are not indictable in New York and Connecticut. Richardson *v.* Rowland, 40 Conn. 565.

On the question of validity of champertous contracts, see Leake on Cont. 2d ed., 732; Whart. on Cont. §§ 421 *et seq.*; Hutley *v.* Hutley, L. R. 8 Q. B. 112.

In Richardson *v.* Rowland, *supra*, it was said by Foster, J.:—

"The only question presented by the finding for our consideration is whether the plaintiff is entitled, upon the facts found, to recover one-half of the sum of $468.53, the amount received by the defendant as the net avails of his suit against Sturges. The plaintiff claims one-half of this sum under a contract with the defendant, by which he was to render him certain services in connection with the suit, and receive half the net amount recovered; the defendant resists the demand, claiming that the contract is void for maintenance and champerty.

"Maintenance at common law signifies an unlawful taking in hand or upholding of quarrels, or sides, to the disturbance or hindrance of common right. The maintaining of one side, in consideration of some bargain to have part of the thing in dispute, is called champerty. Champerty therefore is a species of maintenance.

"Maintenance was an offence at common law, and divers statutes have been passed in England by parliament regarding it, commencing as early as the reign of Edward I. The reasons upon which the ancient doctrine rested in England can now scarcely be said to exist, and the law has, at times, been regarded with disfavor. As long ago as 1791, Mr. Justice Buller, in the case of Master *v.* Miller, 4 T. R. 340, speaks of a particular application of the law of maintenance almost in the language of contempt. Our statute against unlawful maintenance, first passed in 1809, forbade certain officers of the law, attorneys, and counsellors, sheriffs, deputy sheriffs, and constables, from buying any bond, bill, promissory writing, book, debt, or other *chose in action*, under certain penalties. As modified in 1848, and as the law now stands in our statutes, if either of the above-named officers shall, with intent to make gain by the fees of collection, purchase any *chose in action*, and commence a suit

upon the same, he shall forfeit a sum not exceeding $100.

"As the plaintiff is not one of the officers named in our statute, that statute is not interposed by the defendant in the way of a recovery; the common law is the law relied on.

"We are not aware of any case where the law of maintenance and champerty has been considered and passed upon by this court. It is alluded to by Church, J., in giving the opinion of the court in the case of Stoddard *v.* Mix, 14 Conn. 23, 24, and by Ellsworth, J., in Bridgeport Bank *v.* New York & N. Haven R. R. Co., 30 Conn. 273.

"Some of our sister States have adopted the common law on this subject and some have not. Massachusetts and Rhode Island recognize the rule of the common law. Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Met. 489; Martin *v.* Clark, 8 R. I. 389. Among the States which discard the rule are Vermont, Delaware, Tennesse, and Iowa. Danforth *v.* Streeter, 28 Vt. 490; Bayard *v.* McLane, 3 Harrington, 139, 209; Therley *v.* Riggs, 11 Humph. 53; Wright *v.* Meek, 3 Iowa, 472.

"There are such broad distinctions in the state of society between Great Britain and this country, that the reasons which make a law against maintenance and champerty salutary or necessary there, do not exist here, —certainly not to the same extent. Mr. Justice Grier, in giving the opinion of the court in Roberts *v.* Cook, 20 How. 467, says that the ancient English doctrines respecting maintenance or champerty have not found favor in the United States. The enforcement of the law here would not always, perhaps not generally, promote justice. Mr. Chief Justice Parker, in giving the opinion of the court in Thurston *v.* Percival, 1 Pick. 417, says: 'It sometimes may be useful and convenient, where one has a just demand which he is not able from poverty to enforce, that a more fortunate friend should assist him, and wait for his compensation until the suit is determined, and be paid out of the fruits of it.'

"The contract between these parties, however, was in regard to a suit pending in the State of New York; the property attached was there situate; the services to be performed were to be performed there; and the money to be recovered, if recovered at all, was there to be recovered. The contract, in short, was to be performed in the State of New York. The law of New York therefore must necessarily govern the contract. Commonwealth of Kentucky *v.* Bassford, 6 Hill, 526. It becomes quite unnecessary to decide what the law of Connecticut, or of other States, may be on the subject of champerty and maintenance.

"The law of New York upon this subject is very clearly and explicitly laid down by the Court of Appeals of that State, in the case of Stanton *v.* Sedgwick, 14 N. Y. 289. . . . See, also, Durgin *v.* Ireland, Ibid. 322; Voorhies *v.* Dorr, 51 Barb. 580." And see Master *v.* Miller, 4 T. R. 340.

An elaborate history of the law in this respect is to be found in Pike's Hist. of Crime in England, i. pp. 250 *et seq.*, given in 2 Green's Cr. Law Rep. 500.

Sir J. F. Stephen, Dig. C. L. note viii. says:—

"It is not without hesitation that I have inserted these vague and practically obsolete definitions in this book. As, however, maintenance and champerty hold a place in all the text-books, I have not thought it proper to omit all notice of them. A full account of the crimes themselves, of the vagueness of the manner in which they are

defined, and of the reasons why they have so long since become obsolete, may be seen in the fifth report of the Criminal Law Commissioners, pp. 34–9. The Commissioners observe in conclusion: 'Prosecutions for offences comprehended under the general head of maintenance are so rare that their very rarity has been a protection against the disapproval of judges, and those alterations which a frequent recurrence of doubt and vexation would probably have occasioned. . . . . But although no cases have occurred where the doctrine of maintenance has been discussed in the courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this have fallen within our own professional observation in the case of prosecutions commenced, although not persevered in.' The Commissioners recommend that all these offences should be abolished. The definition of barratry, in particular, is so vague as to be quite absurd; and the statutory provision as attorneys practising after a conviction would be utterly intolerable if it had not been long forgotten. I should suppose that there is no other enactment in the whole statute book which authorizes any judge to sentence a man to seven years' penal servitude, after a summary inquiry conducted by himself in his own way.

"These offences, as sufficiently appears from the preambles of the various statutes relating to them, are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependents. As long as the verdict of a jury was, more or less, in the nature of a sworn report of local opinion, made by witnesses officially appointed to make such reports, intimidation must have been possible, and, in many cases, easy."